
State Water Resources Control Board

Public Hearing on Division of Water Rights Enforcement Section’s Draft Cease-and-Desist Order to BlueTriton Brands, Inc.: Hearing Officer’s Rulings on Parties’ Comments on and Objections to Draft Proposed Order

Background

On April 21, 2023, the Administrative Hearings Office (“AHO”) of the State Water Resources Control Board (“State Water Board,” “Board,” or “SWRCB”) issued a Notice of Draft Proposed Order in this proceeding. The AHO’s Draft Proposed Order (“Draft Proposed Order”) was enclosed with that notice.

On May 8, 2023, eight parties and party representatives filed comments on and objections to the Draft Proposed Order. The following paragraphs summarize these comments and objections and discuss my responses and rulings.

Section 2.12.4, on page 47 of the Proposed Order that I transmitted to the Clerk of the Board on May 26, 2023 (“Proposed Order”), contains this citation: “(2023-05-30 hearing officer’s responses and rulings.)” That citation refers to this document, which I had planned to send to the parties on May 30, 2023. Because I now am sending this document to the parties on May 27, 2023, I will ask the Board to change this citation to “(2023-05-27 hearing officer’s responses and rulings.)” before the Board considers adopting the proposed order.

Prosecution Team Comments

Comment A.: “Cite additional authorities that support the State Water Board’s water right permitting authority for diversions from Tunnels 2 and 3 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8.” (2023-05-08 Prosecution Team Comments (“Prosecution Team Comments”), p. 1:21-22.)

Response: Except for *State v. Hansen* (1961) 189 Cal.App.2d 604, the court decisions the Prosecution Team cites in this section of its comments all were in cases involving water-right disputes between various water users. They did not involve the State Water Board’s water-right permitting or enforcement authority or the statutes on which those authorities are based. *State v. Hansen* did involve the water-right permitting authority of a Board predecessor and was cited on pages 63 and 65 of the Draft Proposed Order.

Comment B.: “Clarify that the San Manuel Band of Mission Indians have (sic) contractual rights authorizing diversion through the Respondent’s facilities to exercise their riparian rights to East Twin Creek.” (Prosecution Team Comments, p. 2:12-14.)

The San Manuel Band's right to receive water diverted through the facilities of the Respondent, BlueTriton Brands, Inc. ("BlueTriton") is "strictly contractual" and BlueTriton's diversions require a Special Use Permit from the San Bernardino National Forest. (*Id.*, p. 3:10-21.) The AHO should edit the Draft Proposed Order to recognize these facts. (*Id.*, p. 3:22--4:2.)

Response: I have edited text in the sections 1.0, 3.7.1 and 4.0 to recognize these facts and to clarify that the order would not adjudicate the San Manuel Band's land or riparian right claims or limit the Board, or any other regulatory agency or court, from taking any future actions regarding these claims. The edited text is in the Proposed Order.

Comment C.: "Clarify requirement[s] in the Draft Proposed Order's order section. (Prosecution Team Comments, p. 4:3.) "Flows from Tunnels 2 and 3, and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 that exceed deliveries to the San Manuel Band should be bypassed at these locations, rather than diverted, transported through pipelines, and then discharged at the discharged (sic) facility near Boreholes 10, 11 and 12, or discharged somewhere else in the watershed." (*Id.*, p. 4:15-18.) The AHO should add text to Orders 1.a. and 1.b. clarifying that deliveries to the San Manuel Band are for its riparian uses. (*Id.*, pp. 4:28--5:4.)

Response: I have made appropriate edits to these portions of the Draft Proposed Order.

Comment D.: "Detailed non-substantive comments," including spelling and typographical errors.

Response. I have edited the Draft Proposed Order to address these comments. I appreciate the Prosecution Team's bringing these errors to my attention. (The abbreviations of exhibit are "Exh." when that abbreviation is at the beginning of a citation sentence, and "exh." when the abbreviation is located elsewhere in a citation sentence, or is in a citation clause.)

Story of Stuff Project Comments

Comment I.: The AHO Draft CDO should be revised to include a conclusion that the Cienega Springs are within the jurisdiction of the Water Board. (2023-05-08 Story of Stuff Comment ("Story of Stuff Comments"), p. 1:8-9.)

Response: In section 3.6.1, the Draft Proposed Order finds that the evidence in the record regarding the existence of natural channels at historic Springs 10, 11 and 12 is conflicting. In section 3.8, the Draft Proposed Order concludes that the Division of Water Rights Enforcement Section's draft CDO and revised report of investigation did not allege that BlueTriton's diversions through Boreholes 10, 11 and 12 were unauthorized diversions, and, absent such allegations, these documents did not provide sufficient notice to BlueTriton under Water Code section 1834, subdivision (a), for the Board to be authorized to issue a CDO to BlueTriton regarding these diversions. The

Proposed Order therefore would deny the request in the Prosecution Team’s closing brief for the Board’s order to include CDO provisions regarding these boreholes. This denial would be without prejudice to the Division’s rights to conduct further investigations regarding these diversions, or to issue a new draft CDO regarding them.

Because the Proposed Order would not include any CDO to BlueTriton regarding its diversions from these boreholes, it is not necessary, and it would not be appropriate, for the Proposed Order to include any findings or conclusions on issues regarding the State Water Board’s water-right permitting and enforcement authorities over BlueTriton’s diversions from these boreholes. Instead, the Proposed Order leaves these issues to be considered and decided by the Board during a subsequent proceeding, if the Division’s Enforcement Section decides to bring an enforcement action regarding these diversions.

Comment II.: “California Consolidated Water Company’s 1930 transfer of all rights to any pre-1914 rights in Indian Springs and Coldwater Creek should be added to sections 2.5 and 3.7.2.” (Story of Stuff Comments, p. 6:7-8.)

Response: I have edited sections 2.5 and 3.7.2 of the Draft Proposed Order, and added a new section 3.7.2.1, to address this comment.

Comment III.: “Water rights of other parties should not be determined in this proceeding.” (Story of Stuff Comments, p. 6:19.)

Response: I have edited text in the sections 1.0, 3.7.1 and 4.0 to address this comment and to clarify that the order would not adjudicate the San Manuel Band’s riparian right claims or limit the Board, or any other regulatory agency or court, from taking any future actions regarding these claims.

Comment IV.: “Typographic or other minor edits” (Story of Stuff Comments, p. 10:14.)

Comment: “References to “San Manuel Band lands” in section 2.12.2 should be changed to ‘land allegedly owned or controlled by the San Manuel Band.’” (*Id.*, p. 10:15-19.)

Response: I edited this text to address this comment.

Comment: The San Manuel Band Mission Indian photographs discussed in section 2.12.2 should be excluded from the administrative record because they have not been authenticated and it is unclear whether they present true and accurate images of their subject matter. (*Id.*, p. 10:20-23.)

Response: I overrule this objection. These photographs and the associated photo log and transmittal e-mail are relevant evidence that I have admitted into evidence under Government Code section 11513, subdivision (c). If they are deemed to be hearsay, then the State Water Board may consider them under

Government Code section 11513, subdivision (d), to explain witnesses' testimony about the facilities and features depicted in these photographs.

Comment: Text in Section 3.1 that cites Water Code section 1202 contains some illegible text.

Response: We have corrected this problem, which occurred when I converted a Word file to a pdf file.

Center for Biological Diversity and Sierra Club Comments

Comment 1: “The Center for Biological Diversity (“Center”) and Sierra Club believe that it is appropriate for the Opinion to contain a brief description of applicable English common law pertaining to BT’s unlawful diversions from the upper canyon.” (2023-05-08 Center for Biological Diversity and Sierra Club Comments (“Center for Biological Diversity Comments”), p. 2.)

Response: The quotations in the Center for Biological Diversity’s comments indicate that the cited English court decisions concerned disputes between competing users of water from the same sources. (See *id.*, pp. 2-4.) The cases in which these decisions were issued did not involve the State Water Board’s water-right permitting or enforcement authority or the statutes on which those authorities are based.

Comment 2: “The Center and Sierra Club request the AHO to modify the proposed relief to clarify that any increase in amounts the [San Manuel Band] receives through the existing illegal pipelines, tunnels, and/or boreholes is not to exceed the amount received through the pipeline during any one of the last four years.” (*Id.*, p. 4.)

Response: This Center for Biological Diversity comment does not cite any legal authorities. I am not aware of any legal authority that would authorize the State Water Board to impose this proposed limit in this proceeding, considering the scope of the Division of Water Rights Enforcement Section’s Draft CDO.

Comment: “The Center and Sierra Club believe that the Draft AHO Order should direct the Water Rights Division to consult with California Fish and Wildlife concerning the effects on Strawberry Creek of the water provided by means of the pipeline to the [San Manuel Band], and to consider alternatives to delivery of the water that would maximize restoration of the upper reaches of Strawberry Creek above Borehole Complex 10.” (*Id.*, p. 4.)

Response: The Center for Biological Diversity may file a complaint with the Division of Water Rights Enforcement Section that requests such relief. The Enforcement Section, exercising its prosecutorial discretion, then can decide what actions to take.

Comment 3: “The Center and Sierra Club request modification of the Proposed Order set forth in the AHO’s Proposed Opinion with respect to the Borehole Complex 10.” (*Id.*,

p. 5.) “In light of this evidence, it is critical that further investigation of Borehole Complex 10 be performed by staff.” (*Ibid.*)

Response: For the reasons discussed in the above response to Story of Stuff Comment I, the Proposed Order would leave issues regarding Boreholes 10, 11 and 12 to be considered and decided by the Board during a subsequent proceeding, if the Division’s Enforcement Section decides to bring an enforcement action regarding these diversions.

Comment 4: “The Center and Sierra Club agree with the Prosecution Team Comments on the Draft Proposed Order With Respect to Imposing A Requirement of Bypass Flows.” (*Id.*, p. 6.)

Response: See my response above to Prosecution Team Comment C.

Amanda Frye Comments

Comment 1: “The 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. (2023-05-08 A. Frye Comments (“A. Frye Comments”), p. 2.)

Response: Please see my response above to Story of Stuff Comment I.

Comment 2: “Condoning water withdrawals at spring boreholes 10, 11 and 12 with no valid water right should not be stated in CDO.” (*Id.*, p. 4.)

Response: Please see my response above to Story of Stuff Comment I.

Comment 3: “Rulings or reference to the San Manuel Band of Mission Indians (“San Manuel Band” or “Tribe”) 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 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.” (*Id.*, p. 5.)

Response: Please see my responses above to Prosecution Team Comment B and Story of Stuff Comment III.

Comment 4: “Clarification is needed regarding the Reservation status of ‘San Manuel lands.’” (*Id.*, p. 9.) “[The] distinction between Indian Reservation land and non-Indian Reservation land status is important.” (*Ibid.*)

Response: I have edited the text in the Draft Proposed Order to change “San Manuel Band lands” to “lands that the Prosecution Team and BlueTriton have stated are owned by the San Manuel Band.”

While the distinction between lands reserved by the federal government for the San Manuel Band and private lands purchased by the San Manuel Band may be important in future proceedings regarding these lands and associated water rights, there is no evidence on this issue in the administrative record for this proceeding, and this issue is not relevant to this proceeding.

Comment 5: “Section 2.3. No mention of Federal Reserve (sic) Water Rights.” (*Id.*, p. 9.)

Response: It is possible that the reservation of federal lands to create the San Bernardino National Forest created some federal reserved rights. (See generally *United States v. New Mexico* (1978) 438 U.S. 696.) However, the Division of Water Rights Enforcement Section’s draft CDO did not discuss such potential reserved rights and neither the United States nor any federal agency participated in this proceeding. For these reasons, the Proposed Order does not discuss potential federal reserved rights. This omission would not prevent the United States or another party with an interest in federal reserved rights from asserting the existence of such rights in a subsequent proceeding before the State Water Board, another agency or a court.

Comment 6: “Historical documents show that BTB’s predecessor gave up any right in other watersheds in 1930.” (A. Frye Comments, p. 10.)

Response: See my response above to Story of Stuff Comment II.

Comment 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. (*Ibid.*)

Response: It is not clear what provisions of the Draft Proposed Order this comment is intended to address. I have added a footnote stating that neither the State Water Board nor any of its predecessors was a party to the case that resulted in the Del Rosa MWC judgment, and therefore that the Board is not bound by this judgment.

Comment 8: “Delivery of water to Tribe is outside the hearing scope.” (*Ibid.*)

Response: See response above to Prosecution Team Comment B.

Comment 9: “Clarification in Spring 4 Complex, Spring 1 and 8, Boreholes 1, 1A and 8 needed.” (*Id.*, p. 11.)

Response: The part of section 2.9 titled “Spring 4 Complex, Springs 1 and 8, and Boreholes 1, 1A and 8,” discusses this spring complex and these springs and boreholes. The quotation from the Dames & Moore report states that Spring 4 had not been developed.

Steve Loe Comments

Comment A: “Spring Developments 10,11, 12 not being included in the Draft CDO.” (2023-05-08 S. Loe e-mail to AHO (“S. Loe Comments”), p. 1.

Response: See my response above to Story of Stuff Comment I.

Comment B. “San Manuel Band Riparian Rights” (*Id.*, p. 2.)

Response: See my response above to Prosecution Team Comment B.

Comment C: “Public Trust and Other Downstream Effects” (*Id.*, p. 3.)

Response: The second paragraph in section 2.12.1 of the Proposed Order explains why I concluded that the AHO could not consider issues regarding alleged injury to public trust resources or water-right priority issues during this proceeding. As noted in that paragraph, any interested party may file a complaint with the Division of Water Rights Enforcement Section that raises such issues. If anyone files such a complaint, then the Enforcement Section may consider the complaint and decide whether to take any enforcement actions based on it. The Proposed Order would not limit any interested party’s right to file such a complaint or the Enforcement Section’s authority to take any action on such a complaint that is consistent with the final order adopted by the Board.

Comment D: “Diversions and Discharge locations” (*Ibid.*)

Response: If the Board adopts the Proposed Order as a Board order, then any interested party may file a complaint with the Division of Water Rights Enforcement Section regarding the issue of whether the points of diversion of water from sources in Strawberry Canyon for riparian uses by the San Manuel Band should be limited or changed. The Enforcement Section then may consider the complaint and decide whether to take any enforcement actions based on it. The Proposed Order would not limit any interested party’s right to file such a complaint or the Enforcement Section’s authority to take any action on such a complaint that is consistent with the final order adopted by the Board.

Save Our Forest Association Comments

Comment 1: “Springs 10, 11 and 12 should be included in the final CDO given the preponderance of evidence presented during the hearing that they are natural springs contributing to downstream flows of all springs 1 through 12.” ((2023-05-08 Save Our Forest Association Comments (“Save Our Forest Association Comments”), p. 1.

Response: See my response above to Story of Stuff Comment I.

Comment 2: “The San Manuel Band is not a party to this CDO and does not have a SUP with the USFS for any water diversion.” (*Ibid.*)

Response: See my response above to Prosecution Team Comment B.

Comment 3: “The diversion of any water from existing facilities including Tunnels 2, 3 and its Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 should cease entirely with any allowed diversion to be derived from Boreholes 10, 11 and 12.

Response: Because the Prosecution Team has taken the position that the San Manuel Band has riparian rights that authorize BlueTriton to use all its existing facilities to divert water that BlueTriton delivers to the San Manuel Band, the State Water Board does not have the authority in this proceeding to prohibit diversions from Tunnels 2 and 3 and Boreholes 1, 1A, 7, 7A, 7B, 7C and B for these deliveries. As discussed above in my response to Steve Loe Comment D, if the Board adopts the Proposed Order as a Board order, then any interested party may file a complaint with the Division of Water Rights Enforcement Section regarding the issue of whether the points of diversion of water from sources in Strawberry Canyon for riparian uses by the San Manuel Band should be limited or changed.

Comment 4: “The final CDO should clearly state there are no pre-1914 water rights. (*Ibid.*)

Response: I have expanded section 3.7.2 of the Draft Proposed Order to provide a more-detailed discussion and analysis of BlueTriton’s pre-1914 water-right claims.

Comment 5: “The Bunker Hill Basin (aquifer) (sic) that Strawberry Creek terminates in has been consistently ‘deficient’ in an overdraft condition since 1993 based on the San Bernardino Valley Conservation Water (sic) District’s annual ‘Engineering Investigation Report’ (2023). This overdraft condition could impact any diversions from upstream sources. There are public trust issues remaining that warrant future investigation and action by the Prosecution Team.” (*Id.*, pp. 1-2.)

Response: See my response above to Steve Loe Comment C.

Anthony Serrano Comments

Comment: “I am requesting to have the following two documents added to the FINAL ORDER.” (2023-05-08 Anthony Serrano Comments (“Anthony Serrano Comments”), p. 1.

Response: These documents are in the administrative record for this proceeding. It would not be appropriate to include them in the Board’s order.

Comment: “We should issue a cease-and-desist order that prohibits BlueTriton from diverting water through these facilities for any purpose besides delivering water to the San Manuel Band for its beneficial uses on the Arrowhead Springs Hotel property.” (*Ibid.*)

Response: If the Board adopts the Proposed Order, then the adopted order will contain such a prohibition for Tunnels 2, 3 and 7, and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8.

Comment: Mr. Serrano objects to the conclusion in the Draft Proposed Order that the San Manuel Band has riparian rights, and to the provisions of the Draft Proposed Order that would allow BlueTriton to continue to divert water through its facilities for deliveries to the San Manuel Band. (*Id.*, pp. 1-2, 5-7.)

Response: See my response above to Prosecution Team Comment B.

Comment: This comment discusses the Forest Service's authority. (*Id.*, pp. 3-5.)

Response: See my response above to Amanda Frye's Comment 5.

BlueTriton Brands, Inc. ("BlueTriton" or "BTB") Comments

Comment: "The AHO did not provide Respondent BTB reasonably sufficient time to review the DPO, the authorities and testimony and evidence referenced therein, and the administrative record created in these proceedings (totaling approximately 30,000 pages thus far)." (2023-05-08 BTB comments on draft proposed order ("BlueTriton Comments"), p. 2:3-6.)

Response: Four experienced, qualified attorneys represented BlueTriton throughout this proceeding. All files in the administrative record besides the closing briefs and other post-hearing filings and the Draft Proposed Order have been available for review by these attorneys since May 2022, and the closing briefs and other post-hearing files have been available for review since September 2022. Under these circumstances, the 17-day period for reviewing the Draft Proposed Order and preparing comments on it and objections to it was sufficient.

Comment: "BTB objects to the DPO on the grounds that the DPO is inconsistent with law, is not supported by the evidence, and is the result of irregular AHO proceedings and abuse of discretion, resulting in an unfair hearing. Without limitation, the DPO and the AHO proceedings conflict with or ignore applicable provisions of the Water Code, Board regulations, Chapters 4.5 and 5 of the California Administrative Procedures Act (commencing with Government Code section 11400), the Bagley-Keene Act (Government Code sections 11120), the due process and equal protection clauses of the United States and California Constitutions, and controlling judicial precedents and decisions." (*Id.*, p. 2:10-17.)

Response: This objection does not link any of the stated general objections to any specific provisions of the Draft Proposed Order or to any files in the administrative record that are cited in it. I therefore cannot evaluate or respond to the objection. For this reason, I overrule the objection.

Comment: "BTB further objects to the DPO on the grounds that the DPO relies on inadmissible evidence and testimony; misstates and mischaracterizes testimony,

evidence and legal authorities; and omits reference to or ignores relevant, credible and undisputed testimony, evidence and legal authorities.” (*Id.*, p. 2:18-21.)

Response: Except for the examples discussed in the following paragraph of BlueTriton’s comments and objections, this objection does not link any of the stated general objections to any specific evidence or testimony. Without any specific references, I cannot evaluate the objection. For this reason, I overrule this objection.

Comment: “The DPO bases one finding on photographs that purport to show gullies, a 1901 topographic map that BTB objected to as hearsay, and an unsigned letter purportedly dated October 1, 1930 that BTB also objected to as hearsay. The DPO also includes an unexplained citation to the section in the DPO that summarizes the ‘Story of Stuff Witnesses’ Testimony,’ to which BTB lodged several objections, including that the witnesses identified as experts were not qualified to provide the opinion testimony proffered, and the testimony summarized or submitted hearsay documents for which the witnesses did not provide any foundation to establish the authenticity of the documents or to avoid the hearsay rule.” (*Id.*, pp. 2:22--3:1.)

Response: Although BlueTriton’s comment does not refer to any specific provision of the Draft Proposed Order, I assume that this comment refers to the findings in the sub-section within section 3.6.1 that discusses Springs 1, 2, 3, 7 and 8.

The last sentence of the first paragraph of this sub-section states “Water from these springs therefore would have flowed into natural channels, as that term is used in Water Code section 1201.” This finding is based on Figure 14 to the Draft Proposed Order, which is a copy of exhibit BTB-7, page 75, the Division’s 2021 report of investigation, exhibit PT-3, pages 157-161, testimony of Victor Vasquez, exhibit PT-7, page 9, paragraphs 22-24, and page 23, paragraph 83, and the 1901 topographic map, exhibit SOS-295, page 22. (I have corrected the citation in the Draft Proposed Order to this latter exhibit.)

Of these exhibits, the only one that BlueTriton objects to in its comments is the 1901 topographic map, an excerpt of which is in exhibit SOS-295, page 22. Even if the depictions of blue-line streams in this map are considered to be hearsay, the map with these depictions is admissible under the public employee records exception to the hearsay rule, Evidence Code section 1280, because it was prepared by public employees to depict the topography they observed during the field investigations they conducted before preparing the 1901 map. This map also is admissible under the ancient writings exception to the hearing rule, Evidence Code section 1331, and the exception for historical published maps in Evidence Code section 1341. It clearly is more than 30 years old, and, as Mr. Allord testified, U. S. Geological Survey maps generally have been acted upon as true by persons having interests in matters for which the maps are relevant, they were made by persons indifferent between the parties to this proceeding, and Story of Stuff offered the 1901 map to prove facts of general notoriety and interest.

In *Gray v. Magee* (1933) 133 Cal.App. 653, 658, the Court of Appeal, discussing the trial court proceedings on the issue of whether a disputed road was a public road, stated:

A number of maps were introduced in evidence, including one prepared by the surveyor general of California in 1875; one by the surveyor general of California in 1880; one by the surveyor general in 1886; a land office plat published in 1892; a United States topographical map of the quadrangle in which this land is situated, prepared from surveys made in 1891 and 1898; a land office map prepared in 1913 from a resurvey; and a map of San Diego county published in 1931. All of these maps indicate a road running from Pala across these estate lands and in the direction of Pechanga and Temecula.

On the issue of the appellant's objections to these maps, the court stated:

It is contended that the court committed prejudicial error in admitting a number of maps, nearly all of them government maps, all of which were objected to as immaterial and hearsay. . . . We think these maps were admissible under section 1936 of the Code of Civil Procedure, and certainly no one piece of evidence is inadmissible merely because it does not prove the entire case of the party offering the same.

(*Id.*, p. 661.) For similar reasons, the 1901 topographic map was admissible in the present proceeding under the hearsay exception in Evidence Code section 1341. (Evidence Code section 1341, adopted in 1965 as part of the new Evidence Code, recodified "without substantive change" section 1936 of the Code of Civil Procedure. (See 7 Cal. L. Rev. Comm. Reports 1 (1965), cited in the editor's notes to West's Ann.Cal.Evid.Code § 1341.))

Also, even if this map was not admissible under these exceptions to the hearsay rule, the State Water Board still may consider it under Government Code section 11513, subdivision (d), to supplement or explain Mr. Vasquez's testimony regarding this issue.

Finally, the courts may take official notice of U. S. Geological Survey topographic maps (*Union Transportation Co. v. Sacramento County* (1954) 42 Cal.2d 235, 239; *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009, 1021 fn. 2), so the State Water Board may take official notice of these maps (Cal. Code Regs., tit. 23, § 648.2).

The second sentence in the second paragraph of this sub-section states: "However, the existence of a historical flow path from Spring 2 is demonstrated by Mr. Rowe's October 1, 1930 letter," a copy of which is exhibit SOS-53. This letter is admissible under the ancient writings exception to the hearsay rule, Evidence Code section 1331. It clearly is over 30 years old. The fact that statements in it have since been generally acted upon as true by persons having an interest in the matter is demonstrated by reliance on it and Mr. Rowe's other letters and documents by the testimony of several witnesses in this proceeding, including Mr. Loe, who has extensively studied historical documents regarding the Strawberry Creek watershed, and Mr. Nichols, BlueTriton's expert

witness. (See exh. BTB-6, pp. 23-24, 26, 35-40, ¶¶ 79-81, 85, 115-119, 122-124, 127-129; exh. BTB-9, pp. 15-16, 18.) Also, even if this letter were not admissible under these exceptions to the hearsay rule, the State Water Board still may consider it under Government Code section 11513, subdivision (d), to supplement or explain Mr. Vasquez's testimony regarding this issue and the reports about historical conditions and developments in Strawberry Canyon that are cited in the Draft Proposed Order.

I have added a reference to Mr. Allord's testimony to explain the citation in this subsection to section 2.13.3. Based on his extensive experience working for the U. S. Geological Survey, Mr. Allord was qualified to provide the opinion testimony he gave during the AHO hearing, and was qualified to explain the depictions of the blue-line streams on the 1901 and 1905 topographic maps, and the discrepancies between these depictions.

Moreover, as discussed in the last paragraph of this sub-section, even if these springs did not historically flow into natural channels, diversions from them for beneficial uses still would have been subject to the Board's water-right permitting and enforcement authorities. (See *State v. Hansen* (1961) 189 Cal.App.2d 604, 607, 610.)

Comment: "The DPO fails to address the objections that BTB raised to this evidence in the course of the hearing and in response to the Prosecution Team and other parties' citations to this inadmissible testimony and these documents in their closing briefs." (*Id.*, p. 3:1-4.)

Response: My rulings on BlueTriton's objections to this evidence during the AHO hearing and my rulings in the preceding and subsequent comments address BlueTriton's objections to this evidence. For the reasons stated in these rulings, I overrule BlueTriton's objections to this evidence.

Comment: "The remainder of the DPO, including in particular the "background" detailed in Section 2.0, cites to documents and testimony submitted during the proceeding without any reference to the objections to that evidence made by BTB in the course of the proceeding and following the submission of the parties' closing briefs. Although the AHO overruled a number of the objections made during the course of the proceeding, the AHO has not made any rulings in response to the objections to the evidence cited in the parties' closing briefs." (*Id.*, p. 3:5-10.)

Response: My rulings during the AHO hearing on BlueTriton's objections to documents and testimony cited in part 2.0 of the Draft Proposed Order are in the hearing recordings and hearing officer rulings. It was not necessary for the Proposed Order to repeat or discuss these rulings.

After the parties submitted their closing briefs to the AHO, BlueTriton filed 108 pages of objections, containing 671 objections, to the exhibits cited in other parties' closing briefs. (2022-08-29 BTB objections to exhibits cited in closing briefs.) Many of these objections repeated objections that BlueTriton had made to the same exhibits during the AHO hearing.

It was not feasible for me to go through these 671 objections to attempt to locate the ones that applied to each exhibit cited in the Draft Proposed Order. I therefore decided not to prepare a ruling on each of these objections. Instead, I decided to circulate the Draft Proposed Order and to give all parties opportunities to submit comments on it and objections to it. BlueTriton followed this process and submitted two pages of narrative objections and a table with 40 additional specific sets of objections. This document contains my rulings on those objections.

I make the following rulings on the 671 objections that BlueTriton filed on August 29, 2022: (a) for any objections BlueTriton made in its August 29, 2022 objections to an exhibit that repeated objections to the same exhibit that BlueTriton made during the AHO hearing, I incorporate by reference the rulings I made during the AHO hearing; (b) I dismiss as moot any objections to exhibits that are not included within the preceding clause (a) and are not cited in the Proposed Order; (c) I make the rulings stated in this document, including the attached Appendix A, on any objections to exhibits that BlueTriton also objected to in its May 8, 2023 comments on and objections to the Draft Proposed Order; and (d) if there are any objections in BlueTriton's August 29, 2022 objections to exhibits that are cited in the Proposed Order and are not addressed in the preceding clause (a) or the preceding clause (c), then I overrule those objections on all grounds that potentially may apply to such objections.

Comment: "BTB reiterates each of the evidentiary objections made during the hearing and following the hearing in response to evidence cited in the closing briefs. This includes but is not limited to BTB's objections to: any public comments, including documents and information, submitted after the February 9, 2018 public comment deadline (BTB's January 7, 2022 Motion in Limine to Clarify the Scope of the Record); documents and information introduced by interested parties, the Prosecution Team and the AHO after the issuance of the draft Cease and Desist Order on April 23, 2021 (*id.*) opinion testimony and exhibits offered by persons not properly qualified to testify as 'experts'" (*id.*); improper rebuttal testimony and exhibits (BTB's March 18, 2022 Motion in Limine to Strike and/or Exclude the Prosecution Team's Proposed Rebuttal Testimony and Exhibits); improper sur-rebuttal testimony and exhibits (BTB's April 24, 2022 Motion in Limine to Strike and/or Exclude Proposed Sur-Rebuttal Testimony and Exhibits); and documents submitted without any supporting testimony regarding the source or relevance of such documents." (BlueTriton Comments, p. 3:11-23.)

Response: Please see my response to BlueTriton's previous comment for my rulings on objections BlueTriton made during the AHO hearing or in its August 29, 2022 objections.

For BlueTriton's objections to any public comments made to the Division of Water Rights Enforcement Section before April 21, 2021 (including BlueTriton's objections to any public comments made after February 9, 2018), please see my January 20, 2022 rulings on BlueTriton's January 15, 2022 motion in limine and any rulings on such objections I made during the AHO hearing.

For BlueTriton's January 7, 2022 objections "to opinion testimony and exhibits offered by persons not properly qualified to testify as 'experts'", please see the rulings I made during the AHO hearing on such objections and the rulings in this document, including the attached Appendix A.

For BlueTriton's March 18, 2022 motion in limine to strike or exclude the Prosecution Team's proposed rebuttal testimony and exhibits, please see my March 25, 2022 ruling on this motion.

For BlueTriton's April 24, 2022 motion in limine to strike or exclude proposed sur-rebuttal testimony and exhibits, please see the rulings on this motion I made during the AHO hearing. During the hearing, I exercised my discretion to allow additional testimony by other parties' witnesses, whether or not it specifically rebutted prior testimony by BlueTriton's witnesses.

I overrule BlueTriton's general objection to "documents submitted without any supporting testimony regarding the source or relevance of such documents" because this objection does not refer to any specific documents.

Comment: "BTB also incorporates by this reference as if fully set forth herein, the objections submitted in response to evidence cited in each of the parties' closing briefs, as well as the attached **Exhibit A**, which lists several (but not all) of the unresolved objections to testimony and documents cited in the DPO." (*Id.*, p. 3:23-26.)

Response: Please see my response above regarding BlueTriton's August 29, 2022 objections to exhibits cited in other parties' closing briefs. Please see the attached Appendix A for my rulings on the objections stated in Exhibit A to BlueTriton's May 8, 2023 comments and objections.

Comment: "BTB also objects to evidence the AHO staff identified after the close of the hearing and about which no testimony was offered and BTB was provided no opportunity to rebut (see, e.g, DPO at p. 21, fn. 19.)" (BlueTriton Comments, p. 3:26-28.)

Response: I overrule BlueTriton's objection to the website information cited in footnote 19 on page 21 of the Draft Proposed Order. As stated in that footnote, the Board may take official notice of this information. The Board may consider this information under Government Code section 11513. This information is subject to the admissions exceptions to the hearsay rule stated in Evidence Code sections 1220-1222. To the extent this general objection is to any other evidence cited in the Draft Proposed Order, I overrule the objection because it does not refer to any specific citations in the Draft Proposed Order.

May 27, 2023

/s/ ALAN B. LILLY

Alan B. Lilly
Senior Hearing Officer
Administrative Hearings Office

Enclosures:

- Appendix A (rulings on objections in Exhibit A to BlueTriton's comments and objections)
- Service List (copies sent by e-mail only)

APPENDIX A

AHO Hearing Officer’s Responses to and Rulings on BlueTriton Brands, Inc.’s Objections to Draft Proposed Order

To prepare this Appendix A, the AHO added the “BTB Objection No.” column and entries in it, and the “AHO Response” boxes to Exhibit A to BlueTriton’s May 8, 2023 comments on and objections to the AHO’s April 21, 2023 Draft Proposed Order.

BTB Objection No.	Document	Add’l Ex. Nos.	Description	Page No. in DPO	Objection(s)
1	SOS-29		Doughty Decl FINAL SIGNED	44	Improper foundation testimony; Documents submitted without any supporting testimony regarding relevance.
<p>AHO Response: I overruled BlueTriton’s objections to Exhibit SOS-29 during the AHO hearing and accepted this exhibit into evidence. (See Recording, 2022-02-01, afternoon, 01:15:10-01:20:00; 2022-02-02, morning, 00:14:30-00:15:00.) For the reasons stated then and the reasons stated here, I overrule BlueTriton’s new objections to this exhibit. Paragraphs 1-3 and text in the “Source” column of the table in this exhibit provided adequate foundations for Ms. Doughty’s testimony. The Draft Proposed Order just cites exhibit SOS-29 to provide general information about the testimony of SOS witnesses. During the AHO hearing, I separately addressed the relevance of each exhibit that is described in exhibit SOS-29 and that was offered into evidence.</p>					
2	SOS-30		Frye Decl FINAL SIGNED	44	Improper expert testimony; Recitation of hearsay
<p>AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-30, and I accepted this exhibit into evidence. (See Recording, 2021-02-01, afternoon, 01:11:54-01:39:15; 2022-02-02, morning, 00:14:30-00:15:00.) I overrule BlueTriton’s new objections to this exhibit. Through her extensive research over seven years from numerous sources, Ms. Frye obtained sufficient expertise to provide any opinions that are stated in exhibit SOS-30. (See Evid. Code, §§ 801-802.) The Draft Proposed Order just cites this exhibit to provide general information about the testimony of SOS witnesses. During the AHO hearing, I separately addressed any hearsay objections to the exhibits that are described in exhibit SOS-30 and that were offered into evidence.</p>					

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
3	SOS-31		Loe Decl FINAL SIGNED	45	Improper expert testimony; Recitation of hearsay
<p>AHO Response: During the AHO hearing, I partially overruled BlueTriton’s objections to Exhibit SOS-31 (see Recording, 2022-02-01, 01:34:10-01:39:15), and I accepted exhibit SOS-31 into evidence, except for paragraphs 32, 41, 42, 53, 54 and 55. (See Recording, 2022-02-02, morning, 00:13:15-14:30.) For the reasons stated then and the reasons stated here, I make same rulings on BlueTriton’s new objection to this exhibit. Through his education and experience and extensive work for the San Bernardino National Forest for 30 years, Mr. Loe obtained sufficient expertise to provide the opinions that are stated in exhibit SOS-31. (See Evid. Code, §§ 801-802.) The Draft Proposed Order just cites this exhibit to provide general information about the testimony of SOS witnesses. During the AHO hearing, I separately addressed any hearsay objections to the exhibits that are described in exhibit SOS-31 and that were offered into evidence.</p>					
4	SOS-48		1930-1931 Rowe Field Notes East Twin Creek describing the historic conditions before water was diverted	13	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.
<p>AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-48, and I accepted this exhibit into evidence. (See Recording, 2021-02-01, afternoon, 01:11:54-01:39:15; 2022-02-02, morning, 00:14:30-00:15:00.) I overrule BlueTriton’s new objection to this exhibit. These field notes are admissible under the ancient writings exception to the hearsay rule, Evidence Code section 1331. They clearly are over 30 years old. The fact that statements in them have since been generally acted upon as true by persons having interests in the matter is demonstrated by reliance on the letters that Mr. Rowe prepared after preparing these field notes in the testimony of several witnesses in this proceeding, including Mr. Loe, who has extensively studied historical documents regarding the Strawberry Creek watershed, and Mr. Nichols, BlueTriton’s expert witness. (See exh. BTB-6, pp. 23-24, 26, 35-40, ¶¶ 79-81, 85, 115-119, 122-124, 127-129; exh. BTB-9, pp. 15-16, 18.) Also, even if these field notes were not admissible under this exception to the hearsay rule, the State Water Board still may consider them under Government Code section 11513, subdivision (d), for the purpose of supplementing or explaining Mr. Rowe’s letters by providing the dates of his field investigations. That is the only purpose for which the Draft Proposed Order cites exhibit SOS-48.</p>					

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
5	SOS-49	FR-69	Rowe Map of Strawberry Canyon	13, 15	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.

AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-49 and I accepted this exhibit into evidence. (See Recording, 2021-02-01, afternoon, 01:11:54-01:39:15; 2022-02-02, morning, 00:14:30-00:15:00.) I overrule BlueTriton’s new objection to this exhibit.

The Draft Proposed Order does not cite exhibit FR-69, which is a copy of the same diagram. During the AHO hearing, I accepted exhibit FR-69 into evidence over BlueTriton’s objection. (See Recording, 2022-01-31, afternoon, 00:33:31.)

It does not appear that this diagram is a “statement,” as that term is defined in Evidence Code section 225. Because the hearsay rule applies only to “statements” (see Evid. Code, § 1200), this rule does not apply to this diagram. Also, even if the hearsay rule does apply to this diagram, it is admissible under the ancient writings exception to the hearsay rule, Evidence Code section 1331. It clearly is over 30 years old. The fact that the diagram generally has been acted upon as true by persons having an interest in the matter is demonstrated by reliance on the letters that Mr. Rowe prepared after preparing this diagram by the testimony of several witnesses in this proceeding, including Mr. Loe, who has extensively studied historical documents regarding the Strawberry Creek watershed, and Mr. Nichols, BlueTriton’s expert witness. (See exh. BTB-6, pp. 23-24, 26, 35-40, ¶¶ 79-81, 85, 115-119, 122-124, 127-129; exh. BTB-9, pp. 15-16, 18.) Mr. Nichols included a copy of this diagram in his summary slides of his rebuttal testimony. (Exh. BTB-9, p. 16.) Also, even this diagram was not admissible under these exceptions to the hearsay rule, the State Water Board still may consider it under Government Code section 11513, subdivision (d), for the purpose of supplementing or explaining Mr. Rowe’s letters by providing a diagram of the locations of the springs, weirs and streams that are discussed in his letters.

6	SOS-51	SOS-44 FR-61	Letter from Rowe to Lippincott describing the springs, creek, and trees	14, 17, 39, 65	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.
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AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-51, and I accepted this exhibit into evidence. (See Recording, 2021-02-01, afternoon, 01:11:54-01:39:15; 2022-02-02, morning, 00:14:30-00:15:00.) I overrule BlueTriton’s new objection to this exhibit. This letter is admissible under the ancient writings exception to the hearsay rule, Evidence Code section 1331. It clearly is over 30 years old. The fact that statements in it have since been generally acted upon as true by persons having an interest in the matter is demonstrated by reliance on it and Mr. Rowe’s other letters and documents by the testimony of several witnesses in this proceeding.

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
<p>including Mr. Loe, who has extensively studied historical documents regarding the Strawberry Creek watershed, and Mr. Nichols, BlueTriton's expert witness. (See exh. BTB-6, pp. 23-24, 26, 35-40, ¶¶ 79-81, 85, 115-119, 122-124, 127-129; exh. BTB-9, pp. 15-16, 18.) Also, even if this letter were not admissible under these exceptions to the hearsay rule, the State Water Board still may consider it under Government Code section 11513, subdivision (d), to supplement or explain Mr. Vasquez's testimony and the reports about historical conditions and developments in Strawberry Canyon that are cited in the Draft Proposed Order.</p> <p>It is not clear why BlueTriton's objection refers to exhibits SOS-44 and FR-61, because the Draft Proposed Order does not cite these exhibits. During the AHO hearing, BlueTriton did not object to exhibit SOS-44, and I accepted this exhibit into evidence. (See Recording, 2021-02-01, afternoon, 01:11:54-01:39:15; 2022-02-02, morning, 00:14:30-00:15:00.) During the AHO hearing, I accepted exhibit FR-61 into evidence over BlueTriton's objection. (See Recording, 2022-01-31, afternoon, 00:33:31.) If necessary, I incorporate by reference my prior rulings on BlueTriton's objections, and I overrule BlueTriton's new objections to these exhibits.</p>					
7	SOS-53		Unsigned October 1, 1930 Letter Rowe to Lippincott	63	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.
<p>AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-53, and I accepted this exhibit into evidence. (See Recording, 2021-02-01, afternoon, 01:11:54-01:39:15; 2022-02-02, morning, 00:14:30-00:15:00.) I overrule BlueTriton's new objection to this exhibit. This letter is admissible under the ancient writings exception to the hearsay rule, Evidence Code section 1331. It clearly is over 30 years old. The fact that statements in it have since been generally acted upon as true by persons having an interest in the matter is demonstrated by reliance on it and Mr. Rowe's other letters and documents by the testimony of several witnesses in this proceeding, including Mr. Loe, who has extensively studied historical documents regarding the Strawberry Creek watershed, and Mr. Nichols, BlueTriton's expert witness. (See exh. BTB-6, pp. 23-24, 26, 35-40, ¶¶ 79-81, 85, 115-119, 122-124, 127-129; exh. BTB-9, pp. 15-16, 18.) Also, even if this letter was not admissible under these exceptions to the hearsay rule, the State Water Board still may consider it under Government Code section 11513, subdivision (d), to supplement or explain Mr. Vasquez's testimony, and the reports about historical conditions and developments in Strawberry Canyon that are cited in the Draft Proposed Order.</p>					

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
8	SOS-55	FR-83	Various letters to and from Rowe regarding the water monitoring project	13	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.
<p>AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-55, and I accepted this exhibit into evidence. (See Recording, 2021-02-01, afternoon, 01:11:54-01:39:15; 2022-02-02, morning, 00:14:30-00:15:00.) I overrule BlueTriton's new objection to this exhibit. The letters on pages 19-21 of this exhibit (the only part of this exhibit that is cited in the Draft Proposed Order) were signed by an attorney who apparently was representing Arrowhead Springs Corp. and California Consolidated WC. Because California Consolidated WC was a predecessor of BlueTriton, these letters are admissible under the admissions exceptions to the hearsay rule, Evidence Code sections 1220-1222. Also, even if these letters were not admissible under these exceptions to the hearsay rule, the State Water Board still may consider them under Government Code section 11513, subdivision (d), for the purpose of supplementing or explaining other evidence regarding Mr. Rowe's investigation, by explaining for whom Mr. Rowe worked for during his investigation.</p> <p>It is not clear why BlueTriton's objection refers to exhibit FR-83, because the Draft Proposed Order does not cite this exhibit. During the AHO hearing, I accepted exhibit FR-83 into evidence over BlueTriton's objection. (See Recording, 2022-01-31, afternoon, 00:33:31.) If necessary, I incorporate by reference my prior rulings on BlueTriton's objection, and I overrule BlueTriton's new objections to this exhibit.</p>					
9	SOS-280		Sur-Rebuttal Testimony of Amanda Frye	45	Improper expert testimony; Recitation of hearsay
<p>AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-280 (Recording, 2022-04-25, afternoon, 02:28:00-02:32:56), and I accepted this exhibit into evidence. (See Recording, 2022-04-25, afternoon, 02:39:50.) I overrule BlueTriton's new objections to this exhibit. Through her extensive research over seven years from numerous sources, Ms. Frye obtained sufficient expertise to provide any opinions that are stated in exhibit SOS-30. (See Evid. Code, §§ 801-802.) The Draft Proposed Order just cites this exhibit to provide general information about the testimony of SOS witnesses. During the AHO hearing, I separately addressed any hearsay objections to the SOS exhibits that are described in exhibit SOS-280 and that SOS offered into evidence.</p>					
10	SOS-282		Sur-Rebuttal Testimony of Steve Loe	45	Improper expert testimony; Recitation of hearsay
<p>AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-282 (Recording, 2022-04-25, afternoon, 02:28:00-02:32:56), and I accepted this exhibit into evidence. (See Recording, 2022-04-25, afternoon, 02:39:50.) I overrule BlueTriton's new objections to this exhibit. Through his education and experience and extensive work for the San Bernardino National Forest for 30 years,</p>					

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
					Mr. Loe obtained sufficient expertise to provide the opinions that are stated in exhibit SOS-282. (See Evid. Code, §§ 801-802.) The Draft Proposed Order just cites this exhibit to provide general information about the testimony of SOS witnesses. During the AHO hearing, I separately addressed any hearsay objections to the exhibits that are described in exhibit SOS-282 and that were offered into evidence.
11	SOS-287		Sur-rebuttal Declaration of Rachel S. Doughty	45	Improper foundation testimony; Documents submitted without any supporting testimony regarding relevance
					AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-287 (Recording, 2022-04-25, afternoon, 02:28:00-02:32:56), and I accepted this exhibit into evidence. (See Recording, 2022-04-25, afternoon, 02:39:50.) I overrule BlueTriton's new objections to this exhibit. Exhibits SOS-29 and SOS-287 provide adequate foundations for Ms. Doughty's testimony. The Draft Proposed Order just cites this exhibit to provide general information about the testimony of SOS witnesses. During the AHO hearing, I separately addressed objections to each exhibit that is described in exhibit SOS-287 and that was offered into evidence.
12	SOS-288		Gregory Allord Sur-Sur Rebuttal Testimony	45, 46	Recitation of hearsay without applicable exception; Improper expert testimony.
					AHO Response: During the AHO hearing, BlueTriton objected to exhibit SOS-288, and I overruled the objections and accepted this exhibit into evidence. (See Recording, 2022-05-23, morning, 01:20:40-01:22:56; 01:59:30.) I overrule BlueTriton's new objection to this exhibit. Through his work experience with the U. S. Geological Survey for over 30 years, Mr. Allord obtained sufficient expertise to provide the opinions that are stated in exhibit SOS-288. (See Evid. Code, §§ 801-802.) During the AHO hearing, I separately addressed the relevance of each exhibit that is described in exhibit SOS-288 and that was offered into evidence and any hearsay objections to such exhibits.
13	SOS-295		Gregory Allord Sur-Sur-Rebuttal Summary Slides	46	Recitation of hearsay without applicable exception; Improper expert testimony; Beyond the scope of written testimony.
					AHO Response: During the AHO hearing, BlueTriton objected to exhibit SOS-295, and I overruled the objections and accepted this exhibit into evidence. (See Recording, 2022-05-23, morning, 01:29:45; 01:59:30.) I overrule BlueTriton's new objections to this exhibit. Through his work experience with the U. S. Geological Survey for over 30 years, Mr. Allord obtained sufficient expertise to provide the opinions that are stated in exhibit SOS-295. (See Evid. Code, §§ 801-802.) During the AHO hearing, I separately addressed the relevance of each SOS exhibit that is described in exhibit SOS-295 and that SOS offered into evidence. Exercising my discretion as hearing officer, I allowed Mr.

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
Allord to testify about the slides in exhibit SOS-295, even if some of them went beyond the scope of his written proposed testimony. (See 2021-11-17 Notice of Second Pre-Hearing Conference and Public Hearing, p. 11.)					
14	CBD-1		Testimony of Andrew Zdon	46	Hearsay: CBD-1 p. 3 recites and cites to several other documents without pin cites, including SOS-042, CBD-4, PT-43-45, and “data collected by W.P. Rowe for the truth of the matter asserted.” These cited documents contain hearsay not subject to the ancient writings, adoptive or authorized admissions, or any other exception. An in-court summary of out of court statements does not change the nature of the hearsay.
AHO Response: During the AHO hearing, BlueTriton did not object to exhibit CBD-1, and I accepted this exhibit into evidence. (Recording, 2022-04-27, 1:25:45-01:26:26.) (I did not accept revised exhibit CBD-1 into evidence. (Recording, 2022-05-23, 00:05:28.)) I overrule BlueTriton’s new objections to exhibit CDB-1. During the AHO hearing, I separately addressed BlueTriton’s objections to the exhibits that are discussed in exhibit CBD-1 and that were offered into evidence. I incorporate by reference my responses above to BlueTriton’s objections to Mr. Rowe’s documents, and I overrule BlueTriton’s new objections to exhibit CBD-1. Exhibit CBD-4 is an excerpt from a technical book that Mr. Zdon could rely on in his testimony. BlueTriton has not objected to exhibits PT-43 through PT-45. These documents were prepared by a consultant working for and representing one of BlueTriton’s predecessors and therefore are admissible under the admissions exceptions to the hearsay rule, Evidence Code section 1220-1222. BlueTriton’s attorneys had an opportunity during their cross-examination of Mr. Zdon to ask questions that could have addressed BlueTriton’s current objection to a lack of “pin cites.” As a technical expert, Mr. Zdon was authorized to rely on the types of evidence he relied on to form the opinions stated in exhibit CBD-1. (See Evid. Code, §§ 801-802.)					
15	FR-151		Updated Amanda Frye Testimony and Authentication of exhibits for AHO BTB hearing copy	4 [should be 47]	Recitation of hearsay without applicable exception; Improper expert testimony.
AHO Response: During the AHO hearing, BlueTriton objected to exhibit FR-151, and I overruled the objections and accepted this exhibit into evidence. (See Recording, 2022-01-31, afternoon, 00:27:50-00:33:31.) I overrule BlueTriton’s new objections to this exhibit for the					

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
16	Loe-1		Written declaration	47	Recitation of hearsay without applicable exception; Improper expert testimony.
<p>AHO Response: During the AHO hearing, BlueTriton objected to exhibit Loe-1, and I overruled the objection and accepted this exhibit into evidence. (See Recording, 2022-02-02, morning, 00:46:14-00:49:00.) I overrule BlueTriton’s new objections to this exhibit. The Draft Proposed Order just cites this exhibit to provide general information about the testimony of Mr. Loe. Through his education and experience and extensive work for the San Bernardino National Forest for 30 years, Mr. Loe obtained sufficient expertise to provide the opinions that are stated in exhibit Loe-1. (See Evid. Code, §§ 801-802.) During the AHO hearing, I separately addressed any hearsay objections to the exhibits that are described in exhibit Loe-1 and that were offered into evidence.</p>					
17	Loe-2		Rebuttal Testimony	47	Recitation of hearsay without applicable exception; Improper expert testimony.
<p>AHO Response: During the AHO hearing, BlueTriton objected to exhibit Loe-2, I overruled the objection and accepted this exhibit into evidence. (See Recording, 2022-03-21, morning, 00:09:13-00:11:30.) I overrule BlueTriton’s new objections to this exhibit. Through his education and experience and extensive work for the San Bernardino National Forest for 30 years, Mr. Loe obtained sufficient expertise to provide the opinions that are stated in exhibit Loe-2. (See Evid. Code, §§ 801-802.) The Draft Proposed Order just cites this exhibit to provide general information about the testimony of Mr. Loe. During the AHO hearing, I separately addressed any hearsay objections to the exhibits that are described in exhibit Loe-2 and that were offered into evidence.</p>					

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
18	Bialecki-1		Spring 4, untapped	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
19	Bialecki-2		Headwater Spring	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
20	Bialecki-3		Boring complex 1, 1a, 8	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
21	Bialecki-4		Video of FS water right	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
22	Bialecki-5		FS water right	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
23	Bialecki-6		Untapped Spring 4 approximately 80 ft below the borehole complex 1, 1a & 8	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
24	Bialecki-7		Strawberry Creek headwater spring	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
25	Bialecki-8		Strawberry Creek headwater spring cavern entrance and rocks at the base of the headwater spring	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
26	Bialecki-9		Spring Tunnel 2 residual flow pipe approximately thirty feet from the tunnel concrete vault	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
27	Bialecki-10		Strawberry Creek headwater spring seep and installed valving for monitoring purposes	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.

AHO Response to BlueTriton’s objections 18-27, to exhibits Bialecki-1 through Bialecki-10: During the AHO hearing, BlueTriton objected to these exhibits, and I overruled the objections and accepted these exhibits into evidence. (Hearing, 2022-01-14, 01:06:15-01:08:00.) I overrule BlueTriton’s new objections to these exhibits. During the AHO hearing, Mr. Bialecki testified that he took these photographs and this video, and he described them. This testimony provided adequate foundations for these exhibits. These photographs and this video are not “statements,” as that term is used in Evidence Code section 225, and therefore are not subject to the hearsay rule. (Evid. Code, § 1200.) The Draft Proposed Order just describes these exhibits as part of its general description of the hearing testimony.

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
28	Bialecki-11		2021-06-03 Ltr. to AHO	47	Hearsay; not relevant.
<p>AHO Response: During the AHO hearing, BlueTriton objected to exhibit Bialecki-11, and I overruled the objection and accepted this exhibit into evidence. (Hearing, 2022-01-14, 01:09:20-01:17:00.) I overrule BlueTriton’s new objections to this exhibit. Mr. Bialecki was qualified to adopt this letter, which he wrote, as part of his testimony for the hearing. By doing this, the letter no longer was subject to the hearsay rule. (See Evid. Code, § 1200.) The Draft Proposed Order just describes this exhibit as part of its general description of the hearing testimony.</p>					
29	Serrano-1		Asset purchase agreement template	47	Hearsay; not relevant.
30	Serrano-3		Prior appropriation	47	Hearsay; not relevant.
31	Serrano-4		Appropriative rights	47	Hearsay; not relevant.
32	Serrano-5		Water Rights: statement of water diversion and use program	47	Hearsay; not relevant.
33	Serrano-6		Fully appropriated stream systems	47	Hearsay; not relevant.
34	Serrano-7		Description of other exhibits	47	Hearsay; not relevant.
<p>AHO Response to BlueTriton’s objections 27-34 to exhibits Serrano-1 and Serrano-3 through Serrano-7: During the AHO hearing, BlueTriton objected to these exhibits, and I overruled the objections and accepted these exhibits into evidence. (Hearing, 2022-01-14, 01:24:30-01:27:33.) I overrule BlueTriton’s new objections to these exhibits for the same reasons. The Draft Proposed Order just describes these exhibits as part of its general description of the hearing testimony.</p>					

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
35	FR-153		ETW. (Noted circa 1965 stamped by library June 18, 1978) Development of Arrowhead Springs by ETW. (Referenced in FR 155 as 10-page report by Arrowhead Springs employee ETW	17	Hearsay
<p>AHO Response: During the AHO hearing, BlueTriton objected to exhibit FR-153, and I overruled the objection and accepted this exhibit into evidence. (See Recording, 2022-04-26, 00:44:20-1:07:24.) I overrule BlueTriton’s new objection to this exhibit. This report is admissible under the ancient writings exception to the hearsay rule, Evidence Code section 1331. It clearly is over 30 years old. The fact that statements in it have since been generally acted upon as true by persons having an interest in the matter is demonstrated by Mr. Frye’s reliance on it in her testimony and the fact that no one questioned its authenticity during the hearing. Also, even if this report was not admissible under this exception to the hearsay rule, the State Water Board still may consider it under Government Code section 11513, subdivision (d), to supplement or explain other evidence in the record, particularly exhibit PT-44, p. 3, that discuss the date of construction of Tunnel 3. That is the only purpose for which the Draft Proposed Order cites exhibit FR-153.</p>					
36	SOS-281		Amanda Frye Sur-Rebuttal Summary Slides	19	Hearsay
<p>AHO Response: During the AHO hearing, BlueTriton did not object to exhibit SOS-281 (Recording, 2022-04-25, afternoon, 02:28:00-02:32:56), and I accepted this exhibit into evidence (Recording, 2022-04-25, afternoon, 02:39:50). I overrule BlueTriton’s new objection to this exhibit. Through her extensive research over seven years from numerous sources, Ms. Frye obtained sufficient expertise to authenticate the document in exhibit SOS-281 and to provide the testimony that is stated in this exhibit. (See Evid. Code, §§ 801-802.) BlueTriton’s general hearsay objection to this exhibit does not refer specifically to any of the documents or statements in the 23 slides that comprise exhibit SOS-281. During the AHO hearing and in these rulings, I have separately addressed any hearsay objections to the exhibits that are described in exhibit SOS-281 and that were offered into evidence. Also, even if this exhibit was not admissible under this exception to the hearsay rule, the State Water Board still may consider it under Government Code section 11513, subdivision (d), to supplement or explain other evidence in the record, particularly exhibit PT-43, p. 20, that discuss the date of construction of Tunnel 7. That is the only purpose for which the Draft Proposed Order cites exhibit SOS-281 on page 19.</p>					

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
37	PT-312		Rebuttal Testimony - Tomas Eggers	38	<p>Improper rebuttal testimony: Offered to supplement, not rebut.</p> <p>Hearsay: Evidence recited, including SOS-91 and PT- 314, are hearsay. No evidence was offered to establish the document is being “offered to prove facts of general notoriety and interest” (Evid. Code § 1341.)</p>

AHO Response: During the AHO hearing, I overruled BlueTriton’s objection to the discussion in this exhibit about historical U. S. Geological Survey topographic maps on the grounds that such maps are not “statements” under Evidence Code section 225, and therefore are not subject to the hearsay rule under Evidence Code section 1200. I also ruled that Mr. Eggers had sufficient technical expertise to give opinions about these maps. (Recording, 2022-03-21, morning, 00:48:57-00:50:00, 00:51:52-00:52:59.) Following these rulings, I accepted exhibit PT-312 into evidence. (Recording, 2022-03-21, morning, 02:45:05.) I overrule BlueTriton’s new objections to exhibit PT-312. Exercising my discretion as hearing officer, I allowed Mr. Eggers to provide this testimony, even if some of it did not specifically rebut other parties’ testimony. (See 2022-03-25 hearing officer’s rulings (BlueTriton), p. 3.)

Even if the depictions of blue-line streams in the topographic maps that are exhibits SOS-91 and PT-314 (revised) are considered to be statements subject to the hearsay rule, the maps with these depictions are admissible under the public employee records exception to the hearsay rule, Evidence Code section 1280, because they are records that public employees prepared of the conditions they observed. These maps also are admissible under the ancient writings exception to the hearing rule, Evidence Code section 1331, and the exception for historical maps in Evidence Code section 1341. They clearly are more than 30 years old, and, as Mr. Allord testified, U. S. Geological Survey maps generally have been acted upon as true by persons having interests in matters for which the maps are relevant, they were made by persons indifferent between the parties to this proceeding, and Prosecution Team offered them to prove facts of general notoriety and interest. (See *Gray v. Magee* (1933) 133 Cal.App. 653, 658, 661, and the discussion of this decision on pages 10-11 of my rulings.)

Also, even if these maps were not admissible under these exceptions to the hearsay rule, the State Water Board still may consider them under Government Code section 11513, subdivision (d), to supplement or explain Mr. Egger’s testimony. Finally, the courts may take official notice of U. S. Geological Survey topographic maps, (*Union Transportation Co. v. Sacramento County* (1954) 42 Cal.2d 235, 239; *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009, 1021 fn. 2), so the State Water Board may take official notice of these maps (Cal. Code Regs., tit. 23, § 648.2).

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
38	PT-313		Rebuttal Testimony - Natalie Stork (citation not identified as Revised PT- 313)	38	<p>Improper rebuttal testimony: Offered to supplement, not rebut.</p> <p>Hearsay: Evidence recited, including SOS-91 and PT- 314, are hearsay. No evidence was offered to establish the document is being “offered to prove facts of general notoriety and interest” (Evid. Code § 1341) or to support any other exception to the hearsay rule.</p>
<p>AHO Response: I overrule BlueTriton’s new objections to exhibit PT-313, and I incorporate by reference here my response to BlueTriton objection 37 to exhibit PT-312. All the statements in that response also apply to BlueTriton’s objections to exhibit PT-313.</p>					
39	PT-314		1905 USGS Hydrologic Map (citation not identified as Revised PT- 314)	38, 43, 46, 62	<p>Hearsay: No evidence was offered to establish the document is being “offered to prove facts of general notoriety and interest” (Evid. Code § 1341) or to support any other exception to the hearsay rule.</p>
<p>AHO Response: I overrule BlueTriton’s new objections to exhibit PT-314, revised, and I incorporate by reference here my response to BlueTriton objection 37 to exhibit PT-312. All the statements in that response also apply to BlueTriton’s objections to exhibit PT-314, revised.</p>					
40	PT-316		Written Sur-rebuttal testimony Tomas Eggers	39	<p>Hearsay: Testimony recites and summarizes hearsay contained in other documents, including SOS 49, 51, PT 320. No evidence was offered to demonstrate a basis for the application of the ancient writings or any other exception to the hearsay rule.</p>
<p>AHO Response: During the AHO hearing, BlueTriton did not object to exhibit PT-316, and I accepted this exhibit into evidence. (See Recording, 2022-04-25, morning, 00:01:50-00:03:35, 00:11:04.) I overrule BlueTriton’s new objections to this exhibit. I incorporate by reference my responses to BlueTriton objections 5 and 6 to exhibits SOS-49 and SOS-51. In exhibit PT-316, Mr. Eggers refers to exhibit PT-320, which contains some e-mails between a Prosecution attorney and a Forest Service employee. (Exh.</p>					

BTB Objection No.	Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
					<p>PT-316, pp. 5-6, ¶ 8.) The reference in exhibit PT-316 to exhibit PT-320 was solely for the purpose of authenticating three reports prepared by John Mann, Jr., exhibits PT-317 through PT-319. (Exh. PT-316, pp. 5-6, ¶ 8.) BlueTriton did not object during the AHO hearing to exhibits PT-317 through PT-319, and I accepted these exhibits into evidence. (See Recording, 2022-04-25, morning, 00:01:50-00:03:35, 00:11:04.) BlueTriton has not objected to exhibits PT-317 through PT-319 since the AHO hearing ended. It therefore does not appear necessary for me to rule on BlueTriton’s objection to the part of exhibit PT-316 that refers to exhibit PT-320. To the extent a ruling is necessary, I overrule the objection on the grounds that the statements in exhibit PT-320 are admissible under the public employee records exception to the hearsay rule, Evidence Code section 1280, and on the grounds that, even if these statements are not admissible under this exception, the State Water Board may consider them under Government Code section 11513, subdivision (d), to supplement or explain Mr. Eggers’s testimony.</p>

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