07/18/2023 Board Meeting- ITEM #9
CHANGE SHEET #1 (CIRCULATED 07/07/2023)

Administrative Hearings Office's recommended edits to proposed order prepared by the Administrative Hearings Office (AHO) on the draft Cease and Desist Order (CDO) issued by the Assistant Deputy Director for the Division of Water Rights (Division) Permitting and Enforcement Branch to BlueTriton Brands, Inc. (BlueTriton) and on BlueTriton's request to set aside proposed order and motion to stay further action. (References are to text page numbers.)

On page 3, third paragraph, edit the second sentence as follows:

> If it had gone into effect, the draft CDO would have directed Nestlé to immediately cease all diversions greater than 7.26 acre-feet per year (af/yr) of water that is subject to Division 2 of the Water Code (Wat. Code, §§ 1000-5976) from Nestlé's Tunnels 2, 3 and 7 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8, based on the conclusion that any diversions exceeding this annual amount would be unauthorized diversions. (Exh. PT-1, p. 10, ¶¶ 13, 1.)

On page 12, in the last paragraph, edit the last sentence as follows:

> The judgment stated that California Consolidated WC had, for more than five years before commencement of the action, diverted ~~was diverting~~ water, adversely to the plaintiff, from springs at the headwaters of Strawberry Creek for conveyance to Los Angeles, where the water was bottled for domestic use and used to manufacture beverages and for other purposes. (*Id.*, pp. 12, 15-16.)

On page 21, first full paragraph, edit the last sentence and the citation at the end of the paragraph as follows:

> From this load station, BlueTriton transports the water to BlueTriton's bottling plants, which are located at several locations in southern California, to be bottled as "ARROWHEAD® BRAND~~Arrowhead~~ 100% MOUNTAIN SPRING WATER~~Mountain Spring Water~~." (Figure 10; Recording, 2022-01-13, afternoon, 1:50:15-1:51:06.)

On page 21, edit footnote 20 as follows:

> [20] Newspaper articles submitted and accepted as exhibits during the AHO hearing refer to the following other sources of Arrowhead Mountain Spring Water: an 80-acre site near Running Springs, "mountain springs in San Diego," and "a Sierra Nevada location." (Exh. FR-146, pp. 1, 3.) ~~According to a page on the website, www.arrowheadwater.com/brand/our-springs, the springs in the Strawberry Creek watershed. , which the website refers to as "Arrowhead Spring," are the original spring sources for Arrowhead Spring water. Other pages on this website state that Arrowhead Spring water now also comes from four~~

~~springs in northern California, four springs at other locations in southern California, a spring in British Columbia, and a spring in Colorado. (2023-03-31 website downloads from~~ www.arrowheadwater.com ~~brand our-springs. (This file is in the administrative record in AHO staff exhibits folder.)) The State Water Board takes official notice of these website downloads under Evid. Code, § 452, subd. (h), and Cal. Code Regs., tit. 23, § 648.2.~~

On pages 22-23, delete the following text:

~~Text of the Arrowhead Water website states:~~

> ~~According to the U.S. Food & Drug Administration (FDA): "Spring Water is water derived from an underground formation from which water flows naturally to the surface of the earth." To be able to label our product as "spring water," we have to satisfy stringent standards— standards we proudly meet or exceed. That's why you can be confident in the quality of every bottle of Arrowhead® Brand 100% Natural Spring Water.~~
>
> ~~(2023-03-31 website downloads from www.arrowheadwater.com brand our-springs (cited in footnote 20).)~~

On page 45, first full paragraph, line 6, change "Mr. Lowe's" to "Mr. Loe's".

On page 46, section 2.12.3.4, first paragraph, edit the citation after the first sentence as follows:

> (Recording~~Hearing~~, 2022-04-27, 16:14-30:03.)

On page 47, first two lines, change "Hearing" to "Recording" in the citations.

On page 47, section 2.12.4, line 6, change "(2023-05-30 hearing officer's responses and rulings.)" to "(2023-05-27 hearing officer's rulings with App. A (BlueTriton).)"

On page 47, add the following new paragraphs at the end of section 2.12.4:

> On June 2, 2023, BlueTriton's attorneys filed a "Request to Set Aside Proposed Order" and a "Motion to Stay Further Action on Proposed Order." On June 23-26, 2023, parties to this proceeding and other interested parties filed comments on the May 26, 2023 proposed order.
>
> On July 7, 2023, the AHO transmitted to the Clerk of the Board and the parties to this proceeding the AHO's recommended edits to the AHO's May 26, 2023 proposed order. These changes correct typographical errors, correct some quotations and citations, and edit text addressing several points, including text regarding the relevant provisions of the judgment in the *Del Rosa Mutual Water Company* case discussed in section 2.6. These changes also add a new

Appendix B to this order, which summarizes the filings described in the preceding paragraph and contains our responses.

Our order includes these changes. All of these changes were technical or other minor changes to the May 26, 2023 proposed order, and none of these changes materially changed any of the factual or legal bases of the proposed order. We were authorized by Water Code section 1114, subdivision (c)(2)(C) to make these changes to the proposed order before we adopted this order.

On page 49, in the second full paragraph, edit the quotation as follows:

Waters, whether under or above ground, having no certain general course or definite limits, such as those merely percolating through the strata of the earth and those diffused over its surface, are not water courses, and are not subject to the rules of law applicable to water courses.

On page 49, edit footnote 36 as follows:

In *North Gualala Water Co. v. State Water Resources Control Bd., supra,* 139 Cal.App.4th, p. 1605~~839~~ fn. 18~~16~~, the court quoted some of this text in ~~from~~ the *Pomeroy* decision.

On page 51, edit the quotation at the end of the page as follows:

California maintains a "~~'~~dual system" of water rights, which distinguishes between the rights of "~~'~~riparian"~~'~~ uses, those who possess water rights by virtue of owning the land by or through which flowing water passes, and "~~'~~appropriators,"~~'~~ those who hold the right to divert such water for use on noncontiguous lands. For historical reasons, California further subdivides appropriators into those whose water rights were established before and those after 1914. Post-1914 appropriators may possess water rights only through a permit or license issued by the Board, and their rights are circumscribed by the terms of the permit or license. Riparian users and pre-1914 appropriators need neither a permit nor other governmental authorization to exercise their water rights.

On page 52, second full paragraph, edit the first sentence as follows:

There are two primary types of rights to divert or pump and use percolating groundwater, overlying rights and groundwater appropriative rights.

On page 52, second full paragraph, add the following new footnote 38 at the end of the first sentence and re-number all subsequent footnotes:

[38] In some situations, pueblo rights, federal reserved rights or prescriptive rights may authorize the pumping and use of percolating groundwater. No party to this proceeding has asserted that it has any pueblo rights or federal reserved rights.

The prescriptive-rights claims of some of the parties to the judgment in the *Del Rosa Mutual Water Company* case are discussed in sections 3.7.2.1 and 3.7.2.2.

On page 54, first full paragraph, line 5, change "Decision 968" to "Decision 986".

On page 61, after the quotation, change "(1884)" to "(1886)" in the citation.

On page 61, edit the first four sentences of the first paragraph after the heading for "Springs 1, 2, 3, 7 and 8" as follows:

As shown in Figure 14, ravines are adjacent to~~gullies begin at or near~~: (a) the portals of Boreholes 1, 1A and 8 (near the sites of Springs 1 and 8), (b) the portal of Tunnel 3 (the site of Spring 3), and (c) the portals of Boreholes 7, 7A, 7B and 7C, which are approximately 40 feet from the portal of Tunnel 7 (the site of Spring 7) (see section 2.9). If no tunnels, boreholes or other facilities ever had been constructed at Springs 1, 3, 7 and 8, and no water had been diverted from these springs, then water flowing out of these springs would have flowed down these ravines~~gullies~~. Figure 14 also shows that there also are ~~obvious~~ breaks in the surrounding vegetation at these ravines~~gullies~~. These ravines ~~gullies~~ also are depicted in Appendix D to the Division's 2021 revised report of investigation, which is discussed in Mr. Vasquez's testimony. (Exh. PT-3, pp. 157-161; exh. PT-7, pp. 7-13, 15-24~~p. 9, ¶¶ 22-24, p. 23, ¶ 83~~.)

On pages 62-63, edit the last two sentences on page 62 as follows:

~~Such waters do not originate at any specific point source.~~ In contrast, the evidence in the record indicates that Springs 1, 2, 3, 7 and 8 each historically discharged ~~water at one specific point, from which the water flowed~~ into a natural channel or flow path.

On page 63, in the last paragraph, edit the citation after the first sentence as follows:

See *State v. Hansen, supra,* 189 Cal.App.2d, at pp. 606-607, 610

On page 68, footnote 42, change "Decision 968" to "Decision 986" the two times it appears.

On page 70, section 3.7.1, second paragraph, edit the first sentence as follows:

The holder of a riparian right to divert and use water from a surface water stream may divert water from the stream at a point of diversion that is not on the right holder's parcel, and then convey the diverted water to the parcel for beneficial use there, provided the diversion does not injuriously affect other riparian rights ~~no unreasonable loss of water is caused by these actions~~. (*Turner v. James Canal Co.* (1909) 155 Cal. 82, 92; ~~S~~see *Holmes v. Nay* (1921) 186 Cal. 231, 240; ~~*Turner v. James Canal Co.* (1909) 155 Cal. 82, 92~~.)

On page 72, delete the first paragraph in section 3.7.2.1.

On page 74, add the following new paragraphs after line 3:

> BlueTriton's closing brief to the AHO argued that the stipulated judgment in the *Del Rosa Mutual Water Company* case (see section 2.6) provided that the Arrowhead Springs Corp. and California Consolidated WC "established prescriptive rights to [Del Rosa Mutual MWC's] pre-1914 rights to the tributaries of East Twin Creek based on long-standing California law." (2022-08-05 BlueTriton closing brief, p. 25:9-11.) BlueTriton also argued that the stipulated judgment provided for either a taking by BlueTriton's predecessors of an existing pre-1914 right from Del Rosa MWC or a transfer of this right for consideration. (*Id.*, p. 25:15-18.)
>
> To perfect a prescriptive water right, "the use of the water must be: (1) actual, (2) open and notorious, (3) hostile and adverse to the original owner's title, (4) continuous and uninterrupted for the statutory period, and (5) under a claim of title in the claimant, and not by virtue of another right." (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 784.) The effect of obtaining a prescriptive right is to elevate the water-right priority of the holder of the prescriptive right. (See, e.g., *Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992, 1024; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 297.)
>
> We have considered these required elements for prescriptive rights, the effects of prescriptive rights, and the provisions of the stipulated judgement in the *Del Rosa Mutual Water Company* case discussed in section 2.6. We conclude that this judgment provided that, in return for payments of the listed amounts of compensation to Del Rosa MWC, Del Rosa MWC would not object to the prescriptive-rights claims of Arrowhead Springs Corp. and California Consolidated WC, and would agree that their rights to divert and use water at the rates specified in the judgment from the sources specified in the judgment would have priority over Del Rosa MWC's rights.

On page 74, edit the first full paragraph as follows and add the following new paragraphs:

> We disagree with BlueTriton's argument~~, discussed in the first paragraph of this section,~~ that this ~~the 1931~~ stipulated judgment~~judgement~~ ~~in the *Del Rosa Mutual Water Company* case~~ took or transferred a pre-1914 appropriative right from Del Rosa MWC to California Consolidated WC. ~~That judgment referred to impacts of California Consolidated WC's diversions on Del Rosa MWC's right, stated that California Consolidated WC could compensate Del Rosa MWC for this injury (exh. BTB-13, pp. 15-16, ¶ 5), and provided that California Consolidated WC could continue these diversions (*id.*, p. 18-19, ¶ (b)). The judgment also recognized Del Rosa MWC's right to divert water from East Twin Creek and stated that~~

~~this right was subject to Arrowhead Springs Corp's and California Consolidated WC's rights. (*Id.*, pp. 19-20, ¶ (e).)~~ Nothing in this judgment ~~judgement~~ stated or implied that there was any taking or transfer of any Del Rosa MWC water right to Arrowhead Springs Corp. or California Consolidated WC. Also, nothing in this judgment discussed any conveyances of any water rights from Arrowhead Springs Corp. to California Consolidated WC, or any changes in points of diversion or sources of any appropriative rights.

We have considered the stipulated judgment's clear statements about prescriptive rights, the required elements for such rights, and the effects of obtaining such rights. We also have considered the lack of any discussion in the judgment about any perfection of appropriative water rights by California Consolidated WC, any conveyances of any appropriative water rights to California Consolidated WC, or any changes in points of diversion or sources of any appropriative rights.

Based on these considerations, we conclude that the judgment's description of California Consolidated WC's "right to take, impound, divert, transport and carry away water of that certain spring known as 'Indian Spring' and any and all of the water of all springs situated or obtainable in that part of East Twin Creek known as 'Strawberry Creek and Canyon' and canyons lateral thereto . . . " (exh. BTB-13, p. 18:23-27) was a description of the prescriptive rights claims of California Consolidated WC to which Del Rosa MWC did not object. We conclude that this description was not a description of any appropriative right.

On page 74, edit the first three sentences of the second full paragraph as follows:

The judgment in the ~~indicated that~~ *Del Rosa Mutual Water Company* case did ~~had stipulated that Arrowhead Springs Corp. had perfected a prescriptive right against Del Rosa MWC (*id.*, pp. 12-15, ¶ 4), and that Del Rosa MWC had, in return for compensation, stipulated that California Consolidated WC could divert water from the specified sources (*id.*, pp. 15-16, ¶ 5). These parties were free to enter into these stipulations. However, such stipulations cound~~ not create any new, post-1914 appropriative rights.

On pages 77-78, delete the following text at the end of page 77, which continues on the page 78, and delete footnote 45:

~~Although the parties to the *Del Rosa Mutual Water Company* case could stipulate to a judgment involving their claims against each other, any stipulated change in the source of a pre-1914 appropriative right from sources in the Coldwater Creek and Hot Springs Creek watershed to sources in the Strawberry Creek watershed was not authorized by California water-rights law, and therefore was not valid.[45]~~

On page 78, after the second full paragraph, add the following new paragraph:

> As discussed earlier in this section, we conclude that the judgment in the *Del Rosa Mutual Water Company* case confirmed the parties' agreements regarding Arrowhead Springs Corp.'s and California Consolidated WC's prescriptive rights claims against Del Rosa MWC, did not effect any changes in any appropriative rights, and did not effect any conveyances of any appropriative rights to California Consolidated WC. Also, neither the State Water Board nor any of its predecessors was a party to this judgment, and the judgment is not binding on the Board. For both these reasons, this judgment does not bar us from reaching the conclusions we reach in this section regarding BlueTriton's pre-1914 appropriative right claims.

On page 82, edit the first sentence as follows:

> Also, while Water Code section 1051, subdivision (a), authorizes the Board to investigate stream systems, it does not expressly authorize the Board to require other parties to conduct such investigations.

In Appendix A, page A4, section A3.2, first paragraph, change "Decision 968" to "Decision 986".

After Appendix A, add the following new Appendix B, add an entry for it in the table of contents:

Appendix B

BlueTriton's Request to Set Aside Proposed Order and Motion to Stay Further Action; Comments on May 26, 2023 Proposed Order

Introduction

On June 2, 2023, BlueTriton's attorneys filed a Request to Set Aside Proposed Order (2023-06-02 BlueTriton Request) and a Motion to Stay Further Action on the Proposed Order and First Address the State Water Resources Control Board's Lack of Permitting Authority Over Groundwater (2023-06-02 BlueTriton Motion). On June 23-26, parties to this proceeding and other interested entities filed comments on the AHO's May 26, 2023 proposed order. Files with this motion, this request and these comments are in the "Comments on 2023-05-26 Proposed Order" sub-folder within the "State Water Board meetings" folder in the administrative record.

The following paragraphs summarize BlueTriton's request and motion, and the comments of parties to this proceeding and other parties, and contain our responses.

Comments Supporting May 26, 2023 Proposed Order

Comments: On June 25-26, 2023, the Prosecution Team, the Story of Stuff Project, the Center for Biological Diversity and the Sierra Club, Amanda Frye, Steve Loe, Hugh Bialecki (for Save Our Forest Association, Inc.) and Anthony Serrano filed comments on the May 26, 2023 proposed order. The Story of Stuff Project also filed a petition that indicated it was on behalf of numerous listed individuals.

These comments all urged Board to adopt the proposed order without any changes.

Some of these comments also urged the Board to direct its staff to investigate Strawberry Canyon public trust resources and BlueTriton's diversions through its Boreholes 10, 11 and 12, and to investigate pursuing an administrative civil liability action against BlueTriton.

Response: As discussed in section 3.8, we deny the Prosecution Team's request for a CDO regarding Boreholes 10, 11 and 12. This denial is without prejudice to the Division's authority to conduct further investigations regarding these diversions, or to issue a new draft CDO regarding them. The Division also may, in its discretion, decide to prepare and file an administrative civil liability complaint against BlueTriton under Water Code section 1055, subdivision (a) (under its authority delegated from the Board's Executive Director).

BlueTriton's Request, Motion and Arguments

The following paragraphs discuss the arguments in BlueTriton's June 26, 2023 Request to SWRCB to Reject Proposed Order and Dismiss Draft Cease and Desist Order.[B1] We refer to this document as the "2023-06-26 BlueTriton Request." (BlueTriton uses the acronym "BTB" for its name and the acronym "SWRCB" for the State Water Board. We retain these acronyms in our quotations from the 2023-06-26 BlueTriton Request.)[B2]

The following paragraphs also discuss the arguments in BlueTriton's June 2, 2023 Request to Set Aside Proposed Order, which we refer to as the "2023-06-02 BlueTriton Request," and BlueTriton's June 2, 2023 Motion to Stay Further Action on the Proposed Order and First Address the State Water Resources Control Board's Lack of Permitting Authority Over Groundwater, which we refer to as the "2023-06-02 BlueTriton Motion."

1. Argument: "BTB's Boreholes and Tunnels Collect Percolating Groundwater, Which is Not Subject to the SWRCB's Permitting and/or Enforcement Authority." (2023-06-26 BlueTriton Request, p. 5:4-5.) "The point where water is physically diverted and taken under control establishes its legal character and classification for purposes of determining the scope of the SWRCB's jurisdiction." (*Id.*, p. 6:17-18, quoting Wells A. Hutchins, Water Rights Laws in the Nineteen Western States, Vol. 1, pp. 23-24 (1971).)[B3] "Moreover, the Proposed Order does not cite any authority to support a conclusion that groundwater collections that are not from a subterranean stream can be treated as diversions of surface water flowing in a natural channel." (*Id.*, p. 7:9-11.)

Response: As stated in section 3.6.2:

> The question here therefore is whether we should treat BlueTriton's present diversions by Tunnels 2 and 3 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 as diversions of surface water, over which the State Water Board has water-right permitting and enforcement authorities, or as diversions of

[B1] On June 26, 2023, BlueTriton's attorneys filed one file with a six-page cover letter and the 41-page request cited here. (2023-06-26 BTB ltr.) Because the cover letter does not contain any arguments that are not also in the request, we just address the arguments in the request.

[B2] Consistent with the text of our order, citations to exhibits in this Appendix B are to pdf page numbers, which often are different from the text page numbers. (See footnote 1 of our order.) We cite to the text page numbers in the 2023-06-26 BlueTriton Request. These text page numbers are different from the pdf page numbers of the file that contains this request.

[B3] This Hutchins treatise discusses water-right law in the nineteen western states. We cite it here as "Hutchins, Western States Water Laws." It is different from the Hutchins treatise cited in section 3.1, which discusses only California laws and court decisions. Unless the context indicates otherwise, citations in this Appendix B to "Hutchins" are to Hutchins, The California Law of Water Rights (1956).

percolating groundwater, to which these authorities would not apply in this proceeding.

For its argument that the water diverted by these tunnels and boreholes is percolating groundwater, BlueTriton cites *City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597, and *North Gualala Water Co. v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577. However, neither of these cases involved diversions of water associated with springs.

The chapter of the Hutchins Western States Water Laws treatise that BlueTriton quotes contains general definitions derived from reported court decisions from nineteen western states. This introductory chapter of the treatise does not contain any citations.

These definitions apply to issues regarding rights to use water, and do not necessarily apply to questions of the scope of the State Water Board's water-right permitting and enforcement authorities. (See 2022-08-05 BlueTriton closing brief, p. 13:15--14:5 (Prosecution Team's reliance on reported court decisions on water-right issues associated with springs was incorrect, because these decisions "do not address the SWRCB's permitting authority under Division 2 of the Water Code").)

These definitions also do not specifically address diversions of water associated with springs, and they refer to water that is "captured and brought to the surface by means of a pumping plant" (Hutchins, Western States Water Laws, p. 23). All BlueTriton's diversions involved in this proceeding are associated with springs, and none of these diversions is made by a pumping plant.

BlueTriton omitted from its quotation the sentence in this treatise that states "However, a watercourse flow, or a ground water reservoir, may contain undivided segments of commingled waters to which different rights of use may attach." (*Id.*, pp. 23-24.) This sentence recognizes that different states may have different rules regarding various types of rights of use of surface water and groundwater. Different states also may have different rules regarding the water-right permitting and enforcement authorities of their state regulatory agencies. Our order is based on the specific rules that have been enunciated by California courts and the State Water Board and its predecessors.

No party has cited, and we are not aware of, any reported court decision that addressed the specific issue of whether the Board's water-right permitting and enforcement authorities extend to water diverted by an underground tunnel, borehole or pipe that intercepts the water that otherwise would discharge from a spring, where the discharged water would be subject to these authorities.

Because there are no reported court decisions that address this specific issue, we consider the prior decisions of the State Water Board and its predecessors on applications for permits to appropriate water through pipes and tunnels below the ground surface that intercept water that otherwise would have discharged from springs. Those decisions are discussed in Appendix A, sections A2.1 and A2.2. While none of the decisions in section A2.1 explicitly discussed Water Code sections 1200-1202 or the

Board's water-right permitting authority, they still are precedents supporting the conclusion that the Board's water-right permitting authority, and thus also the parts of the Board's water-right enforcement authority involved in this proceeding, extend to underground pipes and tunnels that intercept water that otherwise would discharge from springs.

In contrast, most of the decisions of the State Water Board and its predecessors that BlueTriton cites for its argument did not involve applications for permits to appropriate water through pipes or tunnels that would intercept water that otherwise would have discharged from springs. (See Decisions 724, 968, 986, 1327, 1337 and 1357, cited by 2023-06-26 BlueTriton Request, p. 7:4-5.) Decision 225, also cited by BlueTriton's Request, involved an application for a permit to appropriate water from a well developed in a cienega that did not have any clear flow channel.

Decision 915 involved an application for a permit to appropriate water that would be developed by tunnels associated with two springs. However, the facts involved in that proceeding are distinguishable from the present proceeding because they involved an application for a permit to appropriate only percolating groundwater that would be developed, and not to appropriate any water that naturally would have discharged, from the spring involved in that proceeding. (Decision 915, pp. 5-6.) In contrast, at least some of the water subject to each of BlueTriton's diversions involved in this proceeding is water that would have discharged from the historic springs under natural conditions. (See section 3.6.2.) Also, in a subsequent decision, Decision 1482, the State Water Board concluded that it should extend the water-right rules that apply to springs to waters that were developed through improvements at the springs. (Decision 1482, p. 14; see section 3.6.2)

In reaching our conclusion on this issue, we also consider Order WR 2019-0149, in which the Board concluded that the Board's water-right permitting and enforcement authorities extended to waters associated with natural springs that were developed through pipes extending from the ground surface near the sites of the springs into the underlying bedrock formations where they intercept water flowing in fractures in the bedrock. (See sections 3.5 and 3.6.2, Figures 12 and 13.)

Considering the decisions discussed in Appendix A, section A2.1, Decision 1482 and Order WR 2019-0149, we conclude that the Board's water-right permitting and enforcement authorities apply to diversions through underground tunnels, boreholes and pipes of water associated with historic springs, where the water that discharged from these springs would have been subject to these authorities. For water-right purposes, the Board should treat these diversions as diversions being made at the sites of the historic springs, even though the tunnels, boreholes or pipes now intercept that water before it can discharge from the historic springs. Otherwise, anyone seeking to divert and use spring water could evade these authorities by installing an underground tunnel, borehole or pipe to intercept the water that otherwise would discharge from the spring. (See section 3.6.2.)

This conclusion is consistent with the initial groundwater extraction notices filed by one of BlueTriton's predecessors. These notices described the locations of the historic springs, not any underground points of interception, and they referred to the sources as "naturally developed springs." (See, e.g., exh. PT-98, pp. 1-2, 5.) This conclusion also is consistent with the positions taken by BlueTriton and its predecessors that the water BlueTriton diverts through these facilities is "spring water" under the FDA regulations. (See section 3.6.2.)

2. Argument: "The Proposed Order's New Hypothetical Surface Water Test is Unsupported by Any Facts or Legal Authority, and Misrepresents the Evidentiary Record." (2023-06-26 BlueTriton Request, p. 7:12-13.) "As the hypothetical facts and questions posed in the May 26, 2022 Post-Hearing Order ("Hypothetical") were neither included in the Draft CDO, nor presented during the course of the hearing, it is improper to rely of (sic) them as the principle (sic) basin (sic) for resolving this matter." (*Id*., p. 7:17-20, bolding and footnote in original omitted.) "The Prosecution Team and intervening parties did not allege that BTB collects groundwater that discharges to a 'surface stream flowing in a natural channel' or a 'subterranean stream flowing in a known and definite channel,' and indeed there is no evidence of streams or subsurface channels in the vicinity of the boreholes and tunnels." (*Id*., p. 9:3-6.)

Response: As discussed in section 3.6.1, one of the issues the AHO hearing officer directed the parties to address in their closing briefs was:

> Hypothetically, if no one had constructed Tunnels 2, 3 and 7, and Boreholes 1, 1A, 7, 7A, 7B, 7C, 7D, 8, 10, 11 and 12 (collectively referred to as the "existing collection facilities"), and if Respondent now were to divert water for water-bottling purposes from unimproved springs in the vicinities of any of the existing collection facilities (through spring boxes or similar facilities located where the spring water flows from underground to the ground surface), would such diversions and uses be diversions and uses of surface water or water in subterranean streams flowing through known and definite channels, as those terms are used in Water Code section 1200, or diversions and uses of percolating groundwater?

Numerous reported California appellate court decisions have affirmed the use of hypothetical questions to expert witnesses. Discussing the rules for hypothetical questions, the California Supreme Court stated in *People v. Vang* (2011) 52 Cal.4th 1038, 1046:

> A hypothetical question need not encompass all of the evidence. "It is true that 'it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question.' [Citation] 'On the other hand, the expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors. . .' "

In *People v. Busch* (1961) 56 Cal.2d 868, 874-875, the court stated:

> While each hypothesis contained in the question should have some evidence to support it, it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question.'

In *In re Jacobson's Guardianship* (1947) 30 Cal.2d 312, 324, the court stated:

> It is not essential to the propriety of a hypothetical question that the facts assumed should be undisputed. The question is proper if it recites only facts within the possible or probable range of the evidence and if it is not unfair or misleading. A large discretion relating to the form of the question rests with the trial court.

The California Supreme Court stated these rules in decisions discussing hypothetical questions that had been presented to expert witnesses during trial to aid the triers of fact in reaching their decisions. In the context of briefings of legal issues, the AHO hearing officer had at least the same amount of discretion to ask the parties and their attorneys to answer hypothetical questions. Such answers were not evidence, but they assisted the AHO hearing officer and us as we evaluated and answered the relevant legal questions.

Analyzing the AHO hearing officer's hypothetical question is an appropriate first step in our analysis in this order of whether the Board's water-right permitting and enforcement authorities apply to BlueTriton's collections of water in Strawberry Canyon and its beneficial uses of this water. (See sections 3.1 and 3.6.2.)

The facts regarding the pre-development flows from Springs 1, 2, 3, 7 and 8 into natural channels, the construction of tunnels and boreholes at the sites of these springs, and the associated water-right issues were discussed in detail in the draft CDO. (Exh. PT-1, pp. 6-9.) During the AHO hearing, Division of Water Rights Senior Water Resource Control Engineer Victor Vasquez testified in detail about these topics. (Exh. PT-7, pp. 7-24; see section 2.12.3.1.) Mr. Nichols also testified about pre-development conditions. (See section 2.12.3.2.)

Considering this discussion in the draft CDO, this testimony, and the legal issues involved in this proceeding, the AHO hearing officer did not abuse his discretion when he directed the parties to brief this issue. Our findings related to this issue in section 3.6.1 are based on facts in the administrative record, and our conclusions on this issue are relevant to our analyses of the legal issues. These conclusions are not "advisory opinions," and they are not based on "conjecture or speculation" or "nonexistent evidence." (Cf. 2023-06-26 BlueTriton Request, pp. 8:3-4, 9:14, 9:18.)

Contrary to BlueTriton's argument, the reference to spring boxes in this issue did not ask about a hypothetical seep, marsh or bog. (See *id*., p. 8:16.) Instead, the reference was to a standard type of facility for diversions from springs that the parties could discuss in their closing briefs in the context of the facts in the administrative record regarding the historic springs at the locations of BlueTriton's tunnels and boreholes.

Although BlueTriton argues that "there is no evidence of streams or subsurface channels in the vicinity of the boreholes and tunnels," citing Mr. Nichols's testimony (*id*., p. 9:5-6), this argument is incorrect. Section 3.6.1 discusses the evidence in the administrative record that supports the finding that water that discharged from Springs 1, 2, 3, 7 and 8 flowed into and through natural channels.

Also, as discussed in section 3.6.1, *State v. Hansen* (1961) 189 Cal.App.2d 604, 606-607, 610 held that a water-right permit was required for an appropriation of water from a spring that "merely moistened the ground thereabouts; and was not the source of any water course." Under this precedent, water-right permits would have been required for appropriations of water from Springs 1, 2, 3, 7 and 8, whether or not water that historically discharged from them flowed into and through natural channels.

3. Argument: "The plain language of Water Code sections 1200 and 1201 preclude the conclusion that BTB is diverting surface water." (2023-06-26 BlueTriton Request, p. 10:18-19.)

Response: As discussed in section 3.6.2 and in our response to Argument 2, we conclude that, for water-right purposes, the Board should treat diversions of water associated with springs that are made through tunnels, boreholes or pipes as diversions being made at the historic springs that were located at or near the portals of the tunnels, boreholes and pipes, even though the tunnels, boreholes and pipes now intercept that water before it can discharge from the historic springs. Based on this conclusion and the conclusion in section 3.6.1 that diversions from these historic springs would be subject to the Board's water-right permitting and enforcement authorities, Water Code sections 1200 and 1201 do not preclude, and instead support, the conclusion that BlueTriton's diversions are subject to these Board authorities.

4. Argument: "The Proposed Order improperly relies on prior SWRCB decisions." (2023-06-26 BlueTriton Request, p. 11:15.)

Response: While none of the decisions discussed in section A2.1 explicitly discussed Water Code sections 1200-1202, they still are precedents supporting the conclusion that the Board's water-right permitting authority, and thus also the parts of the Board's water-right enforcement authority involved in this proceeding, extend to underground pipes and tunnels that intercept water that otherwise would discharge from the springs. This reliance on these decisions as precedents is appropriate because there are no other Board decisions or reported court decisions that address the specific issue of whether the Board's authorities that apply to a spring still apply when a diverter constructs and uses a tunnel, borehole or pipe to intercept water that otherwise would discharge from the spring.

BlueTriton argues that the respondent in the proceeding that led to Order WR 2019-0149 "did not challenge the legal classification of the source water at issue." (2023-06-26 BlueTriton Request, p. 12:25 fn. 19.)

This argument is incorrect. Order WR 2019-0149, referring to the respondent, Mr. Fahey, states: "Fahey's case-in-chief included expert witness testimony by Dr. Grunwald to further support his argument that he diverts groundwater or developed water." (Order WR 2019-0149, p. 74.) The reference to "groundwater" here is to percolating groundwater. After discussing the relevant facts and legal authorities, the order concludes: "[f]or the foregoing reasons, we find that there is not sufficient evidence in the record to support a finding that Fahey diverts developed water or percolating groundwater." (*Id*., p. 78.)

BlueTriton also argues that Order WR 2019-0149 is not an applicable precedent here because of "dissimilar hydrogeologic and physical conditions." (2023-06-26 BlueTriton Request, p. 12:26 fn. 19.) BlueTriton does not explain what conditions it contends are "dissimilar." The diversions involved in the proceeding that led to Order WR 2019-0149 were through pipes that intercepted water in fractures in bedrock formations, and at least some of this water otherwise would have discharged from the Marco and Polo Springs. (See section 3.5 and Figures 12-13.) The conclusion in Order WR 2019-0149 that diversions of water by these pipes were subject to the Board's water-right permitting and enforcement authorities therefore is a precedent that applies to this proceeding.

BlueTriton also is incorrect in arguing that "the Proposed Order does not cite a single SWRCB decision or order or court decision in which the SWRCB based its permitting authority on a hypothetical diversion location and not on the actual or proposed diversion location." (2023-06-26 BlueTriton Request, p. 12:4-6.) All the decisions described in Appendix A, section A2.1, involved applications to appropriate water from the springs listed in those applications. The authorized points of diversion were at the locations of the historic springs, even though the applicants' tunnels and pipes intercepted the water before it discharged from the springs.

BlueTriton repeats its citations to numerous decisions by the Board and its predecessors that denied applications for permits to appropriate percolating groundwater. (2023-06-26 BlueTriton Request, p. 12:6-11.) These decisions are discussed in our response to Argument 1. That discussion is not repeated here.

BlueTriton argues that none of the prior decisions of the State Water Board and its predecessors were designated as precedent decisions in accordance with the specific requirements of Government Code section 11425.60. (2023-06-26 BlueTriton Request, p. 12:12-14.) BlueTriton recognizes that the Board's Order WR 96-01 designated these decisions as precedential, but BlueTriton argues that this designation was improper because the Board has not published a list of these decisions in the California Regulatory Notice Register, and that Board decisions must be designated as precedential for a specific legal or policy principle that is likely to recur. (2023-06-26 BlueTriton Request, p. 12:15-22.)

In Order WR 96-01, the Board stated:

> Recent legislation provides for the designation of precedent decisions, so that persons participating in adjudicatory proceedings before an agency have access to decisions which may be relied on as precedent. (See Cal. Gov. § 11425.60. added by Stats. 1995, Ch. 938, § 21 p. 5538, eff. July 1, 1997.) It has been the SWRCB's practice to treat its decisions and orders as precedent. Of course, a prior decision or order may be distinguished or overturned by a later decision or order. Nevertheless, the treatment of SWRCB decisions and orders as precedent helps provide greater consistency and predictability in agency decision making. Recent decisions and orders are readily accessible, including availability on the SWRCB Internet site (http://www.swrcb.ca.gov) and the Lexis and Westlaw databases. Accordingly, the SWRCB designates all decisions or orders adopted by the SWRCB at a public meeting to be precedent decisions, except to the extent that a decision or order indicates otherwise, or is superseded by later enacted statutes, judicial opinions, or actions of the SWRCB.

(Order WR 96-01, p. 17, fn. 11.)

The State Water Board continues to maintain an index of all of its water-right decisions and orders on its public website. (See https://www.waterboards.ca.gov/board_decisions/adopted_orders/.) These decisions and orders also continue to be available and searchable through the Westlaw and LEXIS databases. Consistent with the statement in Order WR 96-01, treatment of prior decisions and orders adopted by the State Water Board and its predecessors as precedents will continue to help provide greater consistency and predictability in the Board's decision making.

Contrary to BlueTriton's argument, nothing in Government Code section 11425.60 requires that the index of decisions must index and designate decisions for specific legal or policy principles. Rather, subdivision (b) authorizes the Board to designate as precedential decisions that contain such principles. In Order WR 96-01, the Board concluded that all of its decisions and orders contain such principles and therefore should be designated as precedent decisions (subject to the exceptions stated in Order WR 96-01).

Considering that Board decisions and orders are available through the Board's website and these databases, that Government Code section 11425.60, subdivision (b), does not contain any specific procedural requirements for how an agency like the Board may designate its precedent decisions, and that this statute provides that such designations

are not subject to judicial review, we conclude that the State Water Board has substantially complied with the requirements for designating precedential decisions.[B4]

BlueTriton argues that the proposed order contains "surprise use" of prior Board decisions and orders "to craft a new legal theory" "without notice or opportunity to rebut," which it argues "constitutes a denial of due process." (2023-06-26 BlueTriton Request, p. 13:1-4.)

This argument is incorrect. A memorandum by an Office of Enforcement attorney that was Appendix B to the Division's 2017 report of investigation cited many of these Board decisions and noted that the State Water Board had issued permits to appropriate water from springs using artificial methods. (Exh. PT-13, p. 74 and fn. 5.) The 2021 revised report of investigation also cited and discussed these decisions. (Exh. PT-3, p. 33 and fn. 42.) The Prosecution Team submitted copies of many of these Board decisions and Order WR 2019-0149 as exhibits for the AHO hearing. (Exhs. PT-58 through PT-80, PT-84.) The Prosecution Team's closing brief to the AHO cited these Board decisions and some additional Board decisions. (2022-08-05 Prosecution Team closing brief, p. 11:2-4.) All or almost all of the decisions discussed in Appendix A to this order were cited in these Prosecution Team documents.

Also, just as the AHO may independently research statutes and reported court decisions and cite them in its proposed order, the AHO also may independently research prior State Water Board decisions and cite them in its proposed orders.

5. Argument: "The Proposed Order improperly ignores the SWRCB's long-held position regarding the SWRCB's limiting permitting authority over groundwater." (2023-06-26 BlueTriton Request, p. 13:5-10, citing exhs. BTB-23, BTB-24, BTB-28 and BTB-31 through BTB-35.)

Response: The exhibits BlueTriton cites contain State Water Board staff and Board member communications on various dates between 1993 and 2016. None of them contain any detailed analyses, and they all pre-date the Division's 2017 report of investigation. Those communications did not limit the Division from conducting its detailed investigation and preparing the detailed analyses stated in its 2017 and 2021 reports. The AHO properly focused on the detailed analyses in these two reports,

[B4] Although Board decisions have not been publicized annually in the California Regulatory Notice Register, (see Gov. Code, § 11425.60, subd. (c)), Board decisions and orders have been readily available on the Board's website and searchable through the Westlaw and LEXIS databases, and BlueTriton has demonstrated that it has full access to these decisions and orders through its citations to them throughout this proceeding, including numerous citations in the 2023-06-26 BlueTriton request. BlueTriton therefore has not been prejudiced by any lack of publications of these decisions and orders in this register.

rather than on the brief statements in the prior communications, when it conducted its hearing and prepared its proposed order.

During our proceedings, we seriously consider relevant prior statements of our staff and prior Board members. However, such prior statements are not precedential decisions, and we retain the discretion to decide the issues before us in the manner we deem appropriate, based on all evidence in the administrative record and all arguments presented to us.

6. Argument: "Groundwater extraction notices of BTB's predecessors compel the conclusion that BTB is collecting groundwater, not surface water." (2026-06-26 BTB Request, p. 14:8-9.) "[T]he SWRCB is estopped from issuing the Proposed Order because the SWRCB allowed BTB to reasonably rely on the SWRCB's acceptance of these filings for several decades, without question that the subject water is groundwater that is not subject to the SWRCB permitting authority." (*Id.*, p. 15:3-6.)

Response: The Division of Water Rights receives tens of thousands of water-right reports (groundwater extraction notices, statements of water diversion and use, permittee progress reports, licensee reports and registrations of small domestic uses, small irrigation uses and stockpond uses) each year. It is not feasible for the Division to evaluate each one of these annual filings, and the Division's acceptance of any report for filing is not an act on which an estoppel claim may be based.

The first paragraph Water Code section 5007 specifies a process under which a person may apply to the Board to investigate the facts stated in a groundwater extraction notice. There is no evidence in the administrative record for this proceeding that BlueTriton ever filed such an application with the Board.

The second paragraph of section 5007 provides:

> In any action or proceeding hereafter pending in which the facts, or any of them, contained in the notices so filed are material, such notices shall not be evidence of any fact stated therein, but such determination by the board shall be prima facie evidence of said facts.

Under the first part of this paragraph, the groundwater extraction notices filed by BlueTriton shall not be prima facie evidence of any facts stated in the notices. The second part of this paragraph does not apply here, because the Board had not made a determination under this statute regarding BlueTriton's facilities in Strawberry Canyon.

7. Argument: "Even if the Hypothetical Surface Water Test was Appropriate, No Evidence Exists That Water from the Springs Ever Flowed in a Natural Surface Water Channel." (2023-06-26 BlueTriton Request, p. 15:15-16.) The statement in section 3.6.1 of the proposed order that diffused surface waters "do not originate at any specific point source" is inconsistent with the statement in Hutchins that diffused surface waters "may also have their origin in springs." (*Id.*, p. 15:19-26, citing Hutchins, p. 371.)

Response: The following text in Hutchins states the salient description of "diffused surface waters":

> Diffused surface waters consist of surface drainage falling upon and naturally flowing from and over land before such waters have found their way into a natural watercourse.
>
> Such waters are spread over the surface of the ground without being collected into a definite body of water, or into a definite channel having the characteristics of a watercourse. But it is not necessary that they be spread broadly over the land at all times. They may include errant water while passing through a low depression, swale or gulley.

(Hutchins, p. 372, footnotes omitted.)

The key points from this text are that, to be diffused surface water, the water may not be in a definite body of water or a definite channel, and instead is "spread over the surface of the ground." Consistent with the concept of "water spread over the surface of the ground," the proposed order stated in section 3.6.1 that diffused surface waters "do not originate at any specific point source." However, because it is theoretically possible that water could originate at a point source and then spread broadly over the land and become diffused surface water, we have deleted this sentence from this order.

The Hutchins statement that diffused surface waters "may also have their origin in springs" (Hutchins, p. 371) does not mean that all waters originating from springs are diffused surface waters. To be diffused surface waters, such waters, whether originating directly from precipitation or from springs, must "spread over the surface of the ground without being collected into a definite body." (*San Gabriel Valley Country Club v. Los Angeles County* (1920) 182 Cal. 392, 398 (one of the court decisions cited by Hutchins for this point, see Hutchins, p. 371 fn. 89).)

In section 3.6.1, we concluded that the water that historically discharged from Springs 1, 2, 3, 7 and 8 under pre-development conditions flowed into and through natural channels, and were not spread over the surface of the ground. Such waters therefore were not diffused surface waters.[B5]

[B5] In the above quotation, Hutchins refers to "gulley" in a phrase that also includes "low depression" and "swale." Considering this context and his text regarding diffused surface waters quoted above, we conclude that his reference to gullies is intended to refer to surface features through which water may flow over the surface of the ground without being in a definite channel. To avoid any confusion in our order with the use of "gullies" in this part of Hutchins, we have edited the first paragraph of the part of section 3.6.1 on page 61 of the proposed order to refer to "ravines" instead of "gullies." "Ravine" was the term used by both Mr. Vasquez and Mr. Nichols in their testimonies. (See, e.g., exh. PT-7, p. 9, ¶¶ 22-24; exh. BTB-6, p. 43, ¶ 136.

8. Argument: "The Proposed Order misrepresents BTB's legal arguments and the testimony and evidentiary record regarding the surface expression of groundwater in the vicinity of BTB's collection facilities." (2023-06-26 BlueTriton Request, p. 16:5-7.) "Mr. Nichols testified that even if the entire flow of BTB's tunnels and boreholes – that is, the groundwater collected inside the mountain – are 'turned out' at the portals, that discharged water simply seeps down the hillside but does not discharge as a watercourse. [Citations.] Under these factual circumstances, even if BTB collected water at the ground surface, the hypothetical spring boxes would collect diffused surface water and would not be subject to the SWRCB's permitting authority." (*Id.*, p. 17:8-14.)

Response: The parts of Mr. Nichols's testimony cited by BlueTriton state that the discharges from the tunnels and boreholes during "turn out" tests did not produce "contiguous surface water flow in any ravine tributary to Strawberry Creek." (See, e.g., exh. BTB-6, p. 43:9-12, ¶ 136.)

However, the existence of contiguous surface water flow is not a requirement under Water Code sections 1200-1201 for surface water to be flowing in a natural channel. Rather, such water only needs to be in a "defined channel" (see Hutchins, p. 373), as opposed being "spread over the surface of the ground without being collected into a definite body of water, or into a definite channel having the characteristics of a watercourse" (*id.*, p. 372, footnotes omitted). As we state in section 3.6.1:

> But a contiguous surface flow is not required for a natural channel to be present. Flows in many, perhaps most, creeks in California often at times have reaches where there is surface water and reaches without any surface water, particularly under low-flow conditions. Such creeks still flow in natural channels.

9. Argument: "The Proposed Order cites no evidence to support the hypothetical diversion of "flowing water" or a "channel". (2023-06-26 BlueTriton Request, p. 17:15-16.)

Response: The proposed order cites the following evidence to support its findings regarding the historical channels into which water that discharged from Springs 1, 2, 3, 7 and 8 flowed (see section 3.6.1):

> -Figure 14 shows that ravines are adjacent to the portals of Boreholes 1, 1A and 8, the portal of Tunnel 3, and the portals of Boreholes 7, 7A, 7B and 7C, which are approximately 40 feet from the portal of Tunnel 7.
>
> -The Division's 2021 revised report of investigation, exhibit PT-3, pages 157-161, contain photographs showing these ravines in relation to these boreholes and tunnels. These photographs are described in the testimony of Victor Vasquez, exhibit PT-7, page 9, paragraphs 22-24, and page 23, paragraph 83.
>
> -The 1901 topographic map, exhibit SOS-295, page 22 shows the historical, pre-development creeks that flowed adjacent to the current

locations of Boreholes 1 and 8 and the Spring 7 complex. The locations of Boreholes 1 and 8 are shown by the green circles above the second "n" in "Inn" in exhibit PT-314, revised. The location of the Spring 7 complex is shown by the two green circles in this exhibit, to the right of "Inn." Considering the depictions of the historic creeks in exhibit SOS-295, page 22 and the depictions of the locations of the boreholes in exhibit PT-314, revised, these two figures together show that Boreholes 1 and 8 and the Spring 7 complex are immediately adjacent to these historic creeks. Although Mr. Nichols questions these old topographic maps, we find, based on the testimony of Mr. Allord, that they are reliable evidence of pre-development conditions.

-Mr. Rowe's October 1, 1930 letter, exhibit SOS-53, describes flows that were turned into the creek from Tunnel 2, which was located at the site of Spring 2. Although Mr. Nichols argues that these flows may have been augmented by the Tunnel 2 development, it still is reasonable for us to find that, based on the evidence in the record, that water would have flowed from Spring 2 down the flow path described in Mr. Rowe's letter under pre-development conditions.

We have edited the text at the beginning of the part of section 3.6.1 that discusses Springs 1, 2, 3, 7 and 8 so it states that the ravines are "adjacent to" the portals of the listed boreholes and tunnels. This replaces the proposed order text that stated that these ravines "begin" at these locations.

10. Argument: "Springwater classification for labeling purposes is irrelevant." (2023-06-26 BlueTriton Request, p. 18:15.)

Response: Our order states that the conclusion that, for water-right purposes, the Board should treat BlueTriton's diversions as diversions being made at the sites of the historic springs is consistent with the positions taken by BlueTriton, its predecessors and its consultants that the water BlueTriton extracts through its facilities and bottles for sale as "spring water" under the FDA regulations. This is a correct statement. BlueTriton's classification of its bottled water as "spring water" under FDA regulations is a fact we may consider as part of our decision making process in this proceeding.

11. Argument: "The Proposed Order's Novel Hypothetical Surface Water Test Would Substantially Expand the SWRCB's Permitting Authority. (2023-06-26 BlueTriton Request, p. 18:23-24.) "[A]ny groundwater diversions that are hypothetically hydrologically connected to a surface watercourse or a subterranean stream would be illegal without first obtaining a water-right permit from the SWRCB." (*Id.*, p. 19:7-9.) "The hypothetical surface water test would make production from wells with any hydrological connection to surface water and most storm water and diffuse storm collection systems subject to the SWRCB's water rights permitting authority." (*Id.*, p. 19:11-13.)

Response: We disagree with BlueTriton's speculative arguments. Our order's analyses and conclusions follow logically from prior Board decisions regarding applications for permits to appropriate water associated with springs. They do not reflect a significant change in the Board's exercise of its water-right permitting and enforcement authorities. The State Water Board will continue to evaluate the relevant facts in each proceeding and make appropriate findings of fact and conclusions of law.

12. Argument: "The AHO rejects the findings of the 1931 Del Rosa Judgment." (2023-06-26 BlueTriton Request, p. 19:26.) "The AHO's Proposed Order incorrectly concludes that because the SWRCB has 'concurrent jurisdiction over water,' the decades-old judgment issued by the San Bernardino superior court in the Del Rosa case is not binding on the SWRCB." (*Id.*, p. 19:28--20:1.)

Response: BlueTriton's Response refers to "concurrent jurisdiction" with quotation marks and a citation to pages 77-78 of the proposed order, implying that the proposed order used this term. But the proposed order never referred to this term.

BlueTriton is incorrect in arguing that the proposed order would "set aside" the judgment in the Del Rosa Mutual Water Company case. (See *id*., p. 20:22.) The proposed order would not have done this and our order does not do this. Nothing in this order alters any provisions of that judgment.

We have edited the text on pages 74 and 77-78 of the proposed order so that it better characterizes the relevant provisions of the Del Rosa judgment.

13. Argument: "The AHO ignored critical facts in the record that support BTB's pre-1914 water rights claim." (2023-06-26 BlueTriton Request, p. 21:3-4.)

Response: This part of BlueTriton's Request repeatedly argues that BlueTriton's predecessors were diverting water from Strawberry Creek before 1914. To support this argument, BlueTriton's Request states:

> One of the original notices of water appropriation was filed in 1887 by A. F. Coulter, President of Arrowhead Hot Springs Hotel Company, that "claims the water here flowing or to flow in this Strawberry Canon (sic) . . . of one hundred and forty inches measured under a four-inch pressure for irrigation, domestic, mechanical, manufacturing, oatning (sic) and medial purposes upon its lands . . . " (BTB-2_153.) Undoubtedly, water from Strawberry Canyon was put to use at the Hotel prior to 1914 to support the Hotel and also the growing bottling business to customers in and around the Los Angeles area."

(*Id.*, p. 22:6-13, each "(sic)" and each " . . ." in original.)

The first text that is omitted from this quotation at " . . . " states: "being the North west fork of Twin Creeks in Township one North Range four West San Bernardino Base and Meridian to the extent of". (Exh. BTB-2, p. 153.)

As shown in Figure 2 to this order, Strawberry Creek is the easternmost fork of East Twin Creek, not the "North west fork" referred to in this notice. Also, as shown in Figures 3 and 4 to this order, Township 1 North, Range 4 West, San Bernardino Base and Meridian, includes the watersheds of Waterman, Hot Springs and Coldwater Creeks. It does not include the watershed of Strawberry Creek, which is in Townships 1 and 2 North, Range 3 West. This notice therefore incorrectly referred to "Strawberry Canon," when it actually was intended to refer to one of the creeks to the west.

This section of BlueTriton's request does not cite any other evidence supporting BlueTriton's argument that there were any diversions from Strawberry Creek before 1929. The weight of the evidence in the administrative record for this proceeding supports our finding that the first facilities to divert water from Strawberry Creek were constructed in 1929. (See section 2.5.)

14. Argument: "The holdings and findings of Del Rosa support BTB's spring water diversions from its Arrowhead facilities as pre-1914 rights." (2023-06-26 BlueTriton Request, p. 23:21-22.) "[T]he Del Rosa court concluded that BTB's predecessor had acquired rights from [Del Rosa MWC] either through acquisition or prescription." (*Id*., p. 24:19-20.) "BTB's predecessor, either by acquisition or prescription to these rights, steps into the shoes of [Del Rosa MWC]," (*Id*., p. 25:1-2.)

Response: These arguments are incorrect.

As discussed in section 3.7.2.1, nothing in the Del Rosa MWC judgment stated or implied that there was any taking or transfer of any Del Rosa MWC water right to Arrowhead Springs Corp. or California Consolidated WC. Thus, there was no "acquisition" of rights by California Consolidated WC from Del Rosa MWC as a result of this judgment.

We conclude that the parties that stipulated to this judgment intended for it to provide that Del Rosa MWC would not challenge California Consolidated WC's claim of a prescriptive right against Del Rosa MWC. While an upstream diverter may obtain a prescriptive right "against" a downstream diverter, the upstream diverter does not obtain a prescriptive right "from" a downstream diverter, as BlueTriton argues. (See, e.g., *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 293 (discussing a party's obtaining a prescriptive right "against" another party); *Armstrong v. Payne* (1922) 188 Cal. 585, 591 (defendants may have obtained prescriptive rights "against" one property, but not "against" another property).) Thus, even if the judgment had provided that California Consolidated WC obtained a prescriptive right against Del Rosa MWC, California Consolidated WC did not "step in the shoes of" Del Rosa MWC.

BlueTriton's Request cites Water Code section 1706 and *Orange County Water Dist. v. City of Riverside* (1959) 173 Cal.App.2d 137, 192 for the argument that the holder of a pre-1914 appropriative right could have changed the point of diversion from Hot Springs Creek to Strawberry Creek. (2023-06-26 BlueTriton Request, p. 25:6-22.)

The part of the *Orange County Water District* decision cited by BlueTriton concerned quantifications of prescriptive rights that the defendants Cities of Riverside, Colton, San Bernardino and Redlands had perfected against downstream water users in the "Lower" Santa Ana River Basin in Orange County. (173 Cal.App.2d, pp. 158, 162-163, 190-192.) The trial court had computed each city's prescriptive right by totaling the separate amounts of water the city had produced from each well or other facility for the relevant five-year period. (*Id*., p. 191.) The Court of Appeal reversed this part of the trial court's decision, stating that the proper calculation was "to take the whole of [each city's] production from all its wells and other municipal facilities used in producing appropriated water, including discontinued wells and wells in service for less than five years, and to use as the final result the highest total production shown to have been continuously maintained through the necessary five years." (*Id*. pp. 192-193.)

In this discussion, the Court of Appeal cited Water Code section 1706 and stated: "All of the appropriations by appellant cities, except to a very limited extent that of the city of Redlands, are of percolating waters, and so far as we know, not even in the exceptional case of diversions by the city of Redlands, has the appropriation been made under the statutory provisions referred to. Accordingly there appears to be no legal impediment to their changing the points of diversion at will provided no one else is injured thereby." (*Id.*, p. 192.)

The Court of Appeal thus concluded that each city's prescriptive right should be determined from the city's total production of water during the prescriptive period, and that the trial court erred by considering the separate production by each well. The Court of Appeal's calculation method was appropriate because the production of each well had the same adverse effect on Santa Ana River flows to the downstream users, which was the critical question for quantification of prescriptive rights.

As the Court of Appeal noted, no water-right permit is required for appropriations of percolating groundwater. (*Ibid.*; s*ee People v. Shirokow* (1980) 26 Cal.3d 301, 304 fn. 2.) The defendant cities therefore did not need any water-right permits from the State Water Board for their well pumping, and they could change wells without Board approval.

Although the Court of Appeal cited Water Code section 1706 for the proposition that the points of diversion could be changed for the cities' groundwater appropriative rights, and, in this context, stated that "[t]he source of supply remains the same—the Santa Ana River System" (173 Cal.App.2d, p. 192), the decision did not discuss any details of any of these appropriative rights. The court also did not discuss whether any of the cities changed the subbasins from which they produced the water – that is, the sources of water for their groundwater appropriative rights. The court's prescriptive-right analysis would have been the same if the cities were deemed to have pumped the new wells under new appropriative rights, with tacking of the prescriptive periods under the old and new rights. (Cf. *Alpaugh v. Mt. Shasta Power Corp.* (1937) 9 Cal.2d 751, 765-766 (place or character of use under a prescriptive right may be changed, provided vested rights are not injured thereby).)

We conclude that the Court of Appeal's statement about source of supply should be treated as a rule that may apply when the courts are considering prescriptive-right issues. We conclude that this statement should not be treated as a broader rule that would apply to the issue of when, or whether, a source of supply may be changed under a pre-1914 appropriative right. The analysis and conclusions in section 3.7.2.2 about potential changes in sources for pre-1914 appropriative rights are necessary and appropriate for efficient administration of such rights.

15. Argument: "The AHO refused to determine its jurisdiction in a timely manner." (2023-06-26 BlueTriton Request, p. 27:5; see 2023-06-02 BlueTriton Motion, pp. 7-10.)

Response: Section 2.12.1 describes the AHO's hearing notices and rulings in this proceeding. As discussed in the AHO hearing officer's August 8, 2022 ruling, the AHO's hearing process gave the parties opportunities to address the hearing issues, including issues involving application of the State Water Board's permitting and enforcement authorities to BlueTriton's diversions in detail through exhibits and testimony and in their closing briefs. For these reasons, the AHO hearing officer denied BlueTriton's June 27, 2022 motion for judgment and BlueTriton's prior motions to dismiss, for nonsuit and for judgment.

None of the reported court decisions cited by BlueTriton support its argument that the AHO was required to prepare a proposed order on BlueTriton's jurisdictional arguments before proceeding with the hearing, or that the Board was required to issue such an order. Rather, the AHO hearing officer had the discretion to proceed as he did.

As discussed in Order WR 2022-0087, the Board normally will not review preliminary or procedural decisions, orders or rulings issued by the AHO, and instead will wait to consider any issues raised by such decisions, orders and rulings that merit Board review until after the AHO has completed its hearing process and presented a proposed order to the Board. (Order WR 2022-0087, pp. 6-12.) We did not abuse our discretion by following that approach in this proceeding.

16. Argument: "The AHO crafted a new legal test for implementing the SWRCB's permitting authority over groundwater without notice." (2023-06-26 BlueTriton Request, p. 28:26-27.) "The AHO improperly created new issues to address beyond the scope of the original hearing notice." (*Id.*, p. 30:15-16.) "Nor could the AHO expressly rely on non-precedential SWRCB decisions in crafting this new test." (*Id.*, p. 31:3-4.)

Response: See the responses to Arguments 2 and 4 above.

17. Argument: "The AHO disregarded the burden of proof and shifted it to BTB." (2023-06-26 BlueTriton Request, p. 32:10.) "The AHO required BTB to defend against the Prosecution Team's Motion for Judgment, which requested the AHO decide the case on the record *before* providing BTB the opportunity to rebut the Prosecution Team's and other parties' cases against it." (*Id.*, p. 32:18-20, italics in original.)

Response: The AHO hearing officer did not abuse his discretion when he directed BlueTriton to file a response to the Prosecution Team's motion. After considering BlueTriton's response to this motion, the AHO denied the motion. (2022-03-25 hearing officer's rulings, pp. 1-2.)

18. Argument: "The AHO and the SWRCB hosted prohibited ex parte communications." (2026-06-26 BlueTriton Request, p. 33:9.) (See 2023-06-02 BlueTriton Request, pp. 2-4

Response: BlueTriton cites Government Code section 11430.10, subdivision (a). This statute prohibits *ex parte* communications between the presiding officer and employees or representatives of an agency that is a party, or with an interested person outside the agency. The AHO complied with this statute by avoiding any *ex parte* communications about this proceeding with any members of the Prosecution Team or any outside parties.

BlueTriton also cites Government Code section 11430.80, subdivision (a). This statute prohibits *ex parte* communications between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

BlueTriton does not cite or discuss subdivision (b) of section 11430.80. It provides that section 11430.80 does not apply . . . "where the presiding officer does not issue a decision in the proceeding." As stated in the Law Revision Commission Comments on section 11430.80, the limitation in subdivision (a) "does not apply where the presiding officer does not issue a decision to the parties, but merely prepares a recommended decision for the agency head or other person or body to which the power to decide is delegated."

This is precisely the process involved here. The AHO prepared a proposed order for the Board to consider. For proceedings like this one, for which the AHO proceeds under Water Code section 1114, subdivision (c)(1), it is appropriate and efficient for the AHO hearing officer to confer in closed session with Board members and Board attorneys to discuss the AHO's proposed order, and to receive their input, before the AHO completes its proposed order and formally transmits it to the Clerk of the Board. Such proceedings contrast proceedings under Water Code section 1114, subdivision (b). In such proceedings, the AHO hearing officer will prepare final orders without Board member input.

The 2023-06-02 BlueTriton Request asserts that closed sessions in which the AHO hearing officer, Board members and the Board's counsel participated were improper under the Bagley-Keene Act. (2023-06-02 BlueTriton Request, p. 3.) This assertion is incorrect. Government Code section 11126, subdivision (c)(3), authorizes such closed sessions.

BlueTriton's June 2, 2023 Request asserted that the provision in Water Code section 1110, subdivision (a), that designates the AHO as an "independent organizational unit" prohibits AHO staff from having confidential communications with Board members or other members of the Hearing Team. (2023-06-02 BlueTriton Request, p. 4.)

We disagree with this argument. The first sentence of Water Code section 1110, subdivision (a), states that the AHO "is within the board." Considering this statement, we construe the phrase "independent organizational unit" in the second sentence of this statute to mean that the AHO is independent of the other divisions and offices within the Board, like the Division of Water Rights and the Office of Enforcement, not that the AHO is independent of the Board itself. The AHO therefore could have confidential communications with Board members and attorneys representing the Board in this proceeding. The AHO was required to avoid any *ex parte* contacts with any members of the Prosecution Team, and there is no evidence of any such communications.[B6]

BlueTriton also objects to the fact that State Water Board engineering geologist Natalie Stork is a member of the AHO's Hearing Team in the AHO's proceeding on the court's reference to the Board in *City of Marina v. RMC Lonestar*, Monterey County Superior Court No. 20CV001387. (2023-06-26 BlueTriton Request, p. 34:4-15.)

On November 4, 2022, the AHO hearing officer advised the parties in the present proceeding that Ms. Stork would be participating in the AHO hearing team in the *City of Marina* proceeding. (2022-11-04 notice to parties (BlueTriton Brands).)

Before adding Ms. Stork to the AHO hearing team in the City of Marina proceeding, the AHO hearing officer conferred with the Board's Chief Counsel regarding her participation as a member of the AHO hearing team in that proceeding. The Board's Chief Counsel confirmed that, based on *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, Ms. Stork could work on this hearing team, provided that she did not have "any communications or interactions with AHO personnel about the BlueTriton matter, including access to AHO internal, deliberative materials pertaining to BlueTriton."

Based on this direction, the AHO hearing officer confirmed that AHO staff would not give Ms. Stork or her colleague any general access to the AHO's internal files. The AHO has filed a file of the 2022-08-03 e-mail chain reflecting these communications in the AHO Notices, Orders and Rulings subfolder within the Hearing Documents folder in the administrative record for this proceeding. (2022-08-03 e-mail chain between A. Lilly and M. Lauffer.)

[B6] The independence of the AHO from the Division of Water Rights, Enforcement Section is demonstrated by Orders WR 2020-0111, WR 2020-0112, WR 2021-0001, WR 2021-0094 and WR 2023-0009. In the proceedings that led to all these orders, the AHO prepared proposed orders with cease-and-desist order provisions or administrative liability amounts that were different from those recommended by the Division of Water Rights, Enforcement Section.

In the *Morongo* decision, the California Supreme Court considered the issue of whether it would violate a license holder's constitutional right to due process of law for a Board attorney prosecuting a matter before the Board to simultaneously serve as an advisor to the Board on an unrelated matter. (45 Cal.4th, p. 734.)

The court concluded that such an arrangement would not violate the license holder's due process rights. (*Ibid.*) The court stated that "any tendency for the agency adjudicator to favor an agency attorney acting as a prosecutor because of that attorney's concurrent advisory role in an unrelated matter is too slight and speculative to achieve constitutional significance." (*Id.*, p. 737.) The court noted that the Administrative Procedure Act requires internal separation of prosecutorial and advisory functions on a case-by-case basis, and "does not prohibit an agency employee who acts in a prosecutorial capacity in one case from concurrently acting in an advisory role in an unrelated case." (*Id*., p. 738.)

BlueTriton argued that the *Morongo* decision is distinguishable from the present proceeding, because it involved a Board attorney while the present proceeding involves a person who was a witness in the BlueTriton proceeding while being an advisor in the *City of Marina* proceeding. (2022-12-07 S. Grady ltr. to A. Lilly.) However, the above quotation from *Morongo* refers to "an agency employee," which encompasses more than just attorneys. The Board's Chief Counsel and the AHO hearing officer properly relied on the *Morongo* decision when they concluded that Ms. Stork could participate in the hearing team in the *City of Marina* proceeding, even though she had appeared as a witness for the Prosecution Team in the present proceeding.

19. Argument: "The AHO crossed the line into investigative and advocacy roles." (2023-06-26 BlueTriton Request, p. 34:16; see 2023-06-02 BlueTriton Request, pp. 5-7.)

Response: This argument lists five types of AHO actions that BlueTriton asserts were "procedural irregularities." (2023-06-26 BlueTriton Request, p. 35:14.) Each type of action and our response is listed here:

(a) "Researched information from private websites for the record not offered by the parties." (*Id*., p. 35:21-22.)

Response: This argument referred to footnote 20 on page 21 of the proposed order. This footnote referred to a webpage at www.arrowheadspringwater.com that discusses the sources for Arrowhead Spring water.

The two court decisions cited by BlueTriton held that information on websites that "plainly was subject to interpretation" could not be judicially noticed. (*L.B. Research and Education Foundation v. UCLA Foundation* (2005) 130 Cal.App.4th 171, 180 fn. 2; *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 194.) On the other hand, the court in *In re Gilbert R.* (2012) 211 Cal.App. 4th 514, 519 fn. 1, took judicial notice of information on a private website that did not appear to be subject to interpretation.

Here, the information on the Arrowhead Spring water website that was discussed in footnote 20 of the proposed order was not subject to interpretation, and therefore was subject to judicially notice under Evidence Code section 452, subdivision (h), and thus to official notice under California Code of Regulations, title 23, section 648.2. However, this information was just background information that was not necessary for the findings in our order, so we have edited this footnote to remove the citation to this website and we have deleted the related text in the proposed order.

(b) "Researched 'groundwater recordations' for the record without party involvement." (2023-06-26 BlueTriton Request, p. 35:23.)

Response: The Prosecution Team submitted most of the groundwater extraction notices discussed in section 2.10.1 as exhibits. (See exhs. PT-93 through PT-98 and PT-100.) During the AHO proceeding, AHO staff compiled these notices and some additional notices into the Groundwater Extraction Notices folder in the administrative record, which it then designated as exhibit AHO-1. AHO staff obtained some of the additional notices from Division of Water Rights files and the others from responses to requests the AHO hearing officer made to BlueTriton and the San Bernardino Valley Municipal Water District, which now compiles these notices.

The AHO hearing officer offered exhibit AHO-1 into evidence and no party objected. The AHO hearing officer then received it into evidence. (Recording, 2022-03-24, 00:48:50-00:58:00.)[B7] These records also were subject to judicial notice under Evidence Code section 452, subdivision (h), and to official notice by the Board under California Code of Regulations, title 23, section 648.2.

(c) "Augmented the record with its own figures not prepared or offered by the parties." (2023-06-26 BlueTriton Request, p. 35:24.)

Response: This argument apparently refers to Figures 1 and 2 to this order. The Story of Stuff Project and Amanda Frye submitted a map of the Santa Ana River watershed that encompassed the areas covered by Figure 1 and its inset as exhibits during the AHO hearing. (Exhs. SOS-89, FR-14.) Rather than including that map as a figure to this order, the AHO decided to prepare Figures 1 and 2. They contain similar information, but are more focused on the topographical features involved in this proceeding, and Figure 2 shows the areas depicted by Figures 7 and 8.

As discussed in footnotes 7 and 8 to this order, AHO staff prepared Figures 1 and 2 using U.S. Geological Survey datasets, and, AHO staff added a rectangle to Figure 2 to show the locations of Figures 7 and 8. Courts may take official notice of U. S. Geological Survey topographic maps (*Union Transportation Co. v. Sacramento County*

[B7] During the part of the AHO hearing when the AHO hearing officer offered exhibits AHO-1 through AHO-4 into evidence, BlueTriton's attorneys objected to the parts of exhibit AHO-3 that contained oral statements, but they did not object to exhibit AHO-1. (Recording, 2022-03-24, 00:48:50-58:00.)

(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). It was appropriate for AHO staff to use its expertise to prepare Figures 1 and 2 and to add the rectangle to Figure 2. While Figures 1 and 2 are not essential to the findings in this order, they provide useful information regarding the setting and the locations of Figures 7 and 8.

(d) "Without a request from any party, directed BTB to host (and pay expenses of) a site visit for the AHO, all parties, and the press, including transportation via helicopter which required expert witnesses and BTB employees to conduct a tour, from which the AHO took statements and photographs for the record." (2023-06-26 BlueTriton Request, p. 35:25--36:2.)

Response: Code of Civil Procedure section 651 authorizes a court, on its own motion, to order a view of the property that is the subject of the litigation, the place where any relevant event occurred, or any object, the view of which is relevant and admissible in evidence and which cannot with reasonable convenience be viewed in the courtroom. The AHO's site visit in this proceeding was consistent with this statute and was appropriate so the AHO hearing officer and AHO staff could see the relevant topography and facilities in person.

Following the AHO hearing officer's request, the parties developed a proposed site visit itinerary and schedule. (2021-12-15 proposed site visit itinerary and schedule.) During the AHO hearing process, BlueTriton's attorneys raised some questions about the logistics and timing of the site visit, and they required people being transported by helicopter to sign waivers. But they did not argue that the AHO should not conduct the site visit. Also, BlueTriton has not demonstrated that it was prejudiced by the AHO hearing officer's decision to conduct the site visit.

Because Boreholes 10, 11 and 12 could not feasibly be accessed any way besides by helicopter, BlueTriton offered to provide helicopter transportation to this location. The AHO did not direct BlueTriton to do this but accepted BlueTriton's offer. The State Water Board appreciates BlueTriton's providing this transportation during the site visit.

The AHO did not direct the press to attend the site visit. Because the site visit was on U. S. Forest Service property and the properties the AHO visited on the first day were accessible from public roads, the AHO did not have any authority to exclude the press from this part of the site visit.

(e) "Researched non-precedential SWRCB decisions from its database after the close of the proceeding without party involvement and made prejudicial factual findings, legal conclusions, and new legal rules from those decisions." (2026-06-26 BlueTriton Request, p. 36:3-5.)

Response: See response to Argument 4 above.

20. Argument: "The AHO unfairly granted party status to various groups adverse to BTB." (2023-06-26 BlueTriton Request, p. 36:12.)

Response: BlueTriton objects to the AHO's decision to allow Anthony Serrano and the Center for Biological Diversity to participate in the AHO hearing as parties under California Code of Regulations, title 23, section 648.1, even though they did not submit statements demonstrating why the AHO hearing officer should allow them to do so. (*Id.*, p. 37:3-6.)

BlueTriton does not cite to any provision of the administrative record indicating that it objected to any of the additional parties participating as parties in the hearing, and BlueTriton does not demonstrate that it was prejudiced by these parties' participations.

BlueTriton does not discuss the provisions of the AHO's hearing notice that designated the Center for Biological Diversity as a party, and that stated that "[t]he hearing officer also may designate persons or entities that do not file timely Notices of Intent to Appeal as parties, for good cause shown and subject to appropriate conditions" and that "[t]he hearing officer may amend these procedures before, during or after the hearing as he or she deems appropriate." (2021-11-17 Notice of Public Hearing and Pre-Hearing Conference, p. 11, and p. 12, ¶ 3.)

For these reasons, the AHO hearing officer did not abuse his discretion when he allowed these additional parties to participate in the AHO hearing as parties.

BlueTriton also objects to the AHO hearing officer's decision "to allow the Sierra Club, San Bernardino Valley Municipal Water District and the Department of Fish and Wildlife to file briefs that sought to expand the issues before the AHO. . . . Consequently, the proceedings went far beyond the scope of the hearing on the draft CDO requested by BTB in accordance with Water Code section 1834(b)." (*Id.*, p. 37:6-12.)

BlueTriton does not discuss the AHO hearing officer's ruling that denied these requests, and thus did not allow expansions in the scope of the proceedings. (2021-11-04 Hearing Officer's Ruling (BlueTriton), pp. 5-8.)

BlueTriton argues that "[t]here was no legal basis" for the AHO to allow the Story of Stuff Project and Amanda Frye to participate in the AHO hearing, and complains that they submitted too many exhibits. (2023-06-26 BlueTriton Request, p. 37:19-26.) This argument is incorrect. Both these parties filed statements demonstrating that there was good cause for their participation in the hearing. (2021-08-03 A. Frye Good Cause Statement; 2021-08-05 SOS Good Cause Statement.) The AHO hearing officer did not abuse his discretion when he allowed these parties to submit hearing exhibits. He gave BlueTriton an opportunity to object to each of these exhibits, and he ruled on these objections before deciding which exhibits to accept into evidence.

Water Code section 102 provides that "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in

the manner provided by law." Considering this statute, the Board's normal practice is to allow people and organizations with interests in a particular proceeding to participate as parties in the proceeding when they demonstrate good cause for their participation. The AHO hearing officer did not abuse his discretion when he allowed interested people and organizations to appear as parties in this proceeding.

21. Argument: "The AHO improperly allowed Steve Loe and Amanda Frye to serve as expert witnesses." (2023-06-26 BlueTriton Request, p. 37:27-28.)

Response: Evidence Code section 720, subdivision (a), authorizes a person to testify as an expert if he has "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Steve Loe worked for over 30 years as a fisheries biologist for the San Bernardino National Forest. Amanda Frye conducted extensive research over seven years regarding the history of water development in the watersheds of East Twin Creek and its tributaries. They therefore each had "special knowledge, skill and experience" sufficient to allow them to testify as experts under the standard in Evidence Code section 720.

Government Code section 11513, subdivision (c), the statute that applies to admissibility of evidence during AHO hearings, provides that the hearings do not need to be conducted according to "technical rules relating to evidence and witnesses, except as hereinafter provided," and that "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." Mr. Loe's and Mr. Frye's opinions were admissible under this statute.[B8]

BlueTriton argues that the AHO hearing officer should not have allowed Ms. Frye and Mr. Loe to testify both as witnesses for themselves and as witnesses for the Story of Stuff Project. (2023-06-26 BlueTriton Request, p. 38:21-28.) The AHO hearing officer had discretion to decide how to conduct the hearing, and he did not abuse his discretion when he allowed these witnesses to testify in both these capacities.

22. Argument: "The AHO unfairly denied BTB access to documents repeatedly cited and relied on by the Prosecution Team under the guise of confidentiality." (2023-06-26 BlueTriton Request, p. 39:1-2.)

Response: The AHO hearing officer considered this argument and issued a detailed ruling on it. (2022-06-28 Hearing Officer's Ruling (BlueTriton).) The hearing officer did not abuse his discretion when he made this ruling.

[B8] Subdivision (d) of Government Code section 11513 specifies the rules for the use of hearsay evidence. The AHO hearing officer issued a detailed ruling on BlueTriton's objections to hearsay evidence. (2023-05-27 hearing officer's rulings with App. A (BlueTriton).)

23. Argument: "The AHO improperly admitted evidence resulting in an improper record." (2023-06-26 BlueTriton Request, p. 40:20.)

Response: The general statements in this part of BlueTriton's Request do not refer to or cite any specific AHO hearing officer rulings. We therefore cannot review or evaluate BlueTriton's argument. We are not aware of any AHO hearing officer rulings for which the hearing officer abused his discretion.

For these reasons, we deny the 2023-06-02 and 2023-06-26 BlueTriton Requests and the 2023-06-02 Blue Triton motion.

Other Comments Opposing May 26, 2022 Proposed Order

The Association of California Water Agencies, the Northern California Water Association, the California Water Association, the California Farm Bureau and the California Chamber of Commerce submitted letters on June 23 and June 26, 2023. Their letters all urged the Board not to adopt the May 26, 2023 Proposed Order. Almost all their arguments repeated arguments made by BlueTriton and discussed above. We incorporate our prior responses to those arguments and do not repeat them here.

The California Chamber of Commerce letter argues that, if the Board were to adopt the Proposed Order, "the ruling would call into question essentially every other groundwater user or groundwater right holder." (2023-06-26 Cal. Chamber of Commerce ltr., p. 2.) The Northern California Water Association letter argues that "[i]f adopted as written, the Proposed Order may be used to commandeer tens of thousands of subsurface water wells into the Board's limited authority. (2023-06-26 A. Hitchings – NCWA ltr., p. 2.)

These arguments are incorrect. Any future Board proceeding involving uses of groundwater that is not associated with springs will involve different issues from those addressed in this order, and any Board order in such a proceeding will involve different legal analyses.

The letter from an attorney for the San Bernardino Valley Municipal Water District argues that we should designate this order as non-precedential. (2023-06-26 SBVMWD ltr.) We disagree. Our normal practice is for our water-right decisions and orders to be precedential. Consistent with that practice, this order is a precedential order.