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34 *and Courage Campaign Institute*

1 UNITED STATES DISTRICT COURT
2 FOR THE CENTRAL DISTRICT OF CALIFORNIA
3 EASTERN DIVISION
4

5 CENTER FOR BIOLOGICAL) Case No. 5:15-cv-2098
6 DIVERSITY, STORY OF STUFF)
7 PROJECT, and COURAGE)
8 CAMPAIGN INSTITUTE,)
9 Plaintiffs,)
10 vs.)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

11 UNITED STATES FOREST SERVICE,))
12 an agency of the U.S. Department of)
13 Agriculture, RANDY MOORE, in his)
14 official capacity as Pacific Southwest)
15 Regional Forester, and JODY NOIRON,))
16 in her official capacity as Forest)
17 Supervisor for the San Bernardino)
18 National Forest,)
19 Defendants.)

I. INTRODUCTION

20 1. This is an action for declaratory and injunctive relief brought by
21 Plaintiffs the Center for Biological Diversity (“the Center”), Story of Stuff Project
22 (“the Project”), and Courage Campaign Institute (“Courage Campaign”), in
23 connection with actions and inactions of the United States Forest Service (“USFS”)
24 in relation to water diversion and transmission facilities constructed and operating
25 on USFS land in and near the West Fork of Strawberry Creek (“West Strawberry
26 Diversion Structures”) in the San Bernardino National Forest. This facility is
27 operated by Nestlé Waters North America, Inc. (“Nestlé”), in order to supply its

1 “Arrowhead” line of bottled drinking water. Although the USFS issued a special
2 use permit allowing this occupation of public lands in 1976 (amended 1978 and
3 1981) (“Permit”), the Permit expired and was void on August 2, 1988, and no new
4 special use permit has ever been issued. Nestlé, an alleged successor in interest to
5 the original holder of the Permit has, with the express permission of the USFS,
6 continued to operate, and has maintained, modified, and replaced portions of the
7 West Strawberry Diversion Structures since the Permit expired. Pursuant to the
8 requirements of the Federal Land Policy Management Act, 43 U.S.C. § 1701 et
9 seq. (“FLPMA”) and its implementing regulations, the USFS may not allow
10 operation and/or expansion of the West Strawberry Diversion Structures without a
11 valid and current special use permit. Plaintiffs seek an order requiring the USFS to
12 comply with FLPMA and enjoining operation of the West Strawberry Diversion
13 Structures pending compliance with FLPMA.

14 **II. JURISDICTION AND VENUE**

15 2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§
16 1331 (federal question), 28 U.S.C. §§ 2201-2 (declaratory judgment and injunctive
17 relief), and the Administrative Procedure Act, 5 U.S.C. § 701, et seq. (“APA”).

18 3. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e)
19 because this is an action against United States agencies and officials and because a
20 substantial part of the events and omissions giving rise to the claims in this case
21 occurred in this District.

22 **III. PARTIES**

23 4. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a
24 non-profit corporation with offices in California, Arizona, New Mexico, Oregon,
25 and Washington, D.C. The Center is actively involved in species and habitat
26 protection issues throughout the United States and has focused on protection of
27 public lands, including Forest Service managed lands, for decades. The Center has

1 over 50,000 members throughout the United States, including many members who
2 reside in Southern California and live, visit, or recreate in the San Bernardino
3 National Forest near the West Strawberry Diversion Structures and Strawberry
4 Creek. The Center's members and staff intend to continue to visit and recreate in
5 the affected areas in the future for various educational, scientific, aesthetic and
6 other purposes. The Center's members and staff have educational, scientific,
7 biological, aesthetic, and spiritual interests in the resources of the San Bernardino
8 National Forest including water resources and the species that depend on water
9 resources. The Center, its members, and staff have participated in efforts to protect
10 and preserve the resources of the San Bernardino National Forest including water
11 resources and water dependent resources which Plaintiffs allege are impacted by
12 the ongoing use of the expired special use permit at issue in this action.

13 5. Plaintiff STORY OF STUFF PROJECT ("The Project") is a non-
14 profit corporation headquartered in California. The Project's staff facilitate an
15 online Community of more than one million members worldwide dedicated to
16 transforming the way we make, use, and throw away disposable consumer items.
17 The Project, its staff and its Community members have been actively involved in
18 environmental sustainability and resource conservation efforts since its founding in
19 2008. The Project has more than 30,000 members in California, including more
20 than 800 who live in San Bernardino County, near the San Bernardino National
21 Forest. The Project's members regularly visit or recreate in and near the Forest and
22 the West Strawberry Diversion Structures and Strawberry Creek and intend to
23 continue to do so regularly in the future. The Project's members have expressed
24 profound concern about the diversion of water resources from the Forest and the
25 impact that has to the flora and fauna that depend on that water, which are critically
26 impacted by the ongoing drought conditions.

1 6. Plaintiff COURAGE CAMPAIGN INSTITUTE (“Courage
2 Campaign”) is a non-profit corporation in California. Courage Campaign Institute
3 is the educational arm of the Courage Campaign family of organizations with more
4 than 1,000,000 members. Its mission is to fight for a more progressive California
5 and country by defending and extending human rights through innovative
6 leadership-development training, strategic research and public education. Courage
7 Campaign’s members and staff have been actively involved in various responses to
8 the historic California drought, including a campaign asking Nestle to cease
9 bottling water in California. Courage Campaign has 9,167 members who live in
10 San Bernardino County, near the San Bernardino National Forest. Courage
11 Campaign’s members regularly visit or recreate in and near the Forest, and intend
12 to continue to visit and recreate in the affected areas regularly in the future for
13 various educational, scientific, aesthetic and other purposes. Courage Campaign’s
14 members have expressed profound concern about the diversion of scarce water
15 resources from public lands, and the impact that has to the flora and fauna that
16 depend on that water, especially where critically impacted by the on-going drought
17 conditions.

18 7. The above-described aesthetic, conservation, recreational, scientific,
19 educational, and other interests of Plaintiffs’ staff, boards, and members have been,
20 are being, and, unless the relief prayed for herein is granted, will continue to be
21 adversely affected and irreparably injured by the Defendants’ actions and inactions
22 in allowing the West Strawberry Diversion Structures to continue to occupy federal
23 land and divert water without a valid special use permit, which diversion has
24 contributed to dewatering of Strawberry Creek and impacts to the resources of the
25 area including loss of habitat for aquatic and riparian obligate species.

26 8. The injuries described above are actual, concrete injuries suffered by
27 Plaintiffs’ staff, boards, and members. These injuries are caused by Defendants’

1 actions and inactions in allowing Nestlé to continue to operate, modify, and at
2 times substantially replace key components of the West Strawberry Diversion
3 Structure without a valid special use permit.

4 9. The relief sought herein would redress Plaintiffs' injuries. Plaintiffs
5 have no other adequate remedy at law.

6 10. Defendant UNITED STATES FOREST SERVICE ("USFS") is an
7 agency of the United States Department of Agriculture. The USFS is responsible
8 for the administration and management of the federal lands subject to this action in
9 compliance with all pertinent laws including FLPMA, NFMA, and the APA.

10 11. Defendant RANDY MOORE is the Southwestern Region (Region 5)
11 Regional Forester. In that capacity, he is responsible for ensuring that all national
12 forests in the region are managed in compliance with all pertinent laws including
13 FLPMA and the APA. Defendant Moore is sued in his official capacity

14 12. Defendant JODY NOIRON is the Forest Supervisor for the San
15 Bernardino National Forest. In that capacity, she is directly responsible for
16 properly managing special use permits in the Forest and ensuring that the Forest
17 complies FLPMA, NFMA, and the APA. Defendant Noiron is sued in her official
18 capacity.

19 IV. FACTUAL ALLEGATIONS

20 **The Challenged Project and Impacted Environment**

21 13. The West Strawberry Diversion Structure is located near the West
22 Fork of Strawberry Creek in the San Bernardino National Forest on the side of the
23 steep mountain face overlooking the city of San Bernardino. The West Fork drains
24 into Strawberry Creek, which flows beneath a large natural formation resembling
25 an arrowhead that is a local landmark, and then enters the city.

26 14. The West Strawberry Diversion Structure consists of eleven access
27 points that are tunnels, boreholes, and horizontal wells drilled as deep as 490 feet

1 into the mountain, operated by Nestlé. Water from these diversions is collected and
2 then conveyed in a metal pipe that travels several miles down the mountain,
3 including within the bed of Strawberry Creek and its tributaries and their adjacent
4 riparian habitat as well as outside of these areas. The majority of the diverted water
5 is then piped into trucks, eventually to be bottled and sold throughout the United
6 States under Nestlé's signature premium brand name: Arrowhead Springs.

7 15. Removal of large amounts of water at the highest elevations of the
8 watershed is having an environmental impact at the well, borehole, and tunnel sites
9 as well as throughout the entire downstream watershed.

10 16. Strawberry Creek and its tributaries and their associated vegetation
11 support a large diversity of riparian species, but likely to be reduced in numbers
12 because of historic and current diversions coupled with drought. Riparian habitat in
13 the drainage is limited to the area that still receives surface or near surface flows in
14 the Strawberry Creek watershed. As in most of Southern California, summer flows
15 in the watershed are generally low. Summer storms add temporarily increased
16 flow, but the higher flows quickly revert to a lower level generally supported by
17 groundwater. The extent of stream flow in the summer time in Strawberry Creek
18 has been far lower than normal in recent years, in part due to the ongoing drought.
19 The year-round diversion of substantial amounts of water using the West
20 Strawberry Diversion Structure seriously affects summer flows in Strawberry
21 Creek and amount of life that the watershed can support.

22 17. There would be much more and improved riparian and woodland
23 habitat if natural flows were returned to Strawberry Creek and its tributary. This
24 habitat is dependent upon consistent availability of surface water or near-surface
25 water. During drought periods, even the areas that have supported this habitat in
26 wetter years are reduced. Species such as canyon live oak, bigcone Douglas-fir,
27 and California bay are currently being adversely affected by the removal of so

1 much water. These species do not require year-round surface water, but require
2 some subsurface moisture in summer to persist.

3 18. Many of the imperiled species of plants and animals in the watershed
4 depend on aquatic, riparian, and woodland habitat. Least Bell's vireo, southwestern
5 willow flycatcher, California spotted owls, two-striped garter snake, southern
6 rubber boa, Santa Ana speckled dace, mountain yellow-legged frog, and other
7 riparian obligate species are known to use or have used the suitable water-
8 dependent habitat in and adjacent to Strawberry Creek. Their numbers and
9 resilience would likely be increased with improved water supply.

10 19. The Strawberry Creek drainage is a very important and somewhat
11 unique landscape element because of its east/west flow. Most of the drainages in
12 the San Bernardino front country drain directly down the mountain in a north/south
13 direction. As a result, the Strawberry Creek drainage provides a link between
14 habitat in the drainages flowing perpendicular to it. Maintaining more natural flows
15 in the Strawberry Creek drainage is critical, especially in dry years, to enhance the
16 value and functionality of this important linkage.

17 20. Scenic values and recreational values are being adversely affected by
18 the excessive removal of water from the Strawberry Creek Watershed. There
19 would be more forest and woodland—preferred recreational destinations for Forest
20 visitors --if there were natural water flows. Relatively natural front country
21 chaparral drainages, like Strawberry Creek with perennial stream flows, are in
22 short supply in Southern California, especially in the San Bernardino National
23 Forest.

24 **Legal Background: USFS Special Use Permits**

25 21. The USFS is authorized under FLPMA to grant or renew rights of
26 way upon USFS lands for various special uses, including “pipes, pipelines ... and
27

1 other facilities and systems for the impoundment, storage, transportation, or
2 distribution of water.” 43 U.S.C. §§ 1761-66; 36 C.F.R. §§ 251.50-65.

3 22. Special use permits for such rights of way must be subject to terms
4 and conditions that, *inter alia*, ensure compliance with federal and state laws
5 regarding air and water quality and environmental protection, and that “minimize
6 damage to scenic and esthetic values and fish and wildlife habitat and otherwise
7 protect the environment.” 43 U.S.C. §1765.

8 23. NFMA requires the USFS to develop, maintain, and, as appropriate,
9 revise a land and resource management plan (“LRMP”) for each unit of the
10 National Forest System. The LRMP must “provide for . . . watershed, wildlife, and
11 fish” and “provide for diversity of plant and animal communities.” 16 U.S.C. §
12 1604(g)(3)(A) & (B).

13 24. All projects within a national forest must comply with that forest’s
14 LRMP.

15 25. The LRMP for the San Bernardino National Forest (“San Bernardino
16 LRMP”), adopted in 2005, requires that surface water diversions and groundwater
17 extractions, including well and spring developments, may only be authorized upon
18 demonstration that the water extracted is in excess to the current and reasonably
19 foreseeable future needs of forest resources. The LRMP requires consideration of
20 beneficial uses, existing water rights, and the availability of other sources of water
21 as part of the application for water extraction.

22 26. New projects in riparian areas require compliance with the “Five-Step
23 Project Screening Process for Riparian Conservation Areas” found in Appendix E
24 of the San Bernardino LRMP. That process limits activities allowed in riparian
25 conservation areas to those that maintain or improve long-term aquatic and riparian
26 ecosystem health, including quantity, quality, and timing of stream flows.

1 27. The San Bernardino National Forest LRMP incorporates by reference
2 the Forest Service Handbook regarding Soil and Water Conservation Practices
3 specific to the San Bernardino National Forest (“FSH”).

4 28. The FSH requires that existing activities and uses that occupy riparian
5 conservation areas, as the West Strawberry Diversion Structure does, “should be
6 evaluated for risks or impacts and mitigation during special use . . . re-issuance.”
7 Where mitigation is not effective, the FSH directs that the USFS must “reassess
8 with the option to modify or eliminate the use, activity or occupancy when impacts
9 are unacceptable.”

10 29. The SBNF Riparian Directives require that new special use permit
11 applications for surface and ground water extraction and for transport of water
12 across National Forest System lands be reviewed and assessed for potential
13 impacts on aquatic and riparian ecosystems on or off the Forest. It is the obligation
14 of permit applicants to demonstrate that proposed development will meet the
15 riparian management objectives of the Forest.

16 30. Prior to issuing or re-issuing special use permits for surface water
17 diversions, the FSH requires demonstration of proof of water rights.

18 31. Water diversion structures must be located outside of riparian
19 conservation areas, which includes Strawberry Creek and its tributary and a 30 to
20 100 meter buffer, “where practicable.”

21 **The 1976 Special Use Permit at Issue Here**

22 32. On August 8, 1976, the USFS issued the Permit to Arrowhead Puritas
23 Waters, Inc. allowing occupancy of “2.7 acres and/or 4.36 miles” for the purpose
24 of “maintaining thereon water transmission lines, necessary service trails to
25 maintain pipelines and water collection tunnels, horizontal wells, and spring
26 boxes.” These diversion structures were and are located in the -West Fork of
27 Strawberry Creek, just east of Highway 18 in the Forest.

1 33. The Permit was amended on August 2, 1978 to name new owner:
2 “Arrowhead Mt. Spring Water Company.” This is the name that remained on the
3 Permit until its expiration.

4 34. The Permit was again amended on June 24, 1981. At that time, an
5 amendment was made to the termination clause of the Permit stating that the
6 Permit, as amended, would “expire and become void on 8/2/1988.”

7 35. The Permit does not convey any water rights.

8 36. The USFS has never confirmed that Nestlé has a valid water right to
9 the water it diverts from the Strawberry Creek drainage.

10 37. The Permit is nontransferable except by payment of a fee and the
11 permission of the issuing officer or his successor. Upon such permission, the terms
12 of the Permit require issuance of a new permit to the new owner.

13 38. Although the USFS has acknowledged the expiration of the Permit, it
14 has affirmatively allowed Nestlé’s occupancy of the Forest to continue for nearly
15 thirty years “until the permit can be re-issued, based on its continued adherence to
16 the terms of that permit, and its payment of the required annual fee.”

17 39. As of May 12, 1987, a company called Beatrice Bottled Water
18 Division, subsidiary of Beatrice Companies, Inc. claimed to be the holder of the
19 Permit.

20 40. In October 1991, an application to expand development of further
21 water resources in the west fork of Strawberry Creek was denied based upon the
22 negative impacts the USFS expected it to cause to riparian habitat.

23 41. In 1992, the West Strawberry Diversion Improvements were
24 maintained and upgraded with the consent of the USFS.

25 42. In 1993, rock slides and flooding washed out 3,000 feet of pipe and
26 the USFS granted authorization to repair the West Strawberry Diversion
27 Improvements.

1 43. In 1994 an application for a new well to be part of the West
2 Strawberry Diversion Structures was denied, even though an existing well was
3 proposed to be abandoned. The reasons given by the USFS for this denial included
4 that the water extraction levels on the Forest were then believed to be at the
5 maximum allowable.

6 44. In 2002 Nestlé claimed to be the holder of the Permit.

7 45. The USFS has never issued a special use permit to Nestlé for the West
8 Strawberry Diversion Structure.

9 46. In 2003 significant repairs were again made to the West Strawberry
10 Diversion Structure, with the USFS's knowledge and consent, following fire-
11 caused land sliding and flooding.

12 47. In a letter to Nestlé dated April 7, 2015, the U.S. Department of
13 Agriculture, Office of the General Counsel stated that: "In the interim, until the US
14 Forest Service renders a decision on Nestlé's permit application, the current
15 amended permit [the Permit] remains in full force and effect according to its terms,
16 including those provisions requiring compliance with all relevant State and local
17 laws, regulations and orders." By this letter, the Forest Service has stated its intent
18 to allow the unpermitted activities to continue indefinitely.

19 48. The USFS annually accepts payment from Nestlé in exchange for
20 permission to continue to allow the West Strawberry Diversion Structure to occupy
21 Forest Land.

22 **V. CLAIM FOR RELIEF**

23 (Violation of FLPMA Special Use Permit Requirement,

24 43 U.S.C. §§ 1761-66; 36 C.F.R. 251.50-65)

25 49. Each and every allegation set forth in the preceding paragraphs is
26 incorporated herein by reference.

27 50. Defendants have violated FLPMA, 43 U.S.C. §§ 1761-66, by allowing
28 Complaint for Declaratory and Injunctive Relief

1 Nestlé to continue operations and to modify and replace parts of the West
2 Strawberry Diversion Structure without a valid special use permit in effect.

3 51. Nestlé’s operation of the West Strawberry Diversion Structures must
4 be ceased by the USFS unless and until it issues a valid special use permit for those
5 operations.

6 52. The Permit does not provide for renewal, and because the Permit has
7 expired, the USFS does not have the discretionary authority to renew the Permit.
8 36 C.F.R. § 251.64, 251.56(b)(1) (June 6, 1980).

9 53. Nestlé has never been the valid holder of the Permit. 36 C.F.R.
10 § 251.59 (June 6, 1980).

11 54. If the USFS decides to issue a new Special Use Permit to Nestlé, the
12 water diversions and operations currently taking place may need to cease or be
13 curtailed to protect Forest Resources pursuant to the requirements of the San
14 Bernardino LRMP.

15 55. In making its determination whether or under what terms and
16 conditions a new special use permit might be issued to Nestlé, because significant
17 new information and new circumstances have occurred since the Permit was
18 issued, the USFS must conduct appropriate environmental analysis pursuant to the
19 National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”), ensure
20 that Nestlé has valid and adequate rights to any diverted water, ensure consistency
21 with the San Bernardino LRMP, and comply with other laws. *See* 36 C.F.R. §
22 251.56 (June 6, 1980), San Bernardino LRMP.

23 56. For these reasons, Defendants actions in allowing Nestlé’s ongoing
24 operation, modification, and replacement of the West Strawberry Diversion
25 Structure without a valid special use permit are arbitrary, capricious, and otherwise
26 not in accordance with applicable law under the APA, 5 U.S.C. § 701 *et seq.*

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiffs respectfully request that this Court enter
3 judgment providing the following relief:

4 (1) Adjudge and declare that Defendants’ action allowing operation of
5 Nestlé’s pipeline and water extraction facilities in the absence of a valid special use
6 permit violates FLPMA and the APA;

7 (2) Issue an injunction requiring Defendants to prohibit operation or
8 modification of the West Strawberry Diversion Structure unless and until a valid
9 special use permit authorizing such action is in effect;

10 (3) Order Defendants to comply with FLPMA, NFMA, NEPA, and the APA
11 in connection with Nestlé’s diversion of water from the Strawberry Creek
12 watershed; and

13 (5) Grant Plaintiffs their fees, costs, expenses and disbursements,
14 including reasonable attorneys’ fees as provided by the Equal Access to Justice
15 Act, 28 U.S.C. § 2412; and

16 (6) Grant Plaintiffs such additional and further relief as the Court deems
17 just and proper.

18 Respectfully submitted,

19
20 October 13, 2015

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