

Memorandum

Date: October 15, 2009

To: Ms. Katherine Mrowka, Chief
Inland Streams Unit
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

From: 
GARY B. STACEY, Regional Manager
Northern Region
Department of Fish and Game
601 Locust Street
Redding, CA 96001

Subject: **Small Domestic Use Registration No. D030945, Certificate No. R480, Douglas Cole, Stanshaw Creek, Siskiyou County**

The Department of Fish and Game (Department) has received your September 3, 2009, letter which asks for a written confirmation within 45 days regarding requirements which the Department would need for the subject registration. As indicated in your letter, the Department has never issued a clearance letter with terms and conditions for this Small Domestic Use Registration (SDU). Pursuant to Section (§)1228.3 of the State Water Code, registration of a small domestic use appropriation requires consultation with the Department.

The Water Rights Division (Division) sent Mr. Cole a letter on November 30, 1999 and again on April 8, 2005, requesting he contact the Department to obtain a written clearance letter. The Division never received a letter from the Department regarding clearance for this SDU registration and consequently, Certificate R480 has not been renewed.

Based on this information, it appears that Mr. Cole has not complied with the requirements for maintaining a SDU registration. Board literature on small domestics state "In order to maintain a registration, the registrant must renew the registration every five years by completing and submitting a renewal form and renewal fee." As stated above the State Water Code requires consultation with the Department **prior** to issuance of a SDU.

The Department does have conditions which must be met to avoid impacts to beneficial uses due to this diversion.

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This diversion was the subject of a complaint investigation with an inspection held on October 17, 2001. This diversion is also the subject of a protest on Water Right Application 29449 by the Department on March 17, 2000. We understand the Division regards these as separate issues, however, the point of diversion and impacts to resources are the same.

As the Department stated in our November 20, 2001 letter to the Board, as well as in a letter to Mr. Cole, our primary concerns are for coho salmon (*Onchorhynchus kisutch*) which rear in the lower reach of Stanshaw Creek below Highway 96. Coho salmon are State- and federally-listed as "threatened." Coho salmon have undergone at least a 70% decline in abundance since the 1960s, and are currently at 6 to 15% of their abundance during the 1940s (Department, 2004). The presence of coho salmon in Stanshaw Creek was established by the Department during a field investigation. The North Coast Regional Water Quality Control Board's Draft Total Maximum Dailey Load for the Klamath River identifies Stanshaw Creek as an important refugia for coho salmon.

The Department believes the Highway 96 culverts are currently a barrier to upstream migration of fish. The Department, therefore, has focused our concerns and mitigation measures on the 0.25 mile stream reach downstream of these culverts. This stream reach is characterized by deep pools, large woody debris, dense overhanging riparian cover shading the stream, and generally cool water temperatures thus providing good rearing and refuge habitat for juvenile coho salmon and steelhead trout (*O. mykiss*).

Coldwater habitats such as those provided by Stanshaw Creek are important refuge for juvenile coho salmon which may need to escape the warmer temperatures, and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical coldwater refuge habitats for coho salmon and steelhead trout in lower Stanshaw Creek need to be accessible to the fish, therefore, sufficient water needs to remain in the stream to maintain connectivity to the Klamath River year round. Mr. Cole's diversion takes water from Stanshaw Creek and discharges it into another watershed, Irvine Creek.

The Department believes the Division should revoke Mr. Cole's SDU. He has not complied with regulations to obtain the water right in a lawful manner.

If the Division still requests our conditions at this juncture, the following would be our preliminary recommendations:

1. The Department currently proposes year-round bypass flows of 2.5 cubic feet-per-second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to

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ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained. To accomplish this objective, the Department recommends the total stream flow be bypassed whenever it is less than the designated amount.

Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

2. Pursuant to Fish and Game Code (Code) §1600 *et seq.*, prior to any substantial diversion from a stream the applicant must notify the Department and obtain a lake or streambed alteration agreement (LSAA). Mr. Cole last applied for a LSAA in 1999. Due to the listing of coho salmon significant change in conditions has occurred and his LSAA should be updated.
3. The California Endangered Species Act (CESA) (Code Sections 2090 to 2097) is administered by the Department and prohibits the take of plant and animal species designated by the Fish and Game Commission as either threatened or endangered in the State of California. If the project could result in the "take" of a State listed threatened or endangered species, the Responsible Party has the responsibility to obtain from the Department, a California Endangered Species Act Incidental Take Permit (CESA 2081 Permit). The Department may formulate a management plan that will avoid or mitigate take. If appropriate, contact the Department CESA coordinator at (530) 225-2300.
4. All water diversion facilities shall be designed, constructed, and maintained so they do not prevent, or impede, or tend to prevent or impede the passing of fish upstream or downstream, as required by Fish and Game Code Section 5901. This includes, but is not limited to, maintaining or providing a supply of water at an appropriate depth, and velocity to permit volitional upstream and downstream migration of juvenile and adult salmonids.
5. Notwithstanding any right the Responsible Party has to divert and use water, the Responsible Party shall allow sufficient water to pass over, around, or through any dam the party owns or operates to keep in good condition any fish that may exist below the dam, as required by Fish and Game Code Section 5937.

The issuance of this letter by the Department does not constitute a valid water right or an LSAA.

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If you have questions or comments regarding this memorandum, please contact Staff Environmental Scientist Jane Vorpapel at (530) 225-2124.

cc: Ms. Jane Vorpapel
Northern Region
Department of Fish and Game
601 Locust Street
Redding, CA 96001

ec: Mss. Jane Vorpapel, Donna Cobb, and Jane Arnold
Mr. Jim Whelan, Warden Greg Horne
Department of Fish and Game, Northern Region
Jvorpape@dfg.ca.gov, Dcobb@dfg.ca.gov, Jwhelan@dfg.ca.gov,
Ghorne@dfg.ca.gov, JArnold@dfg.ca.gov

Ms. Nancy Murray
Office of the General Counsel, Sacramento, CA
Nmurray@dfg.ca.gov

Messrs. Carl Wilcox and Paul Forsberg
Water Branch, Sacramento, CA
Cwilcox@dfg.ca.gov, Pforsber@dfg.ca.gov