

# Konrad Fisher

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February 25, 2015

State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

## **Re: Stanshaw Creek Water Rights & Physical Solutions**

Dear SWRCB Staff & Board:

Thank you for the opportunity to provide comments as you assess water rights and usage on Stanshaw Creek. I live near the mouth of Stanshaw Creek on land held as the Old Man River Trust (OMRT). As beneficiary of OMRT, I am the only water right holder downstream from the diversion maintained by Marble Mountain Ranch (MMR). I rely on water from Stanshaw Creek to meet my domestic, irrigation, and emergency fire suppression needs. I own 43 acres that is dissected by Stanshaw Creek and lies between the Klamath River and State Highway 96.

Since the Coles purchased their property in 1994, they have increased their water diversion to the point that Stanshaw Creek does not reach the Klamath River during many months of the year. Until 2013, the Coles continued to pursue a water right application (initiated by their predecessors in 1989) to divert water from Stanshaw Creek to produce hydropower. In March 2000, the SWRCB issued a “renotice of application” for MMR’s water right application. In 2000 and 2001, official water right application protests and/or water right complaints were filed by my family, the California Department of Fish and Game (DFG), National Marine Fisheries Service (NMFS), Klamath Forest Alliance, and California Sport Fishing Protection Alliance. To date, these complaints have not been resolved.

As you investigate claimed water rights to Stanshaw Creek, I urge you to consider the following points.

### **1. If a pre-1914 water right exists, it is jointly held by the Fisher and Cole properties.**

The Coles (owners of MMR) incorrectly claim to be exclusive successors-in-interest to the appropriate water right established by the 1867 “Water Notice” by E. Stanshaw. Mr. Stanshaw patented land that is now owned in different portions by myself, the U.S. Forest Service, and the Coles. I own a larger share than Coles.<sup>1</sup>

The vast majority water use for mining occurred on land that I now own. A smaller portion took place on land now owned by the U.S. Forest Service. These facts are substantiated by extensive on-the-ground evidence that exists today including large mining tailing piles, out-of-commission water diversion ditches, and large steel water

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<sup>1</sup> See map showing original land patents VS current ownership at:

<https://drive.google.com/folderview?id=0B8qYwFeEzDsIUvhzLVMyRmNLSDA&usp=sharing&tid=0B8qYwFeEzDsIQiNqc3BvU2h1Y2M>

pipes. This on-the-ground evidence of water diversion and use was documented by Cascade Stream Solutions' (CSS) November 18, 2014 *Marble Mountain Ranch Water Rights Investigation: Water Use Technical Memorandum* ("Technical Memo"). Specifically, a map on page C-9 of the Technical Memo shows water diversion ditches and pipes leading to and through my land, and mine tailing piles on my land. I have not seen evidence that mining took place on the portion of Stanshaw's original land patent that is now owned by the Coles.

The September, 1, 2014 *Marble Mountain Ranch Stanshaw Creek Water Rights Report* by Lennihan Law (Lennihan Report) did not address the Technical Memo's evidence and conclusions about the location of historic water use. Further, the Lennihan Report did not address the fact that ownership of the original Stanshaw land patent is now shared. The Lennihan Report states, "Marble Mountain Ranch was originally a portion of the larger property patented to Stanshaw . . ." (P. 13) Only a portion of what is now MMR includes land that was originally patented to Stanshaw. Finally, the the Stanshaw water right has never been conveyed to land now owned by MMR.

**2. If a pre-1914 water right exists, it is limited to domestic and irrigation use, and possibly stock watering and emergency fire-suppression.**

If the Coles were successors-in-interest to a portion of Mr. Stanshaw's original mining water right, the right would be limited to the amount of water that has been reasonably, beneficially, and continually used since 1914.<sup>2</sup> The only water use that could meet these criteria would be that used for domestic and irrigation needs, and possibly stock watering and emergency fire-suppression.

Prior investigations by SWRCB staff resulted in a similar conclusion. A September 15, 1998 letter to Doug Cole from Harry M. Schueller, Chief of SWRCB's Division of Water Rights reads: "As you have been advised by my staff, your pre-1914 rights are probably limited to your domestic and irrigation needs, which amount to approximately .11 CFS." A May 22, 2002 letter from Michael Contreras of SWRCB's Complaint Unit reads: "A court of competent jurisdiction would likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch."<sup>3</sup>

Furthermore, the Coles' predecessors (the Youngs) submitted an application for a new water right for hydropower production in 1989. Had the Youngs believed they held a valid pre-1914 water right for hydropower production, they arguably would not have applied for a new water right. Until 2013, the Coles continued to seek approval of a water right application that would allow hydropower production.

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<sup>2</sup> The Feb. 19, 2015 memo from Water Power Law Group explains why the ruling in *Millview V. SWRCB* does not impact the quantity of a claimed pre-1914 water right in this situation.

<sup>3</sup> Both SWRCB letters can be found under "unsorted documents" at this shared google drive: <https://drive.google.com/folderview?id=0B8qYwFeEzDsIQjNqc3BvU2h1Y2M&usp=sharing>

The Lennihan Report further strengthens SWRCB's earlier conclusions by documenting a period during which water was not used for mining or hydropower production. The report states that "hydraulic mining activities ceased around the 1920's or 1930's." (P. 16, ¶ 5) Citing documents from the Coles and previous owner Lue Hayes, the report reads: "Owners of the MMR and others have multiple times asserted that the hydroelectric generation was initiated in the 1940's or later." The report also asserts, "These [statements] may be considered binding on them." (Page 16, ¶ 2)

In the next ., the Lennihan Report argues that, "a decision maker could reasonably conclude, as we do for purposes of this memorandum, that power generation was initiated before 1914." The report justifies this leap-of-faith (despite contrary assertions of two previous property owners) based on the author's assertion that the law grants a very lenient burden of proof to pre-1914 water right claimants.

### **3. Domestic & irrigation use of 0.35 CFS would be wasteful & unreasonable.**

According to the Technical Memo, the SWRCB estimated the Cole's domestic and irrigation use at 0.103 CFS. (P. C-11) The Lennihan Report notes that Cole's predecessors (the Youngs) accepted that their domestic and irrigation water needs were 0.11 CFS (P. 15, ¶ 4). The 2009 Statement of Diversion of Use, signed and filed by Doug Cole, estimated domestic and irrigation use to be 0.353 CFS. (Technical Memo P. C-11.) This larger quantity of water is based on the Coles' incorrect, and easily disproven claim that they have 25 acres under alfalfa production. The Lennihan Report ignores the more accurate and substantiated estimates by SWRCB and the Youngs, and instead relies on the Coles' incorrect claim that half of their land is under alfalfa production.

Actual current-day domestic and irrigation water needs at MMR could easily be quantified by assessing: (1) Actual irrigated acres; (2) Actual number of dwellings and RV sites; and (3) Department of Water Resources' standard water use volumes for dwelling and irrigated acres. The resulting number may still exceed historic domestic and irrigation use, but it would be more accurate than the number used in the Lennihan Report to quantify MMR's pre-1914 water right. Perhaps SWRCB enforcement staff already made such an estimate during one of their two recent site visits.

### **4. Conveyance loss of 0.5 CFS is wasteful & unreasonable.**

The Lennihan Report asserts that a conveyance loss 0.5 CFS should be part of MMR's pre-1914 water right. This quantity of conveyance loss would be wasteful and unreasonable, particularly given that the size of the entire creek in late summer can be as low as 2-3 CFS. Piping water from Stanshaw Creek to its place of use would eliminate the majority of conveyance loss. Switching from a ditch to a pipe would also eliminate the water quality impairments and harm to my water rights as described below.

### **5. Diversion method and location of return flow are unlawful.**

The existing unlined conveyance ditch is not only wasteful, but it washes out during many winters, creating mudslides that clog salmon habitat in Stanshaw Creek and cause

plumes of muddy water to enter the Klamath River. I request that SWRCB direct the North Coast Regional Water Quality Control Board to assess whether this method of diversion violates the Clean Water Act.

The portion of MMR's water diversion that is not consumptively used is returned to Irving Creek, not Stanshaw Creek. This practice infringes on my water rights and is unlawful. By dewatering Stanshaw Creek, this diversion also violates the Public Trust Doctrine, Reasonable Use Doctrine, and Endangered Species Act.

## **6. Diversion quantity is wasteful & unreasonable.**

Marble Mountain Ranch's existing hydropower system and stated electricity needs far exceed what is normal for this area, or other areas that are off-grid and rely on independent hydropower systems. Because I may be interested in installing my own hydropower system (given that my home is not served by the grid), I have investigated dozens off-grid hydropower systems. MMR produces far more electricity than is consumed, and has no battery bank to store it.

Marble Mountain Ranch could use significantly less water by retrofitting their hydropower system to rely on a higher point of diversion. By doing so, their system would rely on more "head" (the elevation the water falls before producing power), and thereby less water. MMR's existing low-head, high water volume system is wasteful and unreasonable.

During many summer months, MMR is unable to divert enough water to run their current hydropower system because, unlike other systems, theirs cannot function with lower quantities of water. At these times, MMR continues diverting the majority of Stanshaw Creek despite not using the water for hydropower production or any other use.<sup>4</sup> Last summer, MMR's diversion dewatered the mouth of Stanshaw Creek for an extended period of time during which water was not being used for electricity production. At this time, the amount of water being returned to Irving Creek would have been more than enough to provide connectivity between Stanshaw Creek and the Klamath River. Diverting large quantities of water that is not used for any purpose is a clear violation of the Reasonable Use Doctrine.

For all of these reasons, MMR's water diversion is wasteful and unreasonable and should be curtailed immediately.

## **7. MMR's diversion harms my water rights.**

Shortly after the Coles purchased Marble Mountain Ranch in 1994, they began increasing their water diversion against my ongoing protest, and infringed on my riparian water right and my claimed pre-1914 water right. Previous owners of MMR also infringed on the water rights associated with the property I now own, but not to the extent the Coles have. I have sustained the following injuries as a result of MMR's diversion:

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<sup>4</sup> This fact is discussed in the Technical Memo, and Mr. Cole acknowledges it.

As stated above, I would like to have the option to build my own fish-friendly hydropower system. I cannot operate such a system as long as MMR unlawfully diverts large quantities of water and returns it to Irving Creek. I would like to use water from Stanshaw Creek pursuant to my unexercised riparian water right based on the 1911 patent date of my property. My unexercised riparian water right is senior to all water rights associated with MMR, with the possible exception of MMR's claimed pre-1914 water right for domestic and irrigation use, and possibly stock watering.

MMR's diversion has also infringed on my domestic and irrigation water uses. Because MMR diverts a large quantity of water via ditch, MMR must occasionally stop their diversion to clean the ditch and/or maintain their hydropower system. This causes a sudden increase in Stanshaw Creek's flow by approximately 300 percent. At other times, when Stanshaw Creek's natural flow decreases, MMR adjusts their point of diversion halving Stanshaw Creek's flow in the course of a few hours.

These significant and rapid water fluctuations make it very difficult for me to maintain my own point of diversion, and therefore my water supply to my fruit trees and household. When Stanshaw Creek's flow suddenly decreases, my diversion pipe is left out of the stream flow and my water supply is cut off until I am able to adjust my point of diversion. When Stanshaw Creek's flow suddenly increases, my diversion pipe can be washed out of the creek entirely. If my diversion pipe doesn't wash out at these times, it can fill with sediment carried by the rapidly increased flow.

Finally, during heavy rains in the winter, MMR's diversion ditch washes out creating a landslide on a steep hillside next to Stanshaw Creek. This fills Stanshaw Creek with mud that clogs my water system. Every time this happens, I must take my system apart to clean out the mud. On two occasions, I have had to replace entire sections of pipe because it was not possible to unclog them.

Due to fluctuations in the creek caused by MMR, I have lost my water supply as many as three times per year since 1995. On one occasion, I was out of town for an extended period and I lost several young fruit trees. I have given up on planting additional fruit trees until I have a more reliable water supply.

My unreliable water supply has not yet prevented me from extinguishing a fire in an emergency, but I fear it could. In May 2014, a brush pile that I burned a month prior during a rainstorm reignited. Thankfully, my water system was working so the fire could be contained while emergency response personnel from the U.S. Forest Service arrived. Had my water system been inoperable during this period, the fire could have burned structures and the forest around it. The U.S. Forest Service did not bill me for fire suppression costs, but they probably would have if the fire had become out of control and reached adjoining public land or land owned by MMR.

## **8. MMR's diversion violates laws that supersede valid pre-1914 water rights**

MMR's diversion violates several laws including Public Trust Doctrine, the Reasonable Use Doctrine, the state and federal Endangered Species Acts, and Fish and Game Code sections 5937 and 1600.

California Department of Fish and Wildlife (DFW), the National Marine Fisheries Service (NMFS), and the Karuk Tribe have each produced minimum bypass flow recommendations necessary to protect endangered coho salmon. MMR's diversion does not comply with any of these recommendations.

Stanshaw Creek is regularly dewatered to the point that it does not reach the Klamath River. SWRCB enforcement staff witnessed this during their recent site visit. This dewatering prevents anadromous fish from migrating into the Klamath River to reach the ocean, and it prevents fish from escaping the Klamath River when the river reaches lethal temperatures.

When I have been away from home and unable to monitor the diversion, MMR has dewatered the creek to the point that the pool at the creek's mouth is almost completely dry. This pool provides optimal rearing habitat for juvenile coho, which are the subject of ongoing monitoring by the Karuk Tribe, the U.S. Forest Service, and the Mid Klamath Watershed Council. CDFW recently funded a restoration project to excavate this pool and improve the coho habitat.

The fluctuations in water levels described above cause Stanshaw Creek to carry large quantities of sediment to the detriment of fish and water quality.

Approximately ten years ago, a CDFW (then DFG) staff member from Yreka said that if I found a dead coho, they would take enforcement action. Later that summer, MMR increased their diversion and halved the amount of water in Stanshaw Creek within a matter of hours. Immediately thereafter, I found three dead juvenile salmonids in a newly dewatered channel of the creek, one of which was a coho. I contacted the aforementioned CDFW staff member who explained that he could not take enforcement action because he could not prove that the diversion had killed the coho.

Every summer, with the help of local agency, tribal, and/or non-profit staff, I must modify the mouth of Stanshaw Creek to prevent MMR's diversion from stranding and killing juvenile coho salmon, Chinook Salmon, and Steelhead.

If SWRCB deems that additional evidence is required to determine whether MMR's diversion violates the aforementioned laws, I urge you to exercise the precautionary principle. In doing so, you would place the burden to prove no harm upon MMR, rather than placing the burden to prove harm upon the public. To its credit, SWRCB often correctly places this burden of proof on applicants for new water right appropriations. SWRCB should exercise the same authority to curtail existing illegal diversions. If it does not, SWRCB will encourage people to simply divert the water they want, and continue doing so unless and until the public can prove that the diversion is harmful.

### **9. Physical solutions exist that would meet MMR's needs and increase its value**

As I have asserted for more than 20 years, physical solutions exist that would: (1) Meet MMR's electricity needs; (2) End an ongoing water dispute that compromises MMR's market value; (3) Eliminate the threat of regulatory action against the Coles by government agencies; (4) End the take of endangered coho salmon; and (5) Allow me to exercise my riparian water right for hydropower production.

Very recently, Mr. Cole and I began discussing such solutions that include a solar power system and/or a retrofitted hydropower system that incorporates a higher point of diversion and returns water to Stanshaw Creek instead of Irving Creek. CDFW also approved a grant to evaluate different physical solutions. Furthermore, state and federal agencies have expressed a willingness to fund a new hydropower and/or solar power system that would satisfy MMR's electricity needs and bring MMR into compliance with the law.

If interested parties agree to a physical solution that requires a water diversion for hydropower production, I would agree not to protest if MMR submits a water right application for a reasonable quantity of water and method of diversion.

### **10. Interim period must preclude diversion in excess of water for domestic and irrigation needs.**

Until a long-term physical solution can be implemented, I request that SWRCB direct the Coles to: (1) Install a pipe in Stanshaw Creek that is adequate to meet their domestic and irrigation water needs; and (2) Bypass water that is not needed for domestic and irrigation needs.

Thank you for dedicating your time and resources to resolve this difficult water dispute. Please feel free to contact me if you have any questions or need additional information.

Sincerely,



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