STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2017-00XX-DWR

ORDER FINDING WASTE, UNREASONABLE METHOD OF USE, AND UNREASONABLE METHOD OF DIVERSION OF WATER AND ORDERING CORRECTIVE ACTIONS

In the Matter of Waste, Unreasonable Method of Use, and Unreasonable Method of Diversion of Water

by

DOUGLAS AND HEIDI COLE AND MARBLE MOUNTAIN RANCH

SOURCES: Stanshaw Creek

COUNTY: Siskiyou

Under Water Code section 275, the State Water Resources Control Board (State Water Board) shall take all appropriate proceedings or actions to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this State.

Douglas and Heidi Cole and Marble Mountain Ranch (collectively "Diverter"), on Stanshaw Creek in the County of Siskiyou, are alleged to have diverted water and continue to divert water in violation of Article X, section 2 of the California Constitution and section 100 of the California Water Code[1], which provide that the right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for the Division of Water Rights (Deputy Director) is authorized to bring certain matters to the attention of the State Water Board by appropriate communication, including any matter that, in the judgement of the Deputy Director, should be brought to the attention of the State Water Board. State Water Board Resolution 2012-0029 also authorizes re-delegation of this authority from the Deputy Director to the Assistant Deputy Director for the Division of Water Rights (Assistant Deputy Director). This authority has been re-delegated.

[1] All references to the "Water Code" shall refer to the California Water Code.

On {DATE}, the Assistant Deputy Director for the Division of Water Rights (Division), pursuant to the California Code of Regulations, title 23, section 857, requested a hearing to determine whether the Diverter was misusing water and adoption of an order finding that the Diverter misused water that requires appropriate corrective actions, with a time schedule, for the Diverter to terminate the misuse of water. [2]

As required by the California Code of Regulations, title 23, section 857, Division Staff simultaneously granted the Diverter a reasonable period of time, until June 30, 2018, to cease misusing water, and established reasonable interim deadlines for project milestones. The Assistant Deputy Director requested a hearing within 90 to 120 days after October 15, 2016, the first interim deadline. If the Diverter satisfies the milestones for the October 15, 2016 interim deadline, the Division requests that the parties, upon concurrence, be allowed to request the State Water Board to postpone the hearing date.

Based on evidence and argument presented, the State Water Board finds that:

1. The Diverter has violated and is continuing to violate Article X, section 2 of the California Constitution and Water Code section 100 by misusing water.

2. The Diverter's diversion and use of water is in a manner that harms interests protected by the public trust which constitutes a misuse of water.

3. Corrective actions are necessary for the Diverter to cease misusing water and harming interests protected by the public trust.

FACTS AND INFORMATION

The facts and information upon which this Order is based are as follows:

Marble Mountain Ranch Water Rights

1. Marble Mountain Ranch (MMR) is located at 92520, Highway 96 in Somes Bar, Siskiyou County. MMR is owned and operated by the Cole family. MMR functions as a commercial guest ranch that offers activities such as horseback trail riding, hiking, whitewater rafting, jet boat rides, sport shooting, fly fishing and kayaking.

2. The Diverter diverts surface water from Stanshaw Creek, a tributary to the Klamath River, under a pre-1914 claim of right in two Statements of Water Diversion and Use (Statements), S015022 and S016375. The Diverter also has one Small Domestic Use Registration, D030945R, filed on December 1, 1998. The point-of-diversion (POD) for all of water rights is the same diversion facility located on Stanshaw Creek. The diversion facility is situated on land owned by the United States Forest Service (USFS).

3. S015022 was filed with the State Water Board on December 1, 1998 under the name of Douglas T. Cole, for the following purpose of use: domestic, power, irrigation, fish and wildlife protection and/or enhancement, fire protection and stock watering. S015022 claims a right to divert 2.5 cfs with no seasonal restrictions and is limited to such water as shall be reasonably required for beneficial use.

[2] For the purposes of the California Code of Regulations, title 23, Article 22, "misuse of water" or "misuse" means any waste, unreasonable use, or unreasonable method of diversion of water. (23 Cal. Code Regs., § 855, subd. (b).)

4. S016375 was filed with the State Water Board on May 28, 2010 for irrigation and domestic uses under the name of Marble Mountain Ranch. S016375 claims 3.0 cfs with no seasonal restrictions and is limited to such water as shall be reasonably required for beneficial use. S016375 claims a greater face value than S015022, even though it does not include hydropower as a beneficial use.

5. D030945 includes the following terms and conditions:

   a. Term 5 - The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 10 acre-feet per annum to be collected from January 1 to December 31 of each year. The capacity of the reservoir shall not exceed 10 acre-feet which is the stated capacity shown in the registration. The total amount of water to be taken from the source shall not exceed 10 acre-feet per water year of October 1 to September 30.

   b. Term 10 - Pursuant to California Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this registration, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

   c. Term 11- This appropriation is subject to prior rights. Registrant may be required to curtail diversion or release water stored during the most recent collection season should diversion under this registration result in injury to holders of legal downstream senior rights. If a reservoir is involved, registrant may be required to bypass or release water through, over, or around the dam. If release of stored water would not effectively satisfy downstream prior storage rights, registrant may be required to otherwise compensate the holders of such rights for injury caused.

   d. Term 15 - Diversion works shall be constructed and water applied to beneficial use with due diligence.

   e. Term 17 - In compliance with section 5937 of the Fish and Wildlife Code, if storage or diversion of water under this registration is by means of a dam, registrant shall allow sufficient water at all times to pass through a fishway or, in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam; provided that, during a period of low flow in the stream, upon approval of the California Department of Fish and Wildlife (DFW), this requirement will be satisfied if sufficient water is passed through a culvert, waste gate, or over or around the dam to keep in good condition any fish that may be planted or exist below the dam if it is impracticable or detrimental to pass the water through a fishway. In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir.

f. Term 18 - The facilities for diversion under this registration shall include satisfactory means of measuring and bypassing sufficient water to satisfy downstream prior rights and any requirements of DFW.

g. Term 20 - This registration does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Wildlife Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the registrant shall obtain an incidental take permit prior to construction or operation. Registrant shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this registration.

h. Term 24 - The appropriation registered herein is subject to enforcement, including but not limited to revocation, by the State Water Board if 1) the State Water Board finds that the registrant knowingly made any false statement or knowingly concealed any material fact, in the registration; 2) the registration is not renewed as required by the conditions of this certificate; or 3) the State Water Board finds that the registrant is in violation of the conditions of this registration.

6. Stanshaw Creek is a tributary to the Klamath River. Stanshaw Creek has a drainage area of approximately four square miles. It has a short but significant section of habitat for Coho salmon (*Onchorhynchus Kisutch*) below the Highway 96 crossing, including an off-channel pond or pool located just upstream of its confluence with the Klamath River. This pool is filled by cold Stanshaw Creek water when high flows in the Klamath River subside, creating a high quality summer and winter rearing habitat for non-natal juvenile Coho salmon migrating down the Klamath River corridor. The National Marine Fisheries Service (NMFS), DFW, and the Karuk Tribe, have asserted that the Diverter's diversion and use of water adversely impact Coho salmon in violation of the federal Endangered Species Act and other laws. While both Juvenile Coho salmon and steelhead have been documented in Stanshaw Creek, the creek's moderate channel slope and relative lack of suitable-sized substrate diminishes its importance as a significant spawning stream within the Klamath River watershed. However, the off-channel pond provides excellent habitat for both summer and winter rearing of non-natal Coho salmon.

7. MMR's POD is located approximately three-quarters of a mile upstream of the Highway 96 crossing, on USFS property. The POD consists of a handmade rock wing diversion dam located on the east creek bank of the Stanshaw Creek channel. The rock wing diversion dam extends about halfway across the channel. An unlined ditch conveys the water approximately one-half mile to MMR. The POD and ditch were constructed with Chinese labor in the late 1800's. The Diverter continues to rely on these methods of diverting water.

8. The Diverter's claimed pre-1914 appropriative water right originates from an 1867 claim by Mr. E. Stanshaw for six hundred (600) miner's inches, or 15 cfs, to be used for mining, domestic and irrigation purposes on a large patented parcel that includes the present-day MMR property. The patent date for the original parcel was March 27, 1911. Based on a letter dated January 16, 2016, the Diverter now claims only 3 cfs under the pre-1914 appropriative right. The MMR property does not appear to be riparian and the

Diverter has not claimed a riparian right.

9. Division Staff identified two other diverters on Stanshaw Creek, one upstream from MMR and one downstream.

   a. The upstream diverter is Mountain Home, held under Bruce Robinson. Mountain Home holds Permit 20955 (Application 25446). Permit 20955 has a priority date of August 3, 1977 and entitles Mountain Home to divert up to 1,200 gallons per day for domestic use year-round and up to 0.14 cfs from April 1 through August 30 of each year for irrigation from Sandy Bar Creek, a tributary to Stanshaw Creek and thence the Klamath River. The maximum amount diverted under the permit annually shall not exceed 60 acre-feet per annum. Although Mountain Home has not filed a claim, Mountain Home's property appears to be riparian to Stanshaw Creek. Based on Mountain Home's reported water use in its progress reports of permittee and on consultation with NMFS, Mountain Home's diversion has a negligible impact on public trust beneficial uses and conditions at the Diverter's POD.

   b. The downstream diverter is Mr. Konrad Fisher (Fisher). Fisher diverts water from Stanshaw Creek under a pre-1914 and riparian claim of right, held under the name of J W Fisher Logging, in Statement S015230 for irrigating 1.6 acres of lawn and garden and for household use for up to 24 persons. Fischer owns 43 acres of land downstream and downslope from MMR that was also a portion of E. Stanshaw's larger patented parcel. Fisher and the Diverter are both successors in interest to E. Stanshaw. Based on consultation with NMFS and an assessment of Fisher's water use, Fisher has a negligible impact on flows and public trust beneficial uses in Stanshaw Creek.

Prior Water Right History

March 27, 1989 - Robert E. and Mary Judith Young, prior owners of the MMR property, file Application 29449 to appropriate 2,168 acre-feet per year of water, at a rate of 3 cubic feet per second (cfs), from Stanshaw Creek, between January 1 to December 31, for the purposes of fish and wildlife protection and/or enhancement and power generation.

November 17, 1994 - The Division sends a letter to the Diverter, stating that the Division's records have been updated to reflect the Diverter as the owner of the diversion pertaining to Application 29449.

March-August 2000. NMFS, USFS, Department of Fish and Game (DFG), and California Sportfishing Protection Alliance (CSPA) file protests against Application 29449, alleging the project would adversely affect resident fish species. James and Phylis Fisher, who own property downstream of MMR, file a protest alleging that the Diverter's proposed project would drastically reduce flows in Stanshaw Creek, especially during the dry season, result in insufficient water for their domestic and irrigation needs, and cause aesthetic impact to their riparian property.

July 26, 2000 – An Environmental Field Report, prepared by Division Staff Robert E. Miller, documents the results of a field visit by NMFS, DFG, the Karuk Tribe and the Division, to the Diverter's diversion facility that documents the presence of juvenile Coho and Steelhead in Stanshaw Creek pools below Highway 96 culverts. All of the participants present during the

field visit, with the exception of the Diverter, agree that the proposed project will potentially have negative impacts to anadromous Salmonids.

November 14, 2000 – Contact report by Division Staff, Robert Miller, details a conversation with Mr. Cole, who stated that an injunction has been filed against him by DFG. Mr. Cole also stated that a DFG warden went out to his property to remove rocks from his diversion to allow for the passage of fish. Mr. Cole claims that without the diverted water he will be forced out of business, as he cannot afford to run his diesel generator full time.

November 14, 2000 – Contact report by Division Staff, Robert Miller, details a conversation with Brian Boyd, DFG game warden. Mr. Boyd stated that he went out to MMR and made the diversion structure passable for fish and cited the Diverter under the authority of Fish and Game Code sections 1603 and 5901. Mr. Boyd states Mr. Cole became irate after receiving the citation and stated that he had the appropriate water right. Mr. Boyd countered that he was not concerned with water rights, since it does not pertain to the Fish and Game Code.

November 14, 2000 – Contact report by Division Staff, Robert Miller, details a conversation with Larry Allen, Circuit Prosecutor. Mr. Allen stated that a temporary restraining order was issued to Mr. Cole, because he was in violation of the law and irreparable damage was being done to Stanshaw Creek. A hearing was held and the court issued a preliminary injunction against Cole. Mr. Allen's civil complaint sought permanent injunctive relief penalties ranging from $25,000 to $50,000.

June 18, 2001 - Klamath Forest Alliance submits a complaint against the Diverter, alleging unauthorized diversions in excess of pre-1914 appropriative rights, a change in purpose-of-use not supported under the pre-1914 claim and adverse impact to public trust resources. Studies conducted by DFG find that federally listed Coho salmon exist in Stanshaw Creek and that the Creek provides a critical cold water refuge for the salmon.

October 17, 2001 - Division Staff Charles Rich and Michael Contreras inspect MMR's diversion facility. During the inspection Division Staff meet with representatives from NMFS, DFG, Karuk Tribe, Klamath Forest Alliance, Konrad Fischer and James Fischer (downstream property owners) and Mr. Cole, along with their attorney. Prior to the meeting, Division Staff take a flow reading of 0.61 cubic feet per second (cfs) downstream of the point-of-diversion. During the meeting, several of the biologists state that they believe lower Stanshaw Creek provides a thermal refuge for juvenile fish when temperatures in the Klamath reach lethal levels.

November 15, 2001 - NMFS issues a letter to the Division summarizing their findings from the October 17, 2001 visit and listing their protest dismissal terms. NMFS states that the following conditions will be sufficient for the removal of their protest:

1. Modify the existing diversion to limit the maximum amount of water diverted to 3 cfs. At the time of inspection there was no mechanism in place to control flow into the diversion facility.
2. Add a fish screen to the existing diversion to prevent fish from entering into the diversion. At the time of the inspection an 8-inch salmonid was observed in the flume of the diversion facility.
3. Return the flow currently diverted from Stanshaw Creek and discharged to Irving Creek back to Stanshaw Creek, which provides important thermal refuge for salmonids in the summer.

4. Maintain a minimum bypass flow of 1.5 cfs at all times and return all tailwater from the hydroelectric plant back to Stanshaw Creek.
5. Provide DFG with access to the POD and all places of use to conduct routine and random monitoring and compliance inspections.

November 20, 2001 - DFG issues a letter responding to the Division's ongoing complaint investigation into Application 29449. DFG reiterates their concern that Stanshaw Creek provides important summer thermal refuge for threatened and endangered Salmonids and that the reduced flow caused by the Diverter's diversion would adversely impact that habitat. DFG proposes instituting a year-round bypass flow of 2.5 cfs to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Additionally, DFG recommends that total flows be bypassed whenever stream flow falls below 2.5 cfs. DFG bases the proposed bypass on field reviews conducted at Stanshaw Creek and on best professional judgment. DFG also indicate that higher bypass flows may be required if 2.5 cfs is too low to maintain Salmonid passage at the mouth of Stanshaw Creek.

May 23, 2002 - Division Staff complete their investigation of the Klamath Forest Alliance complaint against the Diverter and issue a letter with the following conclusions to all interested parties:

1. A court of competent jurisdiction would most likely confirm that the Diverter has a valid pre-1914 appropriative right to divert water from Stanshaw Creek.
2. Evidence had not been submitted substantiating a pre-1914 right for power purposes, but Application 29449 if approved would cover all diversions for power purposes.
3. With the current irrigation system most diversions for power purposes during the low-flow periods of the year were incidental to domestic irrigation needs.
4. Prima facie evidence was available to indicate that lower Stanshaw Creek provides habitat for thermal refuge.
5. Bypasses similar to those present during the October 17, 2001 field investigation would provide adequate habitat for thermal refuge purposes.
6. Measuring flows on Stanshaw Creek on a regular basis was not practical. Any requirement to measure minimum bypass flows should not be established unless the requirement acknowledges that a sufficient diversion of water will be allowed into MMR's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of a bypass back into the stream.

As a result of the conclusions, Division Staff recommend that the Diverter cease all diversion of water whether pursuant to a pre-1914 appropriative right or post-1914 appropriative right derived from Application 29449 or Small Domestic Registration D030945R, unless sufficient flow passes below the POD to maintain a flow in lower Stanshaw Creek, below the Highway 96 culverts, similar to that present during the October 17, 2001 field investigation (~0.7 cfs). Division Staff recommend determining bypass flow in either one of two ways:

1. If full diversion of the creek into MMR's ditch is not allowed, visually estimate the flow so that sufficient flow is available to fill a small, hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River.
2. If full diversion of the creek into MMR's ditch is allowed, install a device capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water passes down the diversion ditch to MMR.

Division Staff recommend closing the complaint by the Klamath Forest Alliance and provide 30 days from the date of the letter for interested parties to issue any protests.

July 8, 2002 - NMFS issues a letter to the Division protesting the conclusions of the Klamath Forest Alliance complaint. NMFS states that the Diverter failed to present any evidence of a pre-1914 hydroelectric use of water and evidence only existed for 0.11 cfs of historical water use. NMFS objects to the Division's recommendation of a 0.7 cfs bypass flow, because it is based solely on a single measurement of the creek during the site visit in October 2001. NMFS argues that the Division's proposed conditions do not protect federally listed species, address returning flow to Stanshaw Creek, or mention installing a fish screen at the POD and that visually estimating flow in the creek is an insufficient method of monitoring flow.

May 5, 2005 – The Diverter submits to DFG a project design to mitigate adverse impacts to salmonids in Stanshaw Creek. The project involves piping the effluent from the Diverter's hydroelectric generation back to Stanshaw Creek above the Highway 96 culverts and modifying the diversion conveyance system to prevent discharges to Stanshaw Creek.

September 3, 2009 - The Division submits a letter to DFG, requesting written conditions for the small domestic use registration (D030945) for the Diverter. The letter references an email to the Division from DFG, stating that the Diverter may need a new Streambed Alteration Agreement (SAA), as well as file an incidental take permit for Coho.

October 15, 2009 – DFG responds to the Division's letter dated September 3, 2009 stating that DFG has not issued a new SAA to the Diverter, because stipulated conditions detailed in DFG's protest (filed with the Division on March 17, 2000) are mutually exclusive to issuing the SAA.

October 1, 2012 - Stoel Rives LLP submits a letter to the Division providing evidence that the Diverter has a pre-1914 right. The letter cites Water Code section 1202, stating that the Division has no jurisdiction over the Diverter's pre-1914 right. The letter argues that previous estimates of historical use were inaccurate and that the Diverter has a right to divert up to 3.6 cfs.

November 2, 2012 - The Division issues a letter to Stoel Rives LLP responding to their October 1, 2012 letter. The Division acknowledges that the Diverter, on December 1, 1998, filed a Statement of Water Diversion and Use (15022) claiming a pre-1914 right. However, the Diverter had not filed any Supplemental Statements pursuant to Water Code section 5104, subdivision (a). Consequently, Statement No. 15022 was inactive in the Division's records. In the letter, the Division provides the Diverter with notice of the Statement requirement and potential penalty. The letter further states that the Diverter should file a new Statement or contact Bob Rinker to see if Statement 15022 can be reactivated, so that online Supplemental Statements can be filed. The letter concludes that unless the Division receives, within 30 days, the information requested in the Division's March 30, 2012 letter, Application 29449 will be canceled pursuant to Water Code section 1276.

November 29, 2012 - Ms. Brenner of Stoel Rives LLP submits an initial Statement of Water Diversion and Use in order to reactivate S015022.

December 3, 2012 - Stoel Rives LLP contacts the Division to reactivate Statement S015022. On the same day the Division reactivates Statement S015022. Statement S015022 claims a pre-1914 right.

January 7, 2013 - The Division issue a letter to Stoves Rives LLP informing them of the cancelation of Application 29449.

Current Investigation

10. The State Water Board has authority to investigate diversions made under pre-1914 appropriative water right claims to determine whether such diversions are within the scope of the claimed right. In addition, State Water Board Staff shall investigate an allegation of misuse of water when an interested person shows cause or when the State Water Board itself believes a misuse may exist. (23 Cal. Code Regs. § 856.)

11. On July 17, 2013 the State Water Board received a complaint alleging that MMR was diverting water in excess of its pre-1914 claim of right, and that Stanshaw Creek was being dewatered in most summers as a result, causing impacts to public trust resources.

12. On September 1, 2014, Lennihan Law, P.C., at the request of the Mid Klamath Watershed Council and in collaboration with the Mid Klamath Watershed Council and Cascade Stream Solutions, released the Marble Mountain Ranch Stanshaw Creek Water Rights Report (Lennihan Report). The Lennihan Report reviewed MMR's chain of title, historical water use, and other information. It determined that, although the Diverter likely lacked a riparian water right, "the likely pre-1914 appropriative water right that can be exercised on Coles' Marble Mountain Ranch is approximately 1.16 cfs, with varying seasons of use."

13. On November 18, 2014, the Mid Klamath Watershed Council and Cascade Stream Solutions released the Marble Mountain Ranch Water Right Investigation: Water Use Technical Memorandum (Water Use Technical Memorandum). The Water Use Technical Memorandum assessed the MMR's beneficial uses. It determined that the Diverter put approximately 0.353 cfs to consumptive beneficial uses.

14. On December 17, 2014, State Water Board Staff met with Mr. Cole for a facility tour to document the diversion facility, diversion facility operation, conveyance system, place of use and water discharge to Irving Creek. After the MMR facility tour, State Water Board Staff attended a Stanshaw Creek Water Conservation stakeholders meeting in Orleans, California. Stakeholders included DFW, NMFS, USFS, Mid Klamath Watershed Council, Karuk Tribe representatives, Mr. Cole, and Fisher. The meeting provided a forum for stakeholders to ask questions and share opinions regarding the Lennihan Report and to solicit discussion about a physical solution and the potential process for obtaining public funding assistance for a physical solution project.

15. During site inspections, State Water Board Staff and North Coast Regional Water Board (Regional Water Board) Staff observed that:

    a. The POD lacks a permanent control structure regulating the amount of water diverted from Stanshaw Creek. The POD requires regular maintenance by augmenting the placement of rocks in the stream channel.

    b. The POD lacks devices to measure the diverted flow and the bypassed flow.

    c. Water is gravity diverted at the POD and conveyed approximately one half-mile in a partially lined and partially unlined diversion ditch to an inlet where water is routed to the water treatment facility via a 2-inch PVC pipe and then through the penstock for hydroelectric power generation and irrigation.

d. MMR has two outfall structures along the diversion ditch downstream from the POD to relieve excess amounts of water that would overflow the diversion ditch during periods of high flow in Stanshaw Creek.

e. The excess water from the two outfall structures discharge back to Stanshaw Creek. The first of two outfall structures is located approximately 50-feet downstream of the POD. The first outfall structure operates in a similar manner as the POD and requires regular augmentation of flash board risers and rocks in the diversion ditch to manipulate the amount of water conveyed by the diversion ditch. The second outfall structure is located approximately 300-feet downstream of the POD and occurs just before the diversion ditch narrows from approximately 60 inches in width to approximately 30 inches in width. Flash boards are used in the second outflow structure to manipulate the amount of excess water discharged from the diversion ditch. Water from the second outfall structure is discharged via a shotgunned culvert into a small unnamed tributary to Stanshaw Creek, then to Stanshaw Creek. The culvert appeared to have caused a large erosion feature in the downslope channel. The two outfall structures spill excess flows well before any water is put to beneficial use.

f. The diversion ditch is located on a steep heavily treed hill slope. The diversion ditch resembles a narrow road cut on a steep hillside. The diversion ditch requires regular maintenance due to sediment deposition, cut bank slumps and landslides. The hillside above the ditch on the inner berm is prone to slumping in to the diversion ditch due to the cut bank and removal of the slope base. Slope loading occurs during heavy rainfall events which increase the mass of materials up-slope, resulting in slumps into the ditch. State Water Board Staff noted limited free board space along the majority of the diversion ditch. The elevation of the outer berm crest of the diversion ditch varies greatly. These variations can be attributed to flows in the diversion ditch historically overtopping the low berm crest areas, resulting in hill slope sloughing and landslides.

g. At the diversion ditch conveyance system inlet that splits the flow of water in the ditch, a portion of the water is routed via gravity by a two-inch PVC pipe to five 3,000 gallon plastic water storage containers that MMR uses for water treatment (Water Treatment Tanks). Water conveyed to the water storage containers are MMR's domestic water supply that serves residents living on the property and guests staying at MMR. Numerous leaks were observed in the tanks.

h. The diversion ditch conveyance system continues below the Water Treatment Tanks and conveys water to a 14-inch diameter penstock pipe. Water that is conveyed through the penstock is used for hydropower and connects to MMR's irrigation system. The power generation facility consists of an 18'' pelton wheel that is powered by two pressurized jets. Water flowing through the hydropower facility discharges into a diversion ditch that flows to a pond. The pond serves as a recreational feature and for fire protection.

i. Irrigation flows are conveyed through a short run of nine-inch diameter steel pipe to a four-inch diameter PVC pipe that extends from the junction at the power plant to sprinklers located in the pastures and hose bibs located throughout the property. Division Staff has calculated that approximately seven acres of garden and pasture land is irrigated. Irrigation was not occurring at the

time of inspection.

j. Water discharged from the hydropower facility is not re-used for irrigation or domestic needs, but rather flows into a ditch below the pond and continues across the property for approximately 850 feet to the south before water drops off a head cut to a ravine and into a tributary to Irving Creek. At the time of the inspection, Division Staff estimated that approximately 1.23 cfs was flowing through the hydropower facility and discharged into Irving Creek. Irving Creek is a tributary to the Klamath River located approximately one-mile downstream of the Stanshaw Creek and the Klamath River confluence.

16. On February 12, 2015, State Water Board Staff conducted a second site inspection. Regional Water Board Staff accompanied State Water Board Staff to document any potential water quality concerns associated with MMR's diversion facility and conveyance system.

a. During the February 12, 2015 inspection Regional Water Board Staff and State Water Board Staff identified 19 areas where the diversion ditch has the potential to fail or has failed, allowing unauthorized discharges onto native slopes and causing the erosion of new stream channels delivering sediment towards or into Stanshaw Creek.

b. During the February 12, 2015 inspection State Water Board Staff took three flow measurements at three locations within MMR's diversion ditch: 1) in the diversion ditch approximately 50-feet below the POD on Stanshaw Creek and below the first outfall structure; 2) in the diversion ditch approximately 100-feet downstream of the 2'' domestic water line intake; and 3) in the diversion ditch below the recreational pond and before flow is discharged to Irving Creek. State Water Board Staff estimates the ditch capacity is approximately 3 to 4 cfs. Flow data and latitude and longitude coordinates for the data collections are summarized below in Table 1.

Table 1: Data Collection Latitude and Longitude

Location	Latitude/Longitude	Flow in CFS
1. Downstream just below POD	41.480845, -123.498259	2.23
2. Within diversion ditch 100' downstream of domestic water line intake & 50' upstream of terminus into penstock	41.474430, -123.503532	1.63
3. Downstream of the pond outlet	41.471788, -123.499589	1.23

c. Location # 1 is located within MMR's diversion ditch just below the POD on Stanshaw Creek. State Water Board Staff recorded a flow rate of 2.23 cfs. Location # 2 is located within the diversion ditch 100-feet downstream of the 2-inch domestic water line intake and approximately 50-feet upstream of the terminus into the penstock. State Water Board Staff recorded a flow of 1.63 cfs at Location # 2. State Water Board Staff calculated a ditch loss of approximately 0.6 cfs by subtracting the flow taken at Location # 2 from Location # 1. The flow at Location # 3 was measured at 1.23 cfs and is located within the diversion ditch just below the pond. Flow was recorded at this location to determine the Diverter's consumptive water demand for domestic and irrigation uses.

The Diverter's domestic water demand was calculated by subtracting Location #3 from Location # 2. Had the Diverter been irrigating during the inspection, the difference between Location #2 and Location #3 also would have included the Diverter's irrigation demand.

17. On February 13, 2015 State Water Board Staff received photographic evidence from the Karuk Tribe Department of Natural Resources of a Coho salmon and five juvenile steelhead fish kill found in the Coho rearing pond located off channel near the confluence of Stanshaw Creek and the Klamath River in late July 2009. The Karuk Tribe claimed the fish mortality was due to a lack of flow entering the pond that led to a water temperature increase when Stanshaw Creek flows were reduced by MMR's diversion. The Karuk Tribe was monitoring temperature in the Stanshaw Creek off channel pond in the summer of 2009, however; the water data logger was buried by sediment in the fall and lost. The basis for the Karuk Tribe's temperature findings are based on another data logger deployed a half mile upstream along the Klamath River in off channel ponds at Sandy Bar Creek that recorded 22.9 Celsius and 19.2 Celsius on July 30, 2009.

18. On March 18, 2015, State Water Board Staff was informed that on August 27, 2013 the Diverter used diesel generators to provide MMR with electrical power, because there was insufficient flow in the diversion ditch to operate the hydro-power system and provide irrigation and domestic water for MMR. Under these conditions water should only be diverted for consumptive uses at MMR. If all water was being used for consumptive uses such as domestic and irrigation needs then there would be no discharges from MMR to Irving Creek. State Water Board Staff was further informed that excess diverted water was leaving the MMR pond and flowing toward Irving Creek. Measured flow during this instance was recorded at 1 cfs.

19. On or about December 3, 2015, the State Water Board and the Regional Water Board sent the Diverter a letter by certified mail and by electronic mail. The letter included a notice of violation (NOV) and a draft cleanup and abatement order (CAO) from the Regional Water Board describing water quality violations and prescribing corrective actions. The letter also included a report of inspection from the State Water Board identifying unreasonable methods of use and unreasonable methods of diversion resulting in waste and public trust violations. The State Water Board report of inspection also prescribed corrective actions. The letter stated that the Regional Water Board and the State Water Board had completed their investigations and would pursue formal enforcement action if the Diverter failed to respond to the letter in 30 days to discuss a response that would substantially address the concerns outlined in the Regional Water Board's CAO and the State Water Board report of inspection.

20. On January 14, 2016, Regional Water Board and State Water Board Staff met with Mr. Cole and various other stakeholders in Orleans, California. NMFS presented instream flow recommendations. The attendees also discussed the Regional Water Board and State Water Board inspection reports and recommended corrective actions. At the meeting Mr. Cole indicated that he had yet to institute any changes in his POD or methods of measuring his diversion and bypass flows.

21. On January 19, 2016, the Diverter, through legal counsel, responded to the Division's December 3, 2015 letter. According to the letter, the Diverter had repaired all leaking Water Treatment Tanks.

The letter also outlined immediate and long-term solutions to address concerns raised in the Regional Water Board's CAO and the State Water Board report of investigation. Nonetheless, due to the lack of timelines, specificity, identified consultants, and other factors, the Division and Regional Water Board Staff concluded that the letter did not demonstrate any commitments to actions substantially addressing the concerns outlined in the Regional Water Board's CAO and the State Water Board report of investigation.

22. On February 12, 2016, the Regional Board and the State Water Board notified the Diverter that, in light of their January 19, 2016 response, they would pursue formal enforcement action.

23. On March 24, 2016, through their legal counsel, the Diverter responded to the February 12, 2016 letter from the Regional Board and the State Water Board. The Diverter stated they were committed to working with the Regional Water Board and the State Water Board to implement corrective actions. The letter stated that the Diverter had retained Cascade Stream Solutions, an engineering firm, to implement the improvements and were working with Mid Klamath Watershed Council to identify funding assistance. The Diverter planned to install a 6" pipe in the conveyance ditch by spring 2016 in order to comply with the bypass flow requirements. Long term solutions, such as returning flow to Stanshaw Creek would not be completed until June 2018. The letter stated that the Diverter would submit a Restoration and Monitoring Plan (RMP) by April 15, 2016, but they failed to submit such a plan by that date.

24. In a letter dated April 15, 2016, the Diverter, through legal counsel, stated they were finalizing plans and a contract for the 6" pipe.

25. On April 20, 2016, in response to the March 24, 2016 and April 15, 2016 letters from the Diverter, Regional Water Board and State Water Board Staff, through legal counsel, e-mailed the Diverter's legal counsel with questions seeking clarification of the Diverter's proposed scope of work, project proposals, and project time schedule.

26. On May 13, 2016, Regional Water Board and State Water Board Staff met with Mr. Cole, the Diverter's legal counsel, NMFS, representatives from the Mid-Klamath Watershed Council, and the Diverter's engineers to discuss the questions listed in the Regional Water Board and State Water Board's April 20, 2016 e-mail, as well as questions about bypass flow requirements and other elements of the project.

27. Although the Diverter has started taking steps to eliminate their misuse of water, they have already fallen behind on their proposed time schedule. The Diverter has already failed to:

- Stabilize the head cut and slope at the Irving Creek outfall. The Diverter proposed completing this task by April 15, 2016.
- Report completion of stabilizing the head cut and slope at the Irving Creek outfall with photographs. The Diverter proposed completing this task by May 1, 2016.
- Lay a six-inch pipe in the diversion ditch and install a headgate at the POD. The Diverter proposed completing these tasks by July 1, 2016.
- Complete energy audit and water efficiency study described in January 19, 2016 letter. The Diverter proposed completing these tasks by July 1, 2016.

Waste, Unreasonable Method of Use, and/or Unreasonable Method of Diversion of Water

28. The Diverter is diverting more water than necessary in order to compensate for the loss of water early in the conveyance system due to significant leaks and ditch failures, as well as discharging water that is not consumptively used to Irving Creek. State Water Board Staff calculated that approximately twenty-seven percent of water diverted at the Stanshaw Creek POD is lost in the conveyance system and sixteen percent of water diverted is consumptively used. Fifty-six percent of the water diverted is non-consumptively used for hydroelectric power generation and discharged to Irving Creek.

29. During the facility inspections on December 17, 2014 and on February 12, 2015, State Water Board Staff observed that the facility's POD intake did not have a control mechanism to manage flow through the open ditch system. Without a control mechanism, such as a diversion gate that has the ability to restrict flow through the POD, water may be diverted in excess of the diversion ditch capacity and in excess of what is reasonably required for beneficial use. The Diverter's lack of a control mechanism to control their POD constitutes an unreasonable method of diversion and results in waste and/or unreasonable use of water.

30. During the low-flow summer months, there are times when the Diverter diverts in excess of their consumptive needs, but due to low flow conditions cannot divert enough water to operate the hydropower generation facility. The Diverter does not restrict their diversion during these periods to what is needed for domestic and irrigation needs only. As a result, the excess water diverted and not consumptively used is discharged to Irving Creek. Without a control mechanism on the POD, the Diverter lacks the ability to limit their diversion from Stanshaw Creek to an amount that can be beneficially used. During these periods, the Diverter relies on diesel generators for power generation. The Diverter's diversion of water in excess of what they can put to beneficial use and subsequently discharging that water to Irving Creek constitutes waste and an unreasonable method of using water.

31. During high flows in Stanshaw Creek water may be diverted in excess of the diversion ditch capacity which causes water to overtop the diversion ditch and results in slumps and landslides. In addition, the continuous deposition of sediment from Stanshaw Creek in the ditch reduces the ditch capacity and increases the risk of water overtopping the low berm areas. Similarly, when material from the up-slope cut bank slumps into the ditch, it can result in partially damming or completely damming the ditch and diverting stream flow out of the ditch and downhill. The diversion ditch thus constitutes an unreasonable method of diversion of water.

32. State Water Board and Regional Water Board Staff observed and documented evidence of ditch failures at nineteen (19) locations along the diversion ditch downstream from the POD, as well as in the discharge channel leading to Irving Creek. State Water Board and Regional Water Board Staff evaluated the Diverter's diversion facility for the potential threat to water quality and found that the ditch is a threat to water quality. Due to the unstable nature of the diversion ditch, the ditch is prone to failing and overtopping. The ditch failures result in erosion and sediment discharges to Stanshaw Creek. Quantities of water that have been historically lost to MMR's diversion ditch failures and overtopping the diversion ditch constitute a threat of unauthorized discharge to surface waters of the state and the United States. Stanshaw Creek is tributary to the Klamath

River, which is on the Clean Water Act section 303(d) list of water quality limited segments for sediment and temperature. The Klamath River also has total maximum daily loads for sediment and temperature. The diversion ditch thus constitutes an unreasonable method of diversion of water.

Harm to Public Trust Resources

33. During inspections, State Water Board and Regional Water Board Staff observed that:

    a. The diversion lacks a fish screen at the POD to prevent fish entrainment. The Diverter's POD intake does not have the ability to prevent fish from becoming entrained. Fish that become entrained in MMR's diversion ditch are killed if the fish are caught in the faster moving water that enters the penstock that conveys water to the hydropower turbines.

    b. The facility's POD lacked devices to measure the diverted flow and bypassed flow. Without devices to measure the diverted flow and the bypassed flow, the Diverter cannot control their diversion to avoid harming public trust interests.

    c. Water diverted from Stanshaw Creek to operate MMR's hydropower generation facility is discharged to Irving Creek rather than returned to Stanshaw Creek.

    d. The headcut is actively eroding, resulting in a discharge of sediment to the Irving Creek watershed and, thence, to the Klamath River. Several trees have fallen due to erosion of their root masses.

    e. Evidence of ditch failures that discharged sediment back into Stanshaw Creek. The discharge of sediment from ditch failures potentially impacts public trust beneficial uses.

34. On August 4, 2016 the State Water Board received updated written bypass flow recommendations for the MMR diversion from NMFS.

    a. NMFS's instream flow analysis stated that Juvenile salmonids rely on the cold water refugia provided by off-channel habitat and tributaries such as Stanshaw Creek. When the mainstem Klamath River temperature rises and flows recede, juvenile coho seek off-channel cooler habitat where they may remain throughout the warm season. The off-channel pond at the Stanshaw Creek confluence with the Klamath River provides important rearing habitat for juvenile coho, as well as for chinook and steelhead.

    b. NMFS minimum bypass flow recommendations for Stanshaw Creek specify that a 2 cfs minimum bypass flow at the Diverter's point of diversion while also maintaining 90 percent of unimpaired flow at all times at the Anadromous Reach with no significant temperature gain between the diverted water and return flow.[3]

[3] Page 11 of the NMFS bypass flow recommendations states "A maximum 3.3 cfs diversion that bypasses at least 90% of the unimpaired streamflow into the anadromous reach throughout the year will provide habitat to help conserve and protect listed coho salmon." NMFS subsequently clarified that the "maximum 3.3 cfs diversion" should have stated the "maximum 3.0 cfs diversion."

This is especially important in the summer due to thermal sensitivity and the need for connectivity and the need for ensuring adequate water quality and maintaining food supply for over-summering coho in the pond.

c. Hydraulic analysis based on five cross sections surveyed in 2002 above the Highway 96 culvert, show that when the Stanshaw Creek instream flows drop below about 1.5 to 2.0 cfs, then the wetted channel width diminishes quickly as flows decrease reducing the available cross sectional area of the stream and decreasing available macroinvertebrate habitat and edge water rearing areas. It is important to maintain this base flow to protect macro-invertebrate production and to provide a minimum level of edge water rearing area.

d. NMFS recommends that the Diverter implement the bypass flows in addition to returning any hydroelectric portion of water to Stanshaw Creek to avoid unnecessary public trust resource impacts. NMFS, DFW, and the Karuk Tribe have asserted that the diversions of water by the Diverter adversely impacts Coho salmon in violation of the federal Endangered Species Act and other laws. DFW has concurred with the recommendations of NMFS.

35. The State Water Board has identified other water rights on Stanshaw Creek. Restricting these water rights before restricting the Diverter in order to implement the recommended bypass flows will not be necessary, because they are too small to have any significant or measurable impacts on the conditions of Stanshaw Creek at the Diverter's POD.

36. The State Water Board has the obligation to protect the interests of the public in trust resources, including interests in commerce, fisheries, recreation, and ecology. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; see generally *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 472 fn. 16; *see also* State Water Board Order WR 2016-0015[4].)

37. The public trust doctrine provides that the State of California, as sovereign, "owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434 [internal quotations omitted].) The purpose of the public trust "evolve[s] in tandem with the changing public perception of the values and uses of waterways." (*Id*.) Ecological values are among those values protected by the public trust. (*Id.* at 435.) The State's obligation as trustee is to preserve this trust property from harmful diversions by water rights holders (*Id.* at 445-448.) The public trust doctrine prevents any party from acquiring a vested right to divert or use water in a manner harmful to the interests protected by the public trust. (*Id.* at 445.) The State Water Board has the obligation to protect the interests of the public in trust resources, including interests in commerce, fisheries, recreation, and ecology. (*Id.*)

38. The reasonable use and public trust doctrines are reinforcing and synergistic. Thus, diverting and using of water in a manner that harms interests protected by the public trust may also constitute a misuse of water. The Diverter's diversion and use of water in a manner that harms interests protected by the public trust constitutes a misuse of water.

[4] Accessible at http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2016/wro2016_0015.pdf

Division of Water Rights Enforcement Action Under the California Code of Regulations, title 23, section 856 *et al.*

39. The State Water Board has the authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held. (*Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 404 [as modified (Sept. 20, 2013)].)

40. The State Water Board has the authority to protect public trust resources, such as fisheries, wildlife, aesthetics, and navigation. This investigation was conducted as part of the State Water Board's continuing authority to protect public trust resources such as the threatened Coho salmon and steelhead fisheries, and to prevent the misuse of water.

41. Pursuant to the California Constitution, Article X, section 2:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or method of use or unreasonable method of diversion of water."

42. Water Code section 100 provides:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."

43. Water Code section 275 provides that the State Water Board shall take all appropriate proceedings or actions to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this State.

44. Under the California Code of Regulations, title 23, section 856 State Water Board Staff shall investigate an allegation of waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water: (1) when an interested person shows good cause; or (2) when the State Water Board itself believes misuse may exist.

45. The California Code of Regulations, title 23, section 857, subdivision (a) of, if the investigation indicates misuse of water has occurred, the State Water Board Staff shall notify interested persons and allow a reasonable period of time in which to terminate the misuse or demonstrate to the satisfaction of the State Water Board Staff that misuse has not occurred.

46. In resolving disputes involving competing uses of water, California courts have frequently considered whether there is a "physical solution" available by which competing needs can best be served. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 383-384; *City of Lodi v. East Bay Municipal Util. Dist.* (1936) 7 Cal.2d 316.) A physical solution is consistent with the constitutional goal of promoting maximum beneficial use of the State's water resources.

47. There is substantial evidence that the Diverter is misusing water. There is also substantial evidence that the Diverter's misuse of water harms public trust interests. There is a threat of continuing misuse of water, because the misuse of water has occurred for many years, previous collaborative efforts among stakeholders to eliminate the misuse of water have been unproductive, and the Diverter has already fallen behind their proposed time schedule for eliminating the misuse of water.

48. On August, 5, 2016, the Regional Water Board issued Cleanup and Abatement Order No. R1-2016-0031 for the Diverter to eliminate the threat of future discharges and to clean up and abate the effects of discharges of soil, rock and miscellaneous debris into Irving Creek, Stanshaw Creek, and the Klamath River. The CAO will address water quality violations the Diverter causes with their diversion facility and conveyance system. Complementary, coordinated enforcement action using both the State Water Board's water right enforcement authority and the Regional Water Board's water quality enforcement authority is necessary to fully address water quality violations, misuse of water, and public trust impacts. The broad issues to be addressed, the agency action and authority used, and the agency best suited to exercise that authority is summarized in Table 2.

Table 2: Issues to be addressed, the authority used, and the agency exercising authority.

Issue	Action and Authority Used	Agency
Discharge of pollutants to Irving Creek (Water Code §§ 13376, 13050; Regional Board Water Quality Control Plan - Action Plan for Logging, Construction and Associated Activities Prohibition 1 and 2)	Cleanup and abatement order (Water Code § 13304)	Regional Board
Discharge of pollutants from the conveyance ditch (Water Code §§ 13376, 13050)	Cleanup and abatement order (Water Code § 13304)	Regional Board
Failure to control amount of water diverted (Article X, § 2; Water Code § 100)	Misuse of water (Water Code § 275: 23 Cal. Code regs. § 857)	State Water Board
Conveyance losses in the conveyance ditch (Article X, § 2; Water Code § 100)	Misuse of water (Water Code § 275; 23 Cal. Code regs. § 857)	State Water Board
Water not put to beneficial use discharged to Irving Creek (Article X, § 2; Water Code § 100)	Misuse of water (Water Code § 275: 23 Cal. Code regs. § 857)	State Water Board
Water discharged to Irving Creek not returned to Stanshaw Creek (Public Trust; Article X, § 2; Water Code § 100)	Misuse of water, public trust (Public Trust; Water Code § 275; 23 Cal. Code regs. § 857)	State Water Board
Inadequate bypass flows for fishery resources (Public Trust; Article X, § 2; Water Code § 100)	Public Trust (Public Trust; Water Code § 275; 23 Cal. Code regs. § 857)	State Water Board

49. Pursuant to the California Code of Regulations, title 23, section 857, Division Staff granted the Diverter a reasonable period of time, until June 30, 2018, to terminate the ongoing misuse of water. Division Staff established a time schedule with deadlines for project tasks, described below in Table 3, to complete corrective actions outlined in the Division's report of investigation and terminate the misuse of water within a reasonable time. The interim deadlines are based on the time schedule for the project and scope of work the Diverter proposed in the March 24, 2016 letter. The interim deadlines were adjusted to follow the date the Assistant Deputy Director requested a hearing and issued this Draft Order. The interim deadlines were also adjusted to reflect the end of construction season – roughly October 15th of each year. Interim tasks likely involving construction and/or permitting were given more time to complete.

50. In implementing the corrective actions, Division Staff requested the Diverter to:

    a. Retain appropriately licensed and experienced California Licensed Professional(s) for all project tasks.

    b. Secure all necessary permits for all projects tasks.

    c. Notify the Division, Regional Water Board, and stakeholders when project tasks are complete.

    d. Submit any plan for a project milestone to the Division for approval.

    e. Copy the Division on any permit applications submitted to other agencies.

f. Provide monitoring reports for Stanshaw Creek return flows to demonstrate stability of improvements.

g. Provide monitoring reports to demonstrate stability of improvements, such as lining or piping, that eliminate the misuse of water in the conveyance system and for installing a water diversion control mechanism, such as a headgate, with a measurement device at the POD.

h. Provide monitoring consistent with the RMP.

i. Provide continuous measurement records of Stanshaw Creek flow downstream of the POD to demonstrate compliance with the NMFS bypass requirement.

j. Measure and report diversions consistent with the requirements set forth in the California Code of Regulations, title 23, sections 907 *et seq.* Insofar as the time schedule requires measuring and reporting diversions sooner than required by the California Code of Regulations, title 23, sections 907 *et seq.*, the Diverter shall comply with the deadlines in Table 3.

k. Submit quarterly progress reports addressing compliance actions. Quarterly progress report deadlines shall be January 1, April 1, July 1, and October 1 through January 1, 2022. These progress reports shall include updates on project development and permitting, descriptions of steps taken to develop and implement the required plans and any unforeseen circumstances that may affect progress on meeting identified deadlines.

Table 3: Time Schedule and Tasks

Date	Tasks
October 15, 2016	• Complete energy audit. • Complete water efficiency study. • Develop implementation plan to return flow back to Stanshaw Creek with input from stakeholders and permitting agencies. • Create plans to implement any feasible recommendations from the energy audit and water efficiency study. Submit Division of Drinking Water (DDW) Public Water System determination or copy of DDW Public Water System permit to Division • Install a permanent water diversion control mechanism at the POD, such as a headgate or other suitable structure(s), adequate to control the amount of water diverted. • Install conveyance infrastructure in the ditch, such as a pipeline or other suitable infrastructure, adequate to eliminate the misuse of water in the ditch. • Install a device for diversion measurement and reporting. • Put all water diverted to beneficial use. • Stabilize head cut and slope at Irving Creek. • Install a flow gauge upstream from the Stanshaw Creek POD and a flow gauge downstream below the Highway 96 culverts.
April 30, 2017	• Cease discharges to Irving Creek. • Submit final plans for review and approval by the State Water Board, Regional Water Board, and all other responsible agencies to return flow to Stanshaw Creek.
October 15, 2017	• Complete approved RMP resources improvements.
March 31, 2018	• Begin construction to return flows back to Stanshaw Creek.
June 30, 2018	• Stanshaw Creek return flow project completed. • NMFS bypass flow recommendations implemented.

51. Pursuant to the California Code of Regulations, title 23, section 857, the Assistant Deputy Director requested a hearing and order finding that the Diverter has misused water and is misusing water. The Division requested a hearing within 90 to 120 days after the October 15, 2016 interim deadline to determine whether any misuse of water has occurred or continues to occur and for an order finding that the Diverter misused water and is misusing water and ordering appropriate corrective actions, with a time schedule, for the Diverter to terminate any misuse of water. If the Diverter meets the milestones for the October 15, 2016 interim deadline, the Division requested that the parties, upon concurrence, could request the State Water Board to postpone the hearing date.

ORDER

IT IS HEREBY ORDERED, pursuant to Water Code section 275, Article X, section 2 of the California Constitution, and Water Code section 100, that the Diverter shall cease misusing

water in accordance with the following schedule and conditions:

1. The Diverter shall cease the misuse of water subject to the time schedule in Table 4.

Table 4: Time Schedule and Tasks[5]

Date	Tasks
October 15, 2016	• Complete energy audit. • Complete water efficiency study. • Develop implementation plan to return flow back to Stanshaw Creek with input from stakeholders and permitting agencies. • Create plans to implement any feasible recommendations from the energy audit and water efficiency study. Submit Division of Drinking Water (DDW) Public Water System determination or copy of DDW Public Water System permit to Division • Install a permanent water diversion control mechanism at the POD, such as a headgate or other suitable structure(s), adequate to control the amount of water diverted. • Install conveyance infrastructure in the ditch, such as a pipeline or other suitable infrastructure, adequate to eliminate the misuse of water in the ditch. • Install a device for diversion measurement and reporting. • Put all water diverted to beneficial use. • Stabilize head cut and slope at Irving Creek. • Install a flow gauge upstream from the Stanshaw Creek POD and a flow gauge downstream below the Highway 96 culverts.
April 30, 2017	• Cease discharges to Irving Creek. • Submit final plans for review and approval by the State Water Board, Regional Water Board, and all other responsible agencies to return flow to Stanshaw Creek.
October 15, 2017	• Complete approved RMP resources improvements.
March 31, 2018	• Begin construction to return flows back to Stanshaw Creek.
June 30, 2018	• Stanshaw Creek return flow project completed. • NMFS bypass flow recommendations implemented.

2. The Diverter shall implement the corrective actions subject to the following requirements:

   a. The Diverter shall have the documentation, plans, and reports required under this Order prepared under the direction of appropriately qualified professionals.

[5] Since the interim deadlines in the time schedule recommended in Table 3 follow the date of this Draft Order, the Division has recommended retaining that time schedule. However, the Division understands that the hearing date it requests will follow the October 15, 2016 interim deadline and appropriate adjustments to the time schedule may be necessary.

As required by the California Business and Professions Code sections 6735, 7835, and 7835.1, engineering and geologic evaluations and judgments shall be performed by or under the direction of registered professionals competent and proficient in the fields pertinent to the required activities. The Diverter shall include a statement of qualification and registration numbers, if applicable, of the responsible lead professionals in all plans and reports required under this Order. The lead professional shall sign and affix their registration stamp, as applicable, to the report, plan, or document.

b. All technical reports submitted by the Diverter shall include a cover letter signed by the Diverter, or a duly authorized representative, certifying under penalty of law that the signer has examined and is familiar with the report and that to his or her knowledge, the report is true, complete, and accurate. The Diverter shall also state if the Diverter agrees with any recommendations/ proposals and whether the Diverter approves implementation of said proposals. Any person signing a document submitted under this Order shall make the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my knowledge and on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

c. The Diverter shall obtain all applicable local, state, and federal permits necessary to fulfill the requirements of this Order prior to beginning work.

d. The Diverter shall notify the Assistant Deputy Director, Assistant Executive Officer of the Regional Water Board, and stakeholders when project tasks are complete.

e. The Diverter shall submit any plan for a project milestone to the Assistant Deputy Director for approval.

f. The Diverter shall copy the Assistant Deputy Director on any permit applications submitted to other agencies.

g. The Diverter shall provide monitoring reports for Stanshaw Creek return flows to demonstrate stability of improvements.

h. The Diverter shall provide monitoring reports to demonstrate stability of improvements, such as lining or piping, that eliminate the misuse of water in the conveyance system and for installing a water diversion control mechanism, such as a headgate, with a measurement device at the POD.

i. The Diverter shall provide monitoring consistent with the RMP.

j. The Diverter shall provide continuous measurement records of Stanshaw Creek flow downstream of the POD to demonstrate compliance with the NMFS bypass requirement.

k. The Diverter shall measure and report diversions consistent with the requirements set forth in the California Code of Regulations, title 23, sections 907 *et seq.* In so far as the time schedule requires measuring and reporting diversions sooner than required by the California Code of Regulations, title 23, sections 907 *et seq.*, the Diverter shall comply with the deadlines in Table 3.

l. The Diverter shall submit quarterly progress reports addressing compliance actions. Quarterly progress report deadlines shall be January 1, April 1, July 1, and October 1 through January 1, 2022. These progress reports shall include updates on project development and permitting, descriptions of steps taken to develop and implement the required plans and any unforeseen circumstances that may affect progress on meeting identified deadlines.

m. All monitoring reports, technical reports or notices required under this Order shall be submitted to: the Assistant Deputy Director, Taro Murano, the Assistant Executive Officer for the Regional Water Board, and Stormer Feiler:

Assistant Deputy Director for the Division of Water Rights – John O'Hagan
John.O'Hagan@waterboards.ca.gov
Taro.Murano@waterbaords.ca.gov

By mail to: State Water Resources Control Board, 1001 I St., 14th floor, Sacramento, CA 95814

Assistant Executive Officer for the North Coast Regional Water Quality Control Board – Shin-Roei Lee
Shin-Roei.Lee@waterbaords.ca.gov
Stormer.Feiler@waterboards.ca.gov

By mail to: North Coast Regional Water Quality Control Board, 5550 Skylane Blvd. Suite A, Santa Rosa, CA 95403

3. The Diverter shall report any changes in MMR's ownership and/or any changes in responsible party or parties operating MMR to the Assistant Deputy Director no later than 30 days prior to a planned change and shall reference the number of this Order.

4. If the Diverter is unable to fully comply with the time schedule due to other federal, state, or local agencies with authority over the work required, the Diverter shall immediately alert the Assistant Deputy Director of the reason for delay and any problems with fully complying with the time schedule and diligently work to overcome such obstacles.

5. The Assistant Deputy Director for Water Rights is authorized to modify the timing and the content of the reporting required by all of the provisions of this order to more effectively carry out the intent of this order.

6. If the Diverter fails to cease misusing water pursuant to this Order, the Diverter shall violate this order and may be subject to enforcement action under Water Code sections 1831 and 1846. The State Water Board may also request appropriate legal action by the Attorney General, pursuant to the California Code of Regulations, title 23, section 859.

7. Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law, including, but not limited to, the authority to bring enforcement against the Diverter for unauthorized diversion or use in violation of Water Code section 1052.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on {DATE}.

_____

Jeanine Townsend
Clerk to the Board