

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – Lennihan Report

- Millview CWD
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Stanshaw Creek
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Supporting Documents – Millview CWD

- MILLVIEW COUNTY WATER DISTRICT v. STATE WATER RESOURCES
CONTROL BOARD - FindLaw
- SWRCB millview opening brief
- wro2002-10
- wro2011_0016.pdf

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MILLVIEW COUNTY WATER DISTRICT v. STATE WATER RESOURCES CONTROL BOARD

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Court of Appeal, First District, Division 1, California.

MILLVIEW COUNTY WATER DISTRICT et al., Plaintiffs and Respondents, v. STATE WATER RESOURCES CONTROL BOARD, Defendant and Appellant; Sonoma County Water Agency et al., Interveners and Appellants.

A139481**Decided: September 11, 2014**

Kamala D. Harris, Attorney General, Robert W. Byrne, Assistant Attorney General, Gavin G. McCabe and William Jenkins, Deputy Attorneys General for Defendant and Appellant State Water Resources Control Board. Bartkiewicz, Kronick & Shanahan, Alan B. Lilly, Andrew J. Ramos; Bruce Goldstein, County Counsel and Cory W. O'Donnell, Deputy County Counsel for Intervener and Appellant Sonoma County Water Agency. Law Office of Michael R. Woods and Michael R. Woods for Intervener and Appellant Mendocino County Russian River Flood Control and Water Conservation Improvement District. Neary and O'Brien, Christopher J. Neary and Jennifer O'Brien for Plaintiffs and Respondents Millview County Water District. Carter, Momsen & Knight, Jared G. Carter, Matisse M. Knight and Alexander C. Rich for Plaintiffs and Respondents Steven L. Gomes and Thomas P. Hill.

In 2001, plaintiff Millview County Water District (Millview) began diverting water from the Russian River under the authority of a pre-1914 appropriative water right assigned to Millview by plaintiffs Thomas Hill and Steven Gomes. On the basis of a citizen complaint, and following an evidentiary hearing, defendant State Water Resources Control Board (Board) issued a cease and desist order (CDO) substantially restricting Millview's diversion of water under the right, finding it had been largely forfeited by a period of diminished use from 1967 through 1987.

Millview, Hill, and Gomes (together, plaintiffs) filed a petition for a writ of mandate requiring the Board to set aside the CDO, contending, among other things, the Board lacked jurisdiction to limit appropriation under a pre-1914 water right and the evidence did not support the Board's finding of a forfeiture because there was no evidence of a timely adverse claim of use. The trial court accepted the arguments and granted the writ.

We affirm the trial court's issuance of a writ directing the Board to set aside its decision, although on narrower grounds. We conclude the Board does have jurisdiction under Water Code section 1831 to issue a CDO precluding excessive diversion under a pre-1914 right to appropriate and the Board properly determined the original perfected scope of the claim. We conclude, however, the Board applied an incorrect legal standard in evaluating the forfeiture of Millview's claimed water right and, applying the proper legal standard, the evidence before the Board was insufficient to support a finding of forfeiture. We remand to the Board for reconsideration in light of our decision.

I. BACKGROUND

Millview is a county water district formed to supply water service in an unincorporated area of Mendocino

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County. In February 2006, a private citizen filed a complaint with the Board, contending that a water right claimed by Millview to support its diversion of water from the Russian River did not authorize the diversion because the right was (1) riparian rather than appropriative and (2) forfeited by long nonuse. Following an investigation, the Board's Division of Water Rights (Division) issued a memorandum concluding Millview's water right, which we will refer to as the "Waldteufel claim," was a valid pre-1914 appropriative right, but the Division agreed use rights under the Waldteufel claim had been largely forfeited. In April 2009, the Board issued a notice of a proposed CDO limiting Millview's diversion of water under the Waldteufel claim to a maximum rate of 1.1 cubic feet per second (cfs) and a total volume of 15 acre feet per year (afa). Hill and Gomes, who had assigned the Waldteufel claim to Millview, and Millview disputed the Board's conclusions and requested a hearing on the proposed CDO.

The evidence presented to the Board demonstrated the Waldteufel claim originated in connection with a 165-acre Mendocino County parcel referred to as "lot 103 of the Rancho Yokayo" (Lot 103). Lot 103 was bounded on one side by the west fork of the Russian River and located just north of the conjunction of the river's east and west forks to form the main stem of the river. In 1913, one J.A. Waldteufel acquired a 33.88-acre parcel subdivided from Lot 103 (Waldteufel parcel), also bounded on one side by the west fork of the river.

The next year, on March 24, Waldteufel recorded a notice of appropriation of water, claiming "One Hundred (100) inches measured under a four inch pressure" for domestic and agricultural use "upon the lands owned by me, contiguous to [the Russian River] on Lot # 103 of Healeys survey and Map of Yokayo Rancho." The Board accepted that this rate of diversion represented a maximum annual volume of approximately 1,450 afa. Waldteufel's notice stated that a copy had been posted "at the point of intended diversion" on the west fork of the river. A local resident, born in 1914, recalled subsequent owners of the Waldteufel parcel pumping water from the river for "at least 50 years" to irrigate alfalfa and tree crops.² Plaintiffs submitted testimony from an expert who estimated that, in 1913, a grower would have used between 932 and 1,310 afa, applied between April and October, to irrigate a 165-acre crop of alfalfa.

The Waldteufel parcel passed through several hands before being acquired by Lester and Bertha Wood in 1945.

Between 1967 and 1987, Lester Wood filed statements of water diversion and use with the Board, typically claiming water use equivalent to between 7.5 and 15 afa to irrigate 30 acres of grapes and walnuts. Historic river flow data suggest the Woods' diversions were not limited by the supply of available water. The Waldteufel parcel appears to have remained in the Wood family until it was sold to Hill and Gomes in 1998.³

There is no data in the record regarding the volume of diversion under the Waldteufel claim for any other period before the beginning of Millview's diversions.

In 2002, Hill and Gomes assigned the Waldteufel claim to Millview, with an option to purchase that Millview later exercised. Millview constructed a new point of diversion in the main stem of the Russian River, downstream from the confluence of the two forks, where the flow of water is greater and more reliable than on the west fork.⁴ Because Millview diverted water year-round to supply homes, including both homes constructed on the Waldteufel parcel and those elsewhere within Millview's boundaries, it expanded the nature and location of water use and the timing of diversions, compared with the prior owners, who appear to have used the claim primarily for agricultural purposes in the dry season. During the years for which information is available in the record, 2001 through 2008, Millview's diversions varied from a low of 3.76 acre-feet in the first year to a high of 1,174.75 acre-feet in the year prior to the filing of the citizen complaint.

The lower Russian River is a managed water system. Water that would otherwise flow into the river during the rainy season is retained and stored in two reservoirs managed by the Sonoma County Water Agency (SCWA). During the dry portion of the year, the SCWA releases water to maintain minimum river flow levels established in standards adopted by the Board. In theory, at least, any excess diversion of water by Millview during the dry season must be compensated by increased water releases from these dams to maintain the minimum flow level. In an order apparently issued in 1998, the Board had determined the west and east forks of the Russian River and "a portion of the mainstem within Mendocino County" are fully appropriated from July 1 to October 31.⁵

Based on this evidence, the Board issued a CDO limiting Millview's diversion under the Waldteufel claim to 15 afa, taken only during the period April through September. Relying on the evidence discussed above, the Board concluded there was no evidence Waldteufel used the diverted water on any property other than the 33.88-acre parcel he purchased in 1913. As a result, the Board noted, "it does not appear" that the Waldteufel claim was ever perfected as a right of appropriation, since Waldteufel's use of water for irrigation on the Waldteufel parcel would have been allowed by the riparian rights available to a parcel adjoining the river. While a finding to this effect would have precluded any appropriation under the claim, the Board did not base its order on this theory because its notice of a proposed CDO did not raise as an issue the validity of the Waldteufel claim. The Board's decision did, however, caution that "the validity of the Waldteufel claim of

right in its entirety is questionable.”

Accepting the Waldteufel claim as appropriate, the Board found plaintiffs had failed to prove Waldteufel had ever actually diverted or used the maximum claimed volume of approximately 1,450 afa. The Board found reasonable Millview's expert evidence regarding the volume of irrigation water that would have been used to irrigate alfalfa in Waldteufel's day, but because it found no evidence he had actually irrigated more than the 33.88-acre parcel he purchased, rather than the full 165 acres of Lot 103 as assumed by the expert, the Board reduced the estimate of Waldteufel's total use proportionately. By assuming the expert's rate of irrigation was used on the smaller parcel, the Board found actual use of between 173 afa and 243 afa, diverted from April through early October. However, the Board further found from evidence of the Wood family's usage that any perfected volume above 15 afa, the maximum documented annual usage by Wood over 20 years, had been forfeited due to nonuse. Given the change in location of the point of diversion, the change in the purpose for the diversion, Millview's service area of 8 to 10 square miles, and Millview's actual diversions in excess of 15 afa, the Board concluded there was a risk Millview would exceed the authorized volume of diversion under the Waldteufel claim. The Board also found excess diversion would be harmful to other users, given the complete appropriation of the river during the months available for diversion under the claim.

Millview, Hill, and Gomes filed a petition for a writ of mandate requiring the Board to set aside the CDO. The trial court granted motions to intervene by appellants SCWA and Mendocino County Russian River Flood Control and Water Conservation Improvement District (Mendocino District). In May 2013, the trial court issued an order granting the requested writ. The court concluded, without explanation, that the Board abused its discretion because “the findings essential to the cease and desist orders are not supported by the weight of the evidence” and “proceeded without or in excess of its jurisdiction in issuing the cease and desist orders.” In an oral statement of decision, the trial court effectively declined to explain these rulings further. The Board, SCWA, and Mendocino District have appealed the court's judgment.

II. DISCUSSION

A. Legal Background1. Water Rights in California

Ownership of California's water is vested generally in the state's residents, but individuals and entities can acquire “water rights,” the right to divert water from its natural course for public or private use. (§ 102; see generally *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 100 (United States).)

California maintains a “dual system” of water rights, which distinguishes between the rights of “riparian” users, those who possess water rights by virtue of owning the land by or through which flowing water passes, and “appropriators,” those who hold the right to divert such water for use on noncontiguous lands.⁶ (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 961 (*El Dorado*).) For historical reasons, California further subdivides appropriators into those whose water rights were established before and after 1914.⁷ Post-1914 appropriators may possess water rights only through a permit or license issued by the Board, and their rights are circumscribed by the terms of the permit or license. Riparian users and pre-1914 appropriators need neither a permit nor other governmental authorization to exercise their water rights. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 428–429 (*Farm Bureau*).)

The nature of the water rights held by riparian users and appropriators differ in several ways. Most pertinent to the matter at hand are the limits placed on diversion. Although riparian users must share with other riparian users on the watercourse, there is no predetermined limit on the amount of water an individual riparian user may divert, so long as the uses to which the diverted water is put are riparian, beneficial, and reasonable. (See *Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 116, 118–119 (*Phelps*) [explaining criteria for “riparian” use].) Appropriators, in contrast, may divert only so much water as is authorized by their particular water right. (*Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th at p. 776.) For pre-1914 appropriators, that volume is determined by historical use, as discussed in more detail below. For post-1914 appropriators, who possess no diversion rights apart from those granted by the Board, the limit on their water usage is established by their permit. (§ 1455.)

In addition, appropriators must “use it or lose it.” “[D]ue to the scarcity of water generally in California, its societal importance, and the peculiar nature of common and multiple rights to water from the same watercourse, the courts have recognized that water rights may be forfeited through nonuse under certain circumstances.” (*North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 559 (*North Kern II*).) Under section 1241, which codifies these common law rulings, if an appropriator fails beneficially to use all or a portion of the appropriated water for a period of five years, “that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water.” In the event of such a forfeiture, the maximum volume of water available for use by the appropriator is reduced by the volume found

to be forfeited, up to the entire claim. (See North Kern II, at p. 583.) Riparian users are not subject to a similar rule. (In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 347, 358.)

The two types of rights holders are also treated differently when the available supply of water is insufficient to satisfy the needs of all those holding water rights in a particular watercourse. Under the “rule of priority,” which governs water use in such circumstances, the rights of riparian users are paramount. Although riparian users must curtail their use proportionately among themselves in times of shortage, they are entitled to satisfy their reasonable needs first, before appropriators can even begin to divert water. (United States, supra, 182 Cal.App.3d at p. 104.) As a result, appropriators may be deprived of all use of water when the supply is short. In turn, senior appropriators—those who acquired their rights first in time—are entitled to satisfy their reasonable needs, up to their full appropriation, before more junior appropriators are entitled to any water. (Id. at pp. 104–105; North Kern II, supra, 147 Cal.App.4th at p. 561.)

Finally, water use by both appropriators and riparian users is limited by the “reasonable use” doctrine, which forbids the waste of water or its unreasonable use. (Cal. Const., art. X, § 2 (Article X, Section 2); *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1479–1480 (*Light*).) Because the Board did not claim Millview's use of diverted water was unreasonable, we will have little occasion to address the doctrine here.

2. Pre-1914 Appropriation Rights

Prior to the December 1914 effective date of the Water Commission Act (Stats.1913, ch. 586, p. 1012), there were two ways to establish a right to appropriate water from a California watercourse.⁸ The first dated to statehood: to begin diverting water and applying it to a beneficial use. (*N.C. & S.C. Co. v. Kidd* (1869) 37 Cal. 282, 311–312.) Once a would-be diverter took some act manifesting an intent to appropriate water, he or she established a claim to the volume of water reasonably necessary to serve the purpose for which the diversion was sought. So long as the diverter acted with due diligence to achieve the intended diversion, did in fact divert within a reasonable time, and used the diverted water for a beneficial purpose, the claim was perfected and had priority over any later established claim. (*Haight v. Costanich* (1920) 184 Cal. 426, 431–433.) The second method, illustrated by Waldteufel's conduct, became available with the 1872 passage of Civil Code sections 1415 through 1421. A person intending to establish a claim of appropriation was required to post a notice at the intended point of diversion and to record a copy of the notice with the county. (Civ.Code, § 1415.) The claim became entitled to priority upon commencement of the diversion. (Civ.Code, §§ 1416–1418.) Under both types of claims, the right to appropriate was limited to the amount of water actually put to a beneficial use by the diverter, rather than the amount claimed or diverted. (*Hufford v. Dye* (1912) 162 Cal. 147, 153; *Duckworth v. Watsonville W. etc. Co.* (1910) 158 Cal. 206, 210–211.)

As noted above, pre-1914 appropriation rights are subject to forfeiture for nonuse. Although there is some uncertainty whether section 1241 applies to pre-1914 rights, since it refers to water rights granted by the Board, an identical five-year rule of forfeiture was historically applied to pre-1914 rights under a statutory predecessor to section 1240.⁹ (See *Smith*, supra, 110 Cal. at p. 127.) As the policy underlying the forfeiture of appropriative water rights was explained in *Smith*: “Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose. Though during the suspension of his use other persons might temporarily utilize the water unapplied by him, yet no one could afford to make disposition for the employment of the same, involving labor or expense of any considerable moment, when liable to be deprived of the element at the pleasure of the appropriator, and after the lapse of any period of time, however great.” (Id. at p. 127.) The burden of proof of the elements of forfeiture lies with the party asserting forfeiture. (*Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 820.)

3. The State Water Resources Control Board

The Board was created as the State Water Commission in 1913 to administer the appropriation of water for beneficial purposes. As originally created, the Board had the “limited role” of granting use rights to water that was not being applied to beneficial purposes and was not otherwise appropriated. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 442 (*Audubon Society*)). “[T]he function of the Water Board was restricted to determining if unappropriated water was available; if it was, and no competing appropriator submitted a claim, the grant of an appropriation was a ministerial act.” (Ibid.) By imposing a reasonableness requirement on the exercise of water rights, the 1928 enactment of the predecessor of Article X, Section 2 “radically altered water law in California and led to an expansion of the powers of the board.” (*Audubon Society*, at p. 442.) Through subsequent legislation and judicial decisions, “the function of the Water Board has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge

As currently constituted, the Board “has been granted broad authority to control and condition water use, insuring utilization consistent with public interest.” (Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist. (1977) 20 Cal.3d 327, 342.) Its enabling statute, section 174, describes the Board’s function as “to provide for the orderly and efficient administration of the water resources of the state” and grants it the power to “exercise the adjudicatory and regulatory functions of the state in the field of water resources.” (Id., subd. (a).) In that role, the Board is granted “any powers that may be necessary or convenient for the exercise of its duties authorized by law.” (§ 186, subd. (a).) The particular power exercised by the Board in this matter is governed by section 1831, which permits the Board to issue a CDO, after notice and the opportunity for a hearing, “in response to a violation or threatened violation” of (1) “[t]he prohibition against the unauthorized diversion or use of water subject to this division”; (2) any term or condition of a water permit; or (3) an order of the Board. (Id., subds.(c), (d)(1)–(3).)

4. Review of Board Decisions

Trial court review of Board CDO is conducted pursuant to Code of Civil Procedure section 1094.5, exercising “independent judgment on the evidence.” (§ 1126, subd. (c).) This review was explained in Phelps : “Code of Civil Procedure section 1094.5 governs judicial review of water right orders issued by the [Board]. [Citation.]

The trial court’s inquiry in such a challenge ‘shall extend to the questions whether the [Board] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [Board] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. [¶] Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence ”

(Phelps, supra, 157 Cal.App.4th at pp. 98–99.) When, as here, the trial court is directed to conduct an independent review of administrative findings, “we review the record to determine whether the court’s factual findings are supported by substantial evidence, resolving all evidentiary conflicts and drawing all legitimate and reasonable inferences in favor of the court’s decision. [Citations.] ‘[T]o the extent pure questions of law (e.g., jurisdiction) were decided at the trial court upon undisputed facts, a de novo standard will apply at the appellate level.’ “ (Cassidy v. California Bd. of Accountancy (2013) 220 Cal.App.4th 620, 627, fn. omitted.) ¹⁰

B. The Board’s Jurisdiction

In ruling the Board acted in excess of its jurisdiction in entering the CDO, the trial court apparently accepted plaintiffs’ argument that the Board lacks jurisdiction to issue a CDO with respect to water diverted pursuant to a pre–1914 right of appropriation. Appellants contend, and we agree, the trial court’s ruling was erroneous on this point.

In a decision rendered after entry of the trial court’s order, *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397 (*Young*), the Third District resolved this issue in favor of jurisdiction. In *Young*, the Board had issued a draft CDO challenging the right of a “water distribution corporation” in the Sacramento–San Joaquin River Delta to divert water. After the corporation provided evidence it possessed a pre–1914 right to appropriate, the Board issued a CDO limiting the corporation’s diversion to the amount allowed by that right. (Id. at pp. 401–402.) The petitioners, customers of the corporation, successfully sought a writ of mandate, arguing the “Water Code does not provide the authority to the [Board] to adjudicate the validity, the extent, or the forfeiture of riparian or pre–1914 appropriative rights.” (Id. at p. 403.) The court acknowledged the long-standing rule that the Board “does not have jurisdiction to regulate riparian and pre–1914 appropriative rights.” (Id. at p. 404.) Yet it also noted the Board “ ‘does have authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held.’ “ (Ibid.) The court harmonized these potentially conflicting principles by noting a permit is required for the diversion of certain categories of water and the Board has the authority under section 1831 to issue a cease desist order against the unpermitted diversion of such water. Included among the categories requiring a permit are “water subject to a pre–1914 right but that was not perfected by putting the water to beneficial use with due diligence [citation], and water for which a right had been perfected by putting the water to use under a pre–1914 right but where the use later ceased.” (*Young*, at p. 404.) Accordingly, *Young* reasoned, “to determine whether the diversion and use of water is unauthorized, it is necessary to determine whether the diversion and use that the diverter claims is authorized by riparian or pre–1914 appropriative rights. The [petitioners’] argument that the Water Board lacks jurisdiction to adjudicate claims of riparian or pre–1914 appropriative rights is flawed because it begs the question central to the appeal, namely, whether a given diversion claimed to be authorized is in fact authorized by a valid riparian or pre–1914 appropriative right. If

it is not, the diversion is unauthorized and subject to enforcement pursuant to Water Code sections 1052 and 1831 ” (Id. at p. 406.)

Young’s reasoning is straightforward and persuasive. In order to exercise the authority given to it under section 1831 to prevent unauthorized diversion of water, the Board necessarily must have jurisdiction to determine whether a diverter’s claim under a pre–1914 right of appropriation is valid. Here, in arguing to the contrary, plaintiffs point to section 1831, subdivision (e), which states: “This article shall not authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to regulation of the board under this part.” This subdivision, however, is subject to the same argument. Necessarily, as Young noted, only water diverted under a valid pre–1914 water right is protected from such regulation; a permit is required to divert water appropriated pursuant to a claimed pre–1914 water right that was never perfected, or has been forfeited, or is otherwise invalid. (Young, *supra*, 219 Cal.App.4th at p. 404.) Because section 1831, subdivision (e) does not protect from regulation water purportedly diverted under a claimed pre–1914 right that does not actually authorize such diversion, the subdivision does not preclude the Board from determining the proper scope of a claimed pre–1914 right.¹¹ (See *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 103–104 [Board has jurisdiction to determine whether unappropriated water exists as a prerequisite to issuance of a permit for appropriation].) Any other rule would permit a diverter to place his or her diversion beyond Board regulation merely by claiming to possess, as opposed to validly possessing, a pre–1914 water right.

Plaintiffs argue Young holds only that the Board can make the preliminary determination of whether a claimed pre–1914 right of appropriation was validly established, not the further issue of the scope of the right granted.

While it is true the only issue directly raised by the facts in Young was the existence of the pre–1914 right, the court’s rationale, as the opinion itself recognized (Young, *supra*, 219 Cal.App.4th at p. 403), grants the Board the authority to determine the scope of a claimed right as well as its existence. Section 1831 allows the Board to issue an order preventing the unauthorized diversion of water. Unauthorized diversion includes not merely the diversion of water under a claimed but invalid pre–1914 right, but also diversion beyond the proper scope of a valid pre–1914 right, whether because the diversion exceeds the maximum perfected amount of water under the right or because an intervening forfeiture has reduced the proper scope. The Board therefore possesses the jurisdiction to determine all of these issues.

Plaintiffs’ further argument that the Board must file a judicial proceeding to determine the proper scope of a pre–1914 water right is both inconsistent with the plain language of section 1831 and unsupported by relevant authority. Plaintiffs cite only *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743 (Forni), a decision rejecting the argument the Board lacks jurisdiction to regulate unreasonable riparian water use. (Id. at pp. 751–752.) Forni did suggest, somewhat inconsistently, that courts must make a final determination of unreasonable use (id. at p. 752), but we have recently rejected that conclusion. (See *Light*, *supra*, 226 Cal.App.4th at pp. 1483–1484 [holding that Forni construed the Board’s authority “too narrowly”].) In any event, Forni concerned a determination of unreasonable use under Article X, Section 2. The Board in this case did not rest the issuance of the CDO on a finding of unreasonable use. Rather, it found Millview’s diversion in excess of 15 afa to be unauthorized by its water rights claim, thereby bringing the determination directly within the scope of the plain language of section 1831, which permits the Board to make such a determination without judicial intervention. Forni had no occasion to address either illegal use or section 1831, which did not exist when the case was decided in 1976.

The Legislature’s intent to expand the Board’s authority into territory formerly occupied by the courts is made clear from the progression of legislation in this area. As originally enacted in 1980, section 1831 allowed the Board to issue a CDO only against violations of the terms of a permit, leaving other types of misuse of water outside the Board’s presumed CDO authority. (Stats.1980, ch. 933, § 13, p. 2958.) When the Legislature expanded section 1831 by amendment in 2002 (Stats.2002, ch. 652, § 6, pp. 3604–3605), it added subdivision (d)(1), which expressly authorizes the Board to issue a CDO against violations of “[t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water ” At the time, although section 1052 directed the Board to prevent the unauthorized diversion of water, the Board could do so only by requesting the Attorney General to commence an action to enjoin such diversion. (§ 1052, subd. (b).) ¹²

Subdivision (d)(1) of section 1831 therefore expanded the Board’s authority into the adjudication of unauthorized diversion, which was previously vested in the courts.¹³

C. The Original Perfected Scope of the Waldteufel Claim

The Board’s decision reached three separate conclusions, one of them only tentative, about the scope of the Waldteufel claim. As discussed above, the Board concluded the claim (1) was never perfected for more than 243 afa by Waldteufel, (2) had been reduced by forfeiture to 15 afa, and (3) might not be a proper claim of appropriation at all, since there was no evidence Waldteufel ever made appropriative use of water under the

claim. In seeking to uphold the trial court's decision, plaintiffs contest all three of these conclusions. We begin with the Board's finding of the original perfected scope of the claim.

Plaintiffs contend the Board applied an incorrect legal standard in concluding the Waldteufel claim had never been perfected for diversion greater than 243 afa. In reaching its conclusion, the Board applied the long-standing rule that an appropriator acquires the right to divert no greater volume of water than he or she has actually put to beneficial use. As held in *Hufford v. Dye*, supra, 162 Cal. 147: "It is the well-settled law of this state that one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose. His right is not measured by the extent of his appropriation as stated in his notice or by his actual diversion from the stream, but by the extent to which he applies such waters for useful or beneficial purposes." (Id. at p. 153, italics added; *Haight v. Costanich*, supra, 184 Cal. 426, 431 ["The quantity of water to which a person becomes entitled by such diversion is not determined by the capacity of the ditch diverting the water; the extent of the right gained by the diversion is limited to the amount of water applied to a beneficial use"]; *Trimble v. Hellar* (1913) 23 Cal.App. 436, 443.)

Plaintiffs' argument that the Board misapplied the law depends upon a purported distinction between common law pre-1914 appropriation rights based on actual diversion and appropriation rights gained through the posting and recording of a notice under the Civil Code. Plaintiffs argue that while a common law claimant may gain a right to use a particular amount of water, a statutory claimant's right is measured not by the quantity diverted but by the rate of flow specified in the notice. Accordingly, they contend, Millview is entitled to divert the rate of flow specified by Waldteufel in his notice, "One Hundred (100) inches measured under a four inch pressure," at any time and for any duration Millview elects, resulting in potential annual diversion far greater than the 243-afa limit found by the Board.

The Civil Code provisions governing a notice of water rights claim do require a claimant to specify a rate of flow in the notice. (Civ.Code, § 1415.) Contrary to plaintiffs' contention, however, nothing in the Civil Code grants to the claimant the right to take this flow if, as they argue, "that flow is present and not subject to a prior right." On the contrary, while the Civil Code specifies the requirements for a claimant to bring the "works" to "completion" (Civ.Code, §§ 1416, 1417), it says nothing about the amount of water to which the claimant will be entitled if the works are completed. Plaintiffs equate "completion" under the Civil Code with perfection of a claim, but they cite no authority for the equivalence and make no argument to support this equivalence. In fact, the only legal significance of "completion" under the notice provisions appears to be to establish the priority of the claim against competing claims. Unless the noticed claim was actually "completed" within the meaning of the code, the claim did not relate back to the date of posting. (Civ.Code, § 1418.) The point was made explicitly in *Duckworth v. Watsonville W. etc. Co.*, supra, 158 Cal. 206, in which the court noted: "Compliance with the sections of the code relative to appropriation are important only in so far as the claimant seeks to have his right relate back to the date of posting. [Citation.] Such compliance will cut off rights accruing between the date of posting and the actual diversion for beneficial purposes. If no such rights have intervened, the actual appropriation may be made without following the provisions of the code." (Id. at p. 211.) Although the diverter's notice in *Duckworth* had claimed 250 inches, the court limited his water rights to the 142 inches he actually diverted and used. (Id. at pp. 210–211; see similarly *Trimble v. Hellar*, supra, 23 Cal.App. at pp. 443–444.) Accordingly, the enactment of the Civil Code provisions did not eliminate the need for actual perfection of a claim through beneficial use.

The sole case cited by plaintiffs in support of their claim that appropriations gained through notice are treated differently than those gained by actual diversion makes no such distinction. (*Simons v. Inyo Cerro Gordo Co.* (1920) 48 Cal.App. 524, 537–538 [holding "the most essential element to the legal appropriation of water is its application within a reasonable time to some useful purpose of industry"].) Nor is such a distinction consistent with the policy underlying California water law. The notice system in the Civil Code provided diverters the opportunity to claim more water than they could actually use, a practice in tension with the objective of putting all water to beneficial use.¹⁴ By limiting claims to the maximum amount of water a diverter actually used, the law ensured senior appropriators did not tie up the right to claimed but unused water.

Even if plaintiffs' legal argument had merit, they failed to provide the necessary evidentiary support for their claim before the Board. Their argument is premised on Waldteufel's claim to a flow of water "under a four-inch pressure," which they assert represented a flow rate of 2 cfs. As discussed above, however, the scope of a pre-1914 claim is not determined by the amount claimed or the amount diverted, but by the amount actually used by the claimant. Further, a claimant's use rights are limited to the season and even the time of day or week when the claimant actually used water. (*Bazet v. Nugget Bar Placers, Inc.* (1931) 211 Cal. 607, 616 [appropriator only acquired right to use water during time of year and time of day when actually used]; *Santa Paula Water Works v. Peralta* (1896) 113 Cal. 38, 42, 44 [diverter who used 50 inches of water once per week

for 24 hours limited to such use by doctrine of forfeiture[.]) If plaintiffs were to acquire the right to divert a 2–cfs rate of flow at any time of day and year, as they now contend, they were required to demonstrate Waldteufel actually diverted this rate of flow in the same manner—in effect, whenever it was available. As discussed above, plaintiffs failed to prove Waldteufel's continuous diversion of 2 cfs; at most, they demonstrated Waldteufel's annual use of 243 afa, as the Board found.

As best we can determine, plaintiffs do not otherwise argue that the Board's determination of the maximum perfected scope of the Waldteufel claim constituted an abuse of discretion.¹⁵ In a footnote in their brief, plaintiffs claim the place of use of the Waldteufel claim was the entirety of Lot 103, rather than merely the Waldteufel parcel, but the “evidence” they cite for the assertion is merely a drawing they prepared for the hearing, unsupported by any actual testimony or documentary evidence of historic water use.¹⁶ Plaintiffs' argument from this exhibit is apparently that Waldteufel's supply of water to the remainder of Lot 103 can be inferred from the fact that the remainder was found to be in agricultural production at a much later point in time. There is no rational basis for such an inference. Even assuming the remainder of Lot 103 was used for agricultural purposes in Waldteufel's time, the logical inference is the owner would have drawn irrigation water from the river under the lot's own riparian rights, since it adjoined the river. Given the lack of evidence of the actual conditions, however, even that inference would be no more than speculation. The record contains no direct evidence of Waldteufel's water use, and the only circumstantial evidence, the notice and deed, suggests Waldteufel irrigated only his own property. Accordingly, there is no basis for invalidating the Board's finding that the maximum perfected appropriation under the Waldteufel claim was 243 afa.

D. The Board's Determination of Forfeiture

For the reasons stated above, we find no error in the Board's conclusion that the maximum permissible diversion under the Waldteufel claim, based on the original perfected scope of the claim, is 243 afa. The Board's order did not allow Millview to divert 243 afa under the claim, however, but further reduced Millview's diversion to 15 afa, based on a finding of forfeiture. We now turn to this conclusion.

Plaintiffs contend the trial court's ruling should be affirmed because the Board's forfeiture finding was not supported by the evidence and resulted from the application of an incorrect legal standard. Relying on North Kern II and a prior unpublished decision in the same action, North Kern Water Storage Dist. v. Kern Delta Water Dist. (Jan. 31, 2003, F033370) (North Kern I), plaintiffs argue (1) a forfeiture cannot occur in the absence of a “clash of rights,” the assertion of a conflicting claim to the water rights in question, and (2) the five-year period for measuring the degree of forfeiture is the five years immediately preceding assertion of this conflicting claim. The Board, in contrast, based its ruling of forfeiture on water use two decades before the administrative proceeding, without evidence of the type of conflicting claim required by North Kern II. Because we agree the Board's forfeiture decision was not supported by evidence of the requisite clash of rights, we need not address plaintiffs' second contention.

The plaintiff in North Kern I, supra, F033370, sought a declaration that the defendant had forfeited a significant portion of its pre-1914 appropriative water rights. The entire natural flow of the subject watercourse, the Kern River, had been fully appropriated and beneficially used since the late 1800's.¹⁷

Throughout much of that time, the defendant, which possessed the senior water rights, had used less water than available under its appropriative rights, but none of the many junior users had sought a judicial declaration of forfeiture. In 1976, the defendant began to increase its historic water use, in the process diminishing the water available to the plaintiff, one of the junior users.¹⁸ (North Kern I, supra, F033370.) Given the long period of the defendant's nonuse, perhaps a century, the North Kern I court was required to identify the appropriate five-year period for measuring forfeiture. The court rejected the defendant's argument that the relevant five-year period should be the five years preceding the filing of the lawsuit. Reasoning that forfeiture is not “adjudicated in the abstract without the presence of a competing claim” and “the [five-year] period selected must bear a direct temporal relationship to the time the contrary claim was made,” the court held that the five-year period ended no later than 1976, when the defendant first increased its use in a manner that diminished the water available to the plaintiff. (Ibid.) The matter was remanded for the selection of a specific five-year period. (Ibid.) North Kern II affirmed the trial court's application of North Kern I, which the trial court interpreted to require the assertion of a contrary claim through formal notice of the claimed forfeiture by the new claimant and a formal response by the original rights holder. (North Kern II, supra, 147 Cal.App.4th at p. 566.)

We agree with plaintiffs and North Kern I that forfeiture of a water rights claim does not occur “in the abstract,” merely because an appropriator uses less water than the maximum claimed appropriation for a five-year period. (North Kern I, supra, F033370.) As that court recognized, what is required for forfeiture is not merely nonuse by the rights holder of its full appropriation, but also “the presence of a competing claim” to the unused water by a rival diverter who is prepared to use, or is using, the surplus. (Ibid.) Although the principle

appears not to be announced explicitly by earlier California decisions, we have not located any finding of a forfeiture in the absence of an existing or potential competing claim.¹⁹ Perhaps more to the point, there is no policy reason for finding a forfeiture until an alternative use has been asserted. The purpose of the forfeiture doctrine is to free unused water for beneficial use. (See, e.g., *Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8, 22; *Smith*, supra, 110 Cal. at p. 127.) If no other beneficial use for the surplus water has been asserted, there is no reason to find a forfeiture.

While we agree forfeiture requires a conflicting claim, the requisite form of that conflicting claim is a separate question, and on this issue we part ways with *North Kern II*. The requirement in *North Kern II*, supra,¹⁴⁷ Cal.App.4th at pages 560, 566, that the conflicting claim consist of a formal notice communicated to the rights holder and a response by the rights holder was imposed primarily as a means for determining the timing of the five-year period in a very complex set of circumstances. While the requirement may have been appropriate in that factual setting, there is no authority to support its imposition in all circumstances. On the contrary, prior decisions have demonstrated far more flexibility, requiring no particular manner of asserting a conflicting claim beyond adverse appropriation and use of the surplus water.²⁰ Further, the *North Kern II* ruling appears to rest on a legally flawed premise. The court based its imposition of the formal claim requirement on its conclusion that any water use by an adverse claimant prior to the assertion of such a formal claim was “permissive” by the original water rights holder and therefore could not constitute a basis for forfeiture. (*Id.* at p. 567.) This analysis conflates the concepts of adverse possession and forfeiture, which are separate and independent doctrines. We have found no authority for the court's holding that a forfeiture cannot occur if an adverse claimant's use would qualify as permissive under the law of adverse possession. On the contrary, section 1241 declares a forfeiture after five years of nonuse, without regard for the permissiveness of any actual adverse use. Prior decisions have never imposed such a requirement; rather, they have expressly distinguished forfeiture from the doctrines of abandonment and adverse possession. (See, e.g., *Smith*, supra, 110 Cal. at p. 126 [doctrine of forfeiture “deals with the forfeiture of a right by nonuser alone”].) There would be no role for the doctrine of forfeiture if it merely reiterated the requirements of adverse possession.

In determining the nature of a conflicting claim in the circumstances presented here, we find instructive an Idaho decision, *Sagewillow v. Idaho Dept. of Water Res.* (Idaho 2003) 70 P.3d 669 (*Sagewillow*), which the *North Kern II* court declined to consider.²¹ Idaho statutory law contains a forfeiture provision essentially identical to section 1241. (*Sagewillow*, at p. 674.) In deference to the legal maxim disfavoring forfeitures, Idaho courts have adopted a “resumption of use” doctrine holding that a five-year (or longer) period of nonuse does not work a forfeiture if “the original owner or appropriator resumed the use of the water prior to the claim of right by a third party.” (*Ibid.*; see *Application of Boyer* (Idaho 1952) 248 P.2d 540, 544.) The plaintiff in *Sagewillow* had purchased land with appurtenant water rights allowing irrigation of over 2,000 acres, but for many years prior to the purchase the prior owner had irrigated only half that amount. (*Id.* at pp. 672–673.) Over the four years following the purchase, the plaintiff gradually expanded its irrigated acreage up to the full amount. The Idaho Department of Water Resources, responding to complaints by other landowners, declared a forfeiture and limited the plaintiff's water use to the amount irrigated by its predecessor. (*Id.* at p. 673.) On appeal, the court held that the plaintiff could not invoke the resumption of use doctrine if a junior appropriator had made a prior “claim of right” by putting the unused water to a beneficial use. (*Id.* at p. 675.) The court rejected the plaintiff's argument that a conflicting claim of right required the commencement of a legal proceeding or other formal action. (*Id.* at p. 677.) Reviewing Idaho decisions, the court found “[a] third party has made a claim of right to the water if the third party has either instituted proceedings to declare a forfeiture, [citation], or has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, [citation], or has used the water pursuant to an existing water right [citation].” (*Id.* at p. 680, fn. omitted.)

While California courts have never expressly adopted a “resumption of use” doctrine, our water law achieves the same result. As discussed above, in California there is no forfeiture in the absence of a conflicting claim. As a result, a California rights holder whose water use falls below the full appropriation for five years or more may nonetheless resume full use at any time if no conflicting claim has been asserted in the meantime. This is the functional equivalent of Idaho's resumption of use doctrine. Moreover, such a “resumption of use” is precisely what *Millview* is seeking with respect to the *Waldteufel* claim: although all evidence suggests only minimal use was made of the *Waldteufel* claim for at least 30 years prior to *Millview*'s license, *Millview* argues it is entitled to resume use of the full appropriation under the claim. We agree California law permits *Millview* to resume such use, but only if no conflicting claim was asserted during the period of nonuse.

The characterization of a conflicting claim in *Sagewillow* is consistent with California authority. (*Sagewillow*, supra, 70 P.3d at p. 680.) In general terms, a conflicting claim has been asserted if another claimant has actually appropriated the water otherwise covered by the original claim and has perfected that appropriation by making beneficial use of the surplus water, or has attempted to appropriate the water by instituting

proceedings to establish a right—for example, in California, by seeking a permit from the Board to appropriate the surplus water or by commencing a legal action for a declaration of rights. (Ibid.; see, e.g., *Bazet v. Nugget Bar Placers, Inc.*, supra, 211 Cal. at pp. 617–618 [defendant forfeited right to stored and unused water when others were willing to use water]; *Lindblom v. Round Valley Water Co.*, supra, 178 Cal. at p. 452 [forfeiture found after plaintiff purchased land below dam and was prepared to use excess water]; *Santa Paula Water Works v. Peralta*, supra, 113 Cal. at pp. 42–43 [plaintiff had used defendant's unused water for nearly 20 years]; *Trimble v. Hellar*, supra, 23 Cal.App. at p. 444 [forfeiture occurs through “nonuse[] for a long period of time and the appropriation of the water meantime by another appropriator”].) So long as the original claimant's use of less than the full appropriation lasts for at least five years and does not end before the assertion of this type of conflicting claim, a forfeiture occurs.

Judged by this standard, we find no substantial evidence in the administrative record to support the Board's finding of forfeiture. In attempting to square its decision with *North Kern II*, the Board found a clash of rights between Millview, on the one hand, and SCWA and Mendocino District. According to the Board, the clash of rights existed because increased diversion by Millview requires similarly increased dam releases, thereby “adversely affect[ing] SCWA's ability to store water” and conflicting with Mendocino District's “rights to store water.” The exercise of these storage rights, however, does not constitute an appropriative use of water, which is required to create a conflicting claim that would preclude Millview's resumption of use. On the contrary, storage of water is not considered to be a beneficial use and cannot lead to the acquisition of a right of appropriative use. (*Lindblom v. Round Valley Water Co.*, supra, 178 Cal. at p. 456.) Further, all summertime diverters from the Russian River have the same impact on SCWA's and Mendocino District's storage rights, since all create the need for compensatory releases of water. Unless Millview's right to resume use has been cut off by the claim of another to use of the Waldteufel rights, Millview is entitled to make the same demands on the watercourse as any other authorized user.

The Board's 1998 finding that the Russian River was fully appropriated is certainly suggestive, but it, too, fails to demonstrate the existence of a conflicting claim, at least standing alone. The finding of full appropriation represents a conclusion “no water remain[ed] available for appropriation” in 1998 (§ 1205, subd. (b)); however, it provides no information about who possessed the existing rights of appropriation and, in particular, how the Board evaluated the Waldteufel claim, if at all, in reaching its conclusion. If the Board based its finding of full appropriation on the assumption the Waldteufel claim was entitled to an appropriation of 15 cfs, the finding would represent a ruling that the remaining allocation claimed by plaintiffs was subject to a conflicting claim in 1998. On the other hand, if the Board allocated a larger appropriation to the Waldteufel claim, or simply failed to consider it, the 1998 finding is less helpful. Either way, plaintiffs are entitled to the opportunity to evaluate and challenge any evidence relied on by the Board in reaching the conclusion a conflicting claim had been asserted.

In sum, if the Board is to declare a forfeiture of the Waldteufel claim, it can do so only upon evidence of a conflicting claim, as discussed above. The forfeiture doctrine has been developed and applied primarily in relatively simple watercourses, in which one or two users claim the entire flow. We recognize that, in a large watercourse like the Russian River, determining whether a particular subsequent appropriation covers a prior, largely dormant claim may offer difficult issues of proof—particularly when consideration is given to public trust uses, which, although they cannot be the subject of a specific appropriation (*California Trout, Inc. v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 816, 821–822), must be taken into account in the allocation of water (§ 1243; see *Light*, supra, 226 Cal.App.4th 1463, 1489).²² Nonetheless, however complex their application in a particular situation, the general requirements for a conflicting claim in California are well-defined.

E. The Riparian Nature of the Waldteufel Rights

To acquire the right to appropriate water in the pre-1914 period, an owner of riparian land was required to establish the diversion of water for beneficial use on noncontiguous lands, as well as the quantity of water so used. (*Crane v. Stevinson* (1936) 5 Cal.2d 387, 398.) Because the Waldteufel parcel adjoined the river, Waldteufel was a riparian owner. Notwithstanding his posted notice, he could not perfect the Waldteufel claim as an appropriative water right without actually using the diverted water on noncontiguous land. As the Board noted, and as we discussed in connection with perfection of the claim, Millview failed to supply evidence of such use.

Plaintiffs argue they demonstrated a right to appropriate because Waldteufel intended to use the water on the remainder of Lot 103, which he did not own. The evidence on which they rely for divining his intent is uncertain, since the only apparent evidence of Waldteufel's intent, the notice, said he planned to use the water “upon the lands owned by me.” In any event, the mere intent to use water on noncontiguous lands, if not successfully implemented, would not perfect a pre-1914 claim of appropriation.

The SCWA argues we could affirm the Board's decision on this basis. As the Board noted, however, it did not raise this issue in the CDO notice. In the absence of such notice, the Board chose not to rely on plaintiffs' failure to provide evidence of appropriative use as a basis for its decision. Accordingly, we do not rely on that failure as a basis for affirming the CDO.

F. Due Process

Plaintiffs argue the trial court's decision can be affirmed on the ground they were not provided a fair hearing by the Board because (1) they were not provided notice of the Board's theory that the Waldteufel claim was not "validly established," (2) the Board denied them discovery of information in its possession beyond that to be produced at the hearing, and (3) there were critical vacancies on the Board at the time of the decision.

The nature of plaintiffs' argument on the first point is unclear. To the extent plaintiffs intend "validly established" to refer to the Board's conclusion there was no evidence Waldteufel's claim was ever perfected as a right of appropriation, the claim was mooted when the Board elected not to rest its order on this conclusion. To the extent plaintiffs intend "validly established" to refer to the Board's finding that Waldteufel was not shown to have perfected a right to appropriate more than 243 cfs, we conclude the notice was adequate. The "facts and information" section of the draft CDO states that Waldteufel "recorded a water right notice" in 1914 and Board staff had concluded it "likely has a valid basis." A conclusion the claim had a "valid basis" does not imply the claim had been perfected to the full extent claimed in Waldteufel's notice, thereby excluding that issue from consideration. The remainder of the section makes clear the Board's concern that historic use under the Waldteufel claim was not sufficient to support the full rights claimed by Millview. Included within such a concern is the possibility actual beneficial use was never sufficient to perfect the claim at the rate claimed by Waldteufel. Plaintiffs' subsequent presentation of expert testimony regarding Waldteufel's likely water use under the claim demonstrates their understanding of their burden.

With respect to the denial of discovery, plaintiffs sought prehearing discovery from the Board with respect to "the Board's previous rights determinations on the West Fork of the Russian River" and the information on which the Board relied in concluding a portion of the Waldteufel claim was forfeited. In denying the application, the hearing officer noted plaintiffs could notice depositions (§ 1100) or subpoena documents from the Board (Gov.Code, § 11450.20) without prior approval and could inspect Board files, which are publicly available documents. As a result, the officer concluded plaintiffs could obtain the information from "a more convenient, less burdensome, and less expensive source." Further, the hearing officer left open the possibility of further discovery if this was insufficient.

We find no abuse of discretion and certainly no denial of due process. In arguing to the contrary, plaintiffs do not explain why the methods of investigation and discovery identified by the hearing officer were insufficient. Nor do they identify any particular information they were denied. Accordingly, there is no basis for concluding the denial of discovery was prejudicial.

As to plaintiffs' final due process claim, the Water Code requires the Board to be composed of four persons having specified water-related professional experience and one person who need not have "specialized experience." (§ 175.) At the time the CDO was entered, the two positions requiring a water law attorney and a water supply civil engineer were vacant. Plaintiffs argue they were denied due process by the absence of professional members, particularly a lawyer.

The Water Code authorizes a quorum of three members of the Board to transact business. (§ 181.) We find no legal basis for requiring a full Board. The sole case cited as authority by plaintiffs for their due process argument holds that a single member of a five-member board cannot properly transact business, clearly not the case here. (*Bandini Estate Co. v. Los Angeles* (1938) 28 Cal.App.2d 224, 229–230, disapproved on other grounds in *Universal Cons.Oil Co. v. Byram* (1944) 25 Cal.2d 353, 363.) Plaintiffs cite no authority to support their argument that due process requires the board of a regulatory agency to include a lawyer when ruling on vested rights. Given the availability of judicial review for such decisions, we decline to impose such a requirement.

Finally, plaintiffs argue the trial court's decision must be affirmed unless appellants demonstrated a "miscarriage of justice," citing article VI, section 13 of the California Constitution.²³ The judicial standard of review for any particular decision represents an application of the constitutional standard for a miscarriage of justice; there is no further showing of injustice required. (E.g., *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801–802.) It may be, as Millview argues, that it will have difficulty supplying water to its customers if the Waldteufel claim is not given the full scope for which Millview argues, but restricting Millview to its lawful and properly established water rights is certainly within the Board's discretion. We note it was a lawsuit by plaintiffs that forced the Board's hand in issuing the notice of a proposed CDO.²⁴

G. Remedy

Code of Civil Procedure section 1094.5, which governs our review, states: “The [reviewing] court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.” Because we conclude the Board's order limiting Millview to diversion of 15 afa under the Waldteufel claim is not supported by the evidence, we must direct the Board to set aside the CDO and reconsider the case. In doing so, and without meaning to limit the Board's discretion in any way, we note three possible alternatives for the Board on remand, in addition to dismissal of the proceeding:

- (1) The Board can set aside the present CDO and enter a new CDO limiting Millview's diversion under the Waldteufel claim to 243 afa, between the months of April and October. As noted above, the Board's finding that the claim was never perfected as an appropriative right, if at all, to any greater annual volume than 243 afa was supported by the evidence and consistent with water rights law;
- (2) The Board can set aside the present CDO and conduct further evidentiary hearings on the issue of forfeiture. While there was no substantial evidence of a conflicting claim presented to the Board, such evidence might be developed; or
- (3) The Board can begin again by issuing an amended notice of draft CDO addressing the issue of the perfection of the Waldteufel claim as a right of appropriation and conduct new administrative hearings directed at this issue, alone or in combination with the issue of forfeiture.

Citing *Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41, and *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, plaintiffs argue the Board should not be given the opportunity to conduct additional proceedings. In *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, the Supreme Court partially disapproved *Newman* and *Ashford*, essentially confining them to their facts, which concerned “disciplinary or punitive sanctions” imposed on a “fundamental or vested right.” (*Voices of the Wetlands*, at pp. 534–535.) In essence, the court limited these rulings to writ review of administrative personnel decisions. Even assuming Millview has a “fundamental or vested right” to water under the Waldteufel claim, the purpose of the Board's proceeding was not to impose sanctions by impairing that right, but rather to determine whether the right exists and, if so, the extent of the right. Under Code of Civil Procedure section 1094.5, the Board is entitled to a remand to reconsider its decision on that issue under the guidance of this court's decision.

III. DISPOSITION

The Board is directed to set aside the CDO and reconsider the matter in light of this decision.

FOOTNOTES

1. All statutory references are to the Water Code unless otherwise indicated.
2. The remnants of an appropriately sized steel pipe are still present near Waldteufel's stated point of diversion.
3. The Waldteufel parcel was deeded to a trust by Lester and Bertha Wood. Robert Wood became the successor trustee in 1988 and eventually transferred the property to his own trust, before deeding it to Hill and Gomes.
4. Unlike west fork flows, which come solely from natural sources, east fork flows are supplemented in the dry season by reservoir releases.
5. We have not found a copy of this order in the record, but it is entitled “Order WR 98–08,” which suggests an issuance date in 1998.
6. The dual system is a fusion of the English common law and the informal rules developed by miners to govern their diversion of water from public lands in the early days of statehood. (See *Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 742, 751–754 [excellent summary of the development of California water law].)
7. In 1913, the Legislature enacted the Water Commission Act (Stats.1913, ch. 586, p. 1012), landmark

legislation that, among other provisions, required any new appropriations to occur by permit. Appropriations established prior to the Act's effective date in December 1914 were grandfathered. (See generally *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 741–742.)

8. Although passed in 1913, the Water Commission Act was “held up by referendum and did not go into effect until December 1914.” (*Irrigation Dist. v. Mt. Shasta P. Corp.* (1927) 202 Cal. 56, 66.)
9. Section 1240 states: “The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.” The Supreme Court imposed a requirement of five years of nonuse. (*Smith v. Hawkins* (1895) 110 Cal. 122, 127 (Smith).)
10. The trial court made no factual findings and did not otherwise explain the basis for its ruling, making it difficult to determine whether the court followed the statutory direction to apply its independent judgment to the Board's factual findings. It makes no difference to our review because, as discussed in detail below, the arguments of the parties raise primarily legal issues, to which we apply a *de novo* standard of review. (*Cassidy v. California Bd. of Accountancy*, *supra*, 220 Cal.App.4th at pp. 626–627.)
11. The same argument refutes plaintiffs' argument that section 1831 should be construed to avoid the risk of conflict with Article X, Section 2, which prohibits regulation of riparian and pre-1914 water rights. The Board does not “regulate” those rights by determining whether they exist and, if so, their proper scope.
12. Prevention of unauthorized diversions under section 1052 included the improper diversion of water under asserted pre-1914 appropriative water rights. (§ 1052, subd. (a); *Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 450 [addressing Board authority under § 38 of the Water Commission Act (Stats.1913, ch. 586, § 38, p. 1032), the predecessor statute to § 1052].)
13. Like *Young*, *supra*, 219 Cal.App.4th at page 405, we find the language of section 1831 sufficiently unambiguous on this point as to preclude consideration of the legislative history proffered by plaintiffs. (See *Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1063, disapproved on other grounds in *People v. Harrison* (2013) 57 Cal.4th 1211, 1230, fn. 2 [use of extrinsic materials permitted only if language of statute is ambiguous].)
14. In a study performed in 1901, investigators found no less than six separate notices claiming all of the water of the San Joaquin River, and they estimated the aggregate of the claims in the state amounted to “‘enough moisture to submerge the continent.’” “(1 Hutchins, *Water Rights Laws in the Nineteen Western States* (1971), at p. 295.)
15. At the outset of their brief, plaintiffs state their intention to incorporate all of the arguments made in their pleadings before the trial court. Such incorporation is not permitted, and we have considered only the arguments made in their appellate brief. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 294, fn. 20.)
16. In their discussion of forfeiture, they also argue that other contemporary evidence, such as a purported conclusion reached by Division staff, constitutes evidence that Waldteufel irrigated the entirety of Lot 103. We have reviewed this evidence and conclude none of it provides the slightest indication of Waldteufel's actual water use.
17. The California Rules of Court preclude our citation of a nonpublished decision except as “relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel.” (Cal. Rules of Court, rule 8.1115(a) & (b) (1).) Because North Kern II expressly relied on the statement of facts and legal reasoning of North Kern I without reiterating either in its opinion, we conclude that limited citation to North Kern I is permissible as necessary to explain the published rulings in North Kern II.
18. We have considerably simplified the complex factual circumstances of North Kern I, *supra*, F033370, in an effort to isolate the facts pertinent to our concerns here.
19. The cases are too numerous to list in the text. As examples, see generally *Bazet v. Nugget Bar Placers, Inc.*, *supra*, 211 Cal. at pages 617–618 (defendant forfeited right to stored and unused water when others were willing to use water); *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450, 452 (plaintiff purchased land below dam and was prepared to use excess water); *Hufford v. Dye*, *supra*, 162 Cal. 147, 150 (defendant prepared to use water claimed to have been forfeited by plaintiff); *Santa Paula Water Works v. Peralta*, *supra*, 113 Cal. at pages 42–43 (plaintiff had used defendant's unused water for nearly 20 years); *Smith*, *supra*, 110 Cal. at page 127 (forfeiture prohibits retention of rights “as against other appropriators”).
20. In *Smith*, *supra*, 110 Cal. at pages 127–128 and its subsequent decision, *Smith v. Hawkins* (1898) 120

Cal. 86, 88, and in *Lindblom v. Round Valley Water Co.*, supra, 178 Cal. at page 456, the courts measured forfeiture from the date of filing of a lawsuit brought to settle the water rights. (See also *Gray v. Magee* (1930) 108 Cal.App. 570, 579.) In *Santa Paula Water Works v. Peralta*, supra, 113 Cal. 38, 44, *Hufford v. Dye*, supra, 162 Cal. 147, 151, 159, and *Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 595, the courts based the forfeiture on a historic practice that dated from many years prior to the filing of the lawsuit. In *Bazet v. Nugget Bar Placers, Inc.*, supra, 211 Cal. 607, the court held that forfeiture occurred when the defendant stored water, and thereby failed to use it beneficially, for a period of five years, during which persons with a riparian claim on the water were available to use it. (Id. at pp. 617–618.)

21. In seeking an earlier date of commencement for the five-year period, the plaintiff in *North Kern II* had argued “mere use by a junior appropriator can begin the period of measurement for forfeiture purposes,” without the assertion of the type of formal claim required by the court, because “mere beneficial use of water by a junior appropriator constitutes a ‘claim of right’ to the water,” citing *Sagewillow*. (*North Kern II*, supra, 147 Cal.App.4th at pp. 566–567.) The *North Kern II* court declined to consider the argument under the doctrine of law of the case, concluding the contention “directly conflicts with this court’s prior holding that such use is permissive” in *North Kern I*. (*North Kern II*, at p. 567.)

22. The public trust doctrine requires the Board to take certain public uses, such as navigation, recreation, and the preservation of wildlife habitat, into account when allocating water use. (*Audubon Society*, supra, 33 Cal.3d 419, 434, 446–447.) In *Audubon*, the leading case on the public trust doctrine, the Supreme Court held that the Board was not statutorily required to issue permits for the appropriation and beneficial use of all available water. By allowing some water to remain unappropriated, the Board could effectively allocate the water for public trust uses. (Ibid.)

23. Plaintiffs also cite a Court of Appeal decision that was depublished by a grant of review after the filing of their brief, which we cannot consider.

24. In its original memorandum responding to the citizen complaint, the Division did not recommend immediate enforcement action, and the Board took no action. Concerned that the memorandum created uncertainty about their exercise of the *Waldteufel* claim, plaintiffs sued the Board. Although the trial court denied the requested writ of mandate, concluding the Board had taken no action subject to judicial review, it suggested relief might be available at some future time if the Board did not “either disavow the conclusion of forfeiture or pursue a due process course to reviewable finality.” Only after this ruling did the Board issue the notice of proposed CDO.

Margulies, Acting P.J.

We concur: Dondero, J. Banke, J.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

**MILLVIEW COUNTY WATER DISTRICT,
et al.,**

Plaintiffs and Respondents,

v.

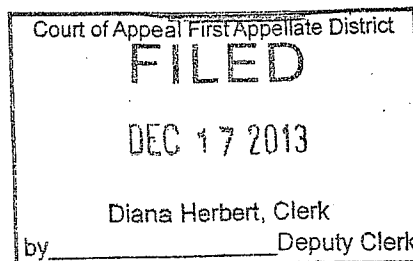
**CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD,**

Defendant and Appellant,

SONOMA COUNTY WATER AGENCY, et al.,

Real Parties in Interest and
Appellants.

Case No. A139481



Mendocino County Superior Court, Case No. SCUCVPT 1259715
The Honorable Leslie C Nichols, Judge (Ret.)

**APPELLANT STATE WATER RESOURCES
CONTROL BOARD'S OPENING BRIEF**

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,, DIVISION 1**

Case Name: **MILLVIEW COUNTY WATER DISTRICT,
et al. v. CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD** Court of Appeal No.: A139481

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(Cal. Rules of Court, Rule 8.208)

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SUPPLEMENTAL CERTIFICATE ☐

Please check the applicable box:

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☐ Interested entities or persons are listed below:

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The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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(Date)

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INTRODUCTION

In the trial court, plaintiffs, Thomas Hill, Steven Gomes, and Millview County Water District (Millview) challenged the State Water Resources Control Board's ("Board") cease and desist order, Order WR 2011-0016. Plaintiffs claim a right to divert water under a pre-1914 appropriative right—the Waldteufel claim of right—that Hill and Gomes purchased in 1998, and sold to Millview. Order WR 2011-0016 prohibits Plaintiffs from diverting more than 15 acre feet per year under the Waldteufel claim of right. The Board found that to the extent the Waldteufel claim of right could have been perfected, it was originally perfected in the early twentieth century and authorized diversion of no more than 243 acre feet per year. However, that right was forfeited and reduced to 15 acre feet per year based on non-use during a twenty year period of time between 1967 and 1987. The Board therefore issued the subject cease and desist order because Plaintiffs diverted in excess of 15 acre feet per year between 2002 and 2008. Plaintiffs claim it has the right to divert up to 1400 acre feet per year under the Waldteufel claim of right.

The trial court found that the Board exceeded its jurisdiction in issuing the cease and desist order, and that the Board's essential findings are against the weight of the evidence. However, the trial court erred because the Board has jurisdiction to enjoin the illegal diversion of water, including diversions under a pre-1914 claim of right, and the Board's findings are supported by undisputed facts established by uncontradicted evidence. Therefore, the Board requests that this Court reverse the trial court's judgment, and remand with directions to enter judgment for the Board, and real parties in interest, the Sonoma County Water Agency, and the Mendocino County Russian River Flood Control and Water Improvement District (Mendocino County Flood Control District).

STATEMENT OF THE CASE

This case was initiated on February 9, 2012, when Plaintiffs filed a Petition for Writ of Mandamus, naming the Board as the sole defendant. (Clerk's Transcript on Appeal (CT), 3.) Shortly thereafter, Plaintiffs filed a motion seeking an alternative writ and stay of the Board's cease and desist order WR 2011-0016. (CT 94-472.) The Board filed a motion to change venue or assignment of a neutral judge under Code of Civil Procedure section 394. (CT 924-931.) The Real Parties in Interest, Sonoma County Water Agency, and the Mendocino County Russian River Flood Control and Water Conservation Improvement District (Mendocino County Flood Control District), each filed motions seeking to intervene in the matter. (CT 924-956, 1025-1068.)

The trial court granted the Real Parties in Interests' motions to intervene. (CT 2037-2040, 2049-2050.) The trial court initially denied the Board's motion to change venue, and stayed the proceedings pending review by this Court of the order denying the motion to change venue. (CT 1952-1975, 2032-2033.) The Board filed a petition for a writ of mandate in this Court seeking review of the trial court order denying its motion to change venue or for assignment of a neutral judge. (See First District Court of Appeal Case No. A135114.) This Court granted the Board's petition, issued a writ of mandate to the trial court, and ordered it to grant the motion to change venue or for assignment of a neutral judge. (CT 2085-2088.) Real Parties in Interest each filed cross complaints against Plaintiffs. (CT 2063-2075, 2103-2120.)

Based on a stipulation of the parties, the case was reassigned to an out of county neutral judge sitting by designation. (CT 2121-2126, 2127.) After the reassignment, the trial court denied Plaintiffs' motion for an alternative writ or stay of the Board's cease and desist order WR 2011-0016, finding that "the court is not satisfied that the public interest will not suffer

if the stay is granted. Further, the court is unable to find that the [State Water Board] is unlikely to prevail ultimately on the merits.” (CT 2306.)

On May 10, 2013, the trial court issued its Notice of Decision and Order and Statement of Decision granting the Plaintiffs’ petition stating that “[t]he requested peremptory writ shall issue.” (CT 2709-2712.) The Real Parties in Interest dismissed their cross claims, and on July 22, 2013, the trial court entered judgment in this matter, and issued a peremptory writ of mandate. (CT 2772-2781, 2797-2810.) On August 6, 2013, the Board timely filed its Notice of Appeal. (CT 2826-2828.)

STATEMENT OF CALIFORNIA WATER LAW

In order to properly understand the breadth of the Board’s authority and exercise of discretion when it issued Order WR 2011-0016, this brief begins with a background overview of California water law.

I. CALIFORNIA WATER LAW RECOGNIZES RIPARIAN AND APPROPRIATIVE WATER RIGHTS.

“California operates under a ‘dual’ or hybrid system of water rights which recognizes both doctrines of riparian rights and appropriation rights.” (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 101.) “The riparian doctrine confers upon the owner of land the right to divert the water flowing by his land for use upon his land, without regard to the extent of such use or priority in time. [citation omitted.] All riparians on a stream system are vested with a common ownership such that in times of water shortage all riparians must reduce their usage proportionally.” (*Ibid.*) However, a riparian owner may not seasonally store water. (Attwater & Markle, *Overview of California Water Rights and Water Quality Law* (1988) 19 Pac. L.J. 957, 970, reprinted in 67C West’s Ann. Wat. Code (2009 ed.) p. 1, 8-9, 39 (Attwater & Markle) citing *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316.)

“The appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators.” (*United States v. State Water Resources Control Board, supra*, 182 Cal.App.3d at 101.) “[A]ppropriation rights are subordinate to riparian rights so that in times of shortage riparians are entitled to fulfill their needs before appropriators are entitled to any use of the water. [citation omitted.] And as between appropriators, the rule of priority is ‘first in time, first in right.’ [citation omitted.] The senior appropriator is entitled to fulfill his needs before a junior appropriator is entitled to use any water.” (*Id.* at 101-102.)

II. ALL WATER RIGHTS ARE LIMITED BY THE BENEFICIAL USE TO BE SERVED.

Article X, section 2, applies to all types of water rights in California:

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....

(Cal. Const., art.X, § 2.)

Article X, section 2, requires water resources to be put to beneficial use to the fullest extent of which they are capable, and limits all water rights to the amount of water reasonably required for the beneficial use to be served. (*Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 582-584; *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 366-67; see also *Smith v. Hawkins* (1895) 110 Cal. 122, 127-128.)

III. RIPARIAN, PRE-1914 APPROPRIATIVE RIGHTS UNDER THE COMMON LAW AND CIVIL CODE, AND APPROPRIATIVE RIGHTS UNDER THE WATER CODE.

A. Riparian Rights.

Because “the riparian doctrine confers upon the owner of land the right to divert the water flowing by his land for use upon his land,” land owners do not need a water permit or a water license from the Board to divert water. (*United States v. State Water Resources Control Board, supra*, 182 Cal.App.3d at 101.) Rather, “riparian rights [are] . . . acquired through ownership of land contiguous to the watercourse.” (*Id.* at 102.)

B. Appropriative Rights.

In contrast to riparian rights, which are based on ownership of riparian lands, appropriative rights are perfected by diverting the water and putting it to beneficial use, in accordance with procedures initially recognized by common law and later codified in statute. (*Attwater & Markle, supra*, 19 Pac. L.J. 957, at pp. 962-967, 972-73, reprinted in 67C West’s Ann. Wat. Code (2009 ed.) 4-5, 9-10, 13.) There are two general categories of appropriative rights: those initiated under the permitting and licensing procedures now codified under the Water Code and those initiated and acquired under the common law principles and statutes that applied previously. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429.) Appropriative rights initiated before the December 19, 1914 effective date of the permit and license system, and perfected by putting the water to beneficial use with due diligence, are commonly referred to as pre-1914 rights. (*People v. Murrison* (2002) 101 Cal.App.4th 349, 359 fn. 6; see Wat. Code, § 1202, subd. (b).)

1. Pre-1914 Appropriative Rights Perfected Under the Common Law and Civil Code.

“Upon the discovery of gold and the development of the California mining industry, water was often diverted from streams passing through government lands to be used on nonriparian lands.” (*United States v. State Water Resources Control Board, supra*, 182 Cal.App.3d at p. 101.)

“Initially, rights to appropriate water were acquired by actual diversion and use of the water.” (*Id.* at 102.) In 1872, the Legislature enacted statutory procedures for initiating and perfecting an appropriative water right. (Civ. Code, § 1414 et seq.) The Civil Code procedures were not exclusive, however. One could still acquire an appropriative right, without following the statutory posting requirements, by diverting the water and putting it to beneficial use. (*Duckworth v. Watsonville Water & Light Co.* (1910) 158 Cal. 206, 211.)

The Waldteufel claim of right was initiated by following the Civil Code procedures. (Administrative Record (AR) 1327.)¹ The Civil Code procedures provided a person could initiate an appropriation of water by posting notice in a conspicuous place at the point of diversion stating:

1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;
2. The purpose for which he claims it, and the place of intended use;
3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it.

¹ Each page number in the AR includes the letters “SWRCB” followed by a page number. For ease of reading, this brief’s citations eliminate the letter portion of the page identification in the AR, and refer solely to number identification.

(Civ. Code, § 1415.) A copy of the notice needed to be filed with the county recorder within ten days of its posting at the point of diversion. (*Id.*) And within sixty days of filing the notice with the county recorder, an individual needed to commence construction of the diversion works, and diligently complete the diversion works. (*Id.*)

As early as 1898, the Supreme Court held that “an appropriation of water by the owner of land by means of a ditch is not measured by the capacity of the ditch through which the appropriation is made, but is limited to such quantity, not exceeding the capacity of the ditch, as the appropriator may put to a useful purpose.” (*Smith v. Hawkins, supra*, 120 Cal. at 88; See also, *Hufford v. Dye* (1912) 162 Cal. 147, 153 [case involving Civil Code appropriation] [“It is the well-settled law of this state that one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose. His right is not measured by the extent of his appropriation as stated in his notice or by his actual diversion from the stream, but by the extent to which he applies such waters for useful or beneficial purposes.”]; accord *Trimble v. Heller* (1913) 23 Cal.App. 436, 443 [case involving Civil Code appropriation] [“The size of the ditch is a factor in aid of the intention of the party making the appropriation of the water. It is not, however, conclusive. The true test is the amount of water actually used for beneficial purpose.”]; *Thayer v. California Development Co.* (1912) 164 Cal. 117, 137; *Erickson v. Queen Valley Ranch Co., supra*, 22 Cal.App.3d at 584 [“Plaintiff’s existing appropriative right is measured not by the flow originally appropriated and not by the capacity of the diversion ditch, but by the amount of water put to beneficial use at the delivery point plus such additional flow as is reasonably necessary to deliver it.”].)

The Civil Code procedures served to record when the appropriation was initiated, and how much was intended to be appropriated. But, the other elements necessary to perfect an appropriative right, including the need to control the water and put it to beneficial use, and the principle that beneficial use is the measure of the right remain the same. (1 Slater, California Water Law and Policy (2012) § 2.13, p. 2-34 [“The essential judicially developed elements for perfecting an appropriative right remained virtually unchanged with the adoption of the Civil Code. However, the Civil Code provisions did serve to clarify several matters including the date on which an intention to appropriate was announced.” (footnote omitted).]; (Attwater & Markle, *supra*, 19 Pacific L. J. at 966-967, reprinted in 67C West’s Ann. Wat. Code (2009 ed.) at 7 [“A diversion project under the California Civil Code would invoke a statutory variation of the doctrine of relation back. The priority of right subsequently acquired through beneficial use of water would be the date of posting of the notice. . . The Civil Code provisions[’] . . . fundamental purpose was to supply a more precise means of fixing the date of priority of an appropriative right.”])

2. Appropriative Rights Perfected Under the Water Code.

“Beginning in 1914 . . . a statutory scheme has provided the exclusive method of acquiring appropriation rights.” (*United States v. State Water Resources Control Board*, *supra*, 182 Cal.App.3d at p. 102.) The Water Commission Act became effective in 1914 (Stats. 1913, ch. 586) and was later codified in division 2 of the Water Code. Section 11 of the Water Commission Act, later amended and codified as Water Code sections 1201 and 1202, described the water over which the Board acquired permitting authority as all water not otherwise properly diverted or used under a pre-

Water Commission Act (riparian or pre-1914) right.² Consequently, pre-1914 appropriative rights need no permit from the Board. However, since 1914 “an application for appropriative rights must . . . be made to the [State Water] Board for a permit authorizing construction of necessary water works and the taking and use of a specified quantity of water.” (*Ibid.*)

“Once an appropriative right permit is issued the permit holder has the right to take and use the water according to the terms of the permit. ([Wat. Code] §§ 1381, 1455.) Upon compliance with the permit terms, a license is issued and the appropriative rights become confirmed. ([Wat. Code] §§ 1600-1610.) Until the license is issued, the [State Water] Board may reserve jurisdiction to amend the terms of the permit. [Wat. Code] § 1394.)” (*Ibid.*)

C. All Water Diverters Must File Statements of Diversion With The Board.

Even though diversions authorized under riparian and pre-1914 appropriative rights are exempt from the permit and license system, the diverters must generally file statements of diversion and use with the Board. (Wat. Code, § 5101.) These statements include the amount of use and the purpose of use for the year being reported. (See e.g., AR 1260-1267.)

² Water Code section 1201 provides:

All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.

IV. ALL APPROPRIATIVE RIGHTS ARE SUBJECT TO FORFEITURE FOR NON-USE.

Generally, an appropriative right—whether a pre-1914 right or an appropriative right perfected under the Water Code—is forfeited under the Water Code and reverts to the public if the appropriator fails to put it to beneficial use during a five year period of time. (Wat. Code, §§ 1240, 1241; *Erickson v. Queen Valley Ranch Co*, *supra*, 22 Cal.App.3d at 582; *Wright v. Best* (1942) 19 Cal.2d 368, 380-381.) A forfeiture may be complete or partial. (*Erickson v. Queen Valley Ranch Co*, *supra*, 22 Cal.App.3d at 582)

Under Water Code section 1241, the forfeiture period for a post 1914 water right perfected under the Water Code is five years. (Wat. Code, § 1241, *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 933-934 [interpreting section 1241 to apply to water appropriated subject to the permit and license system under the Water Code.]) Under Water Code section 1240, the forfeiture period for a pre-1914 water right is also five years. (*Crane v. Stevinson* (1936) 5 Cal.2d 387, 398[interpreting former Civil Code section 1411]; *Erickson v. Queen Valley Ranch Co.*, *supra*, 22 Cal.App.3d at 582; see *Wright v. Best* (1942) 19 Cal.2d 368, 380-81 [interpreting former Civil Code section 1411]; Attwater & Markle, *supra*, 19 Pacific L. J. at p. 967, reprinted at 67C West's Ann. Wat. Code (2009 ed.) p. 7 [statutory forfeiture was enacted as part of the 1872 Civil Code]; 68 West's Ann. Wat. Code (2009 ed.) foll. § 1240, p. 99 [Wat. Code § 1240 is derived from former Civ. Code, § 1411]; see *Trimble v. Heller*, *supra*, 23 Cal.App. at p. 443, [quoting former Civil Code, §1411 in support of the conclusion that beneficial use is the measure of the right.])³

³ There are other legal theories which have a similar effect as forfeiture, but that are substantively distinct from forfeiture. A water right can be lost by abandonment, and from the moment of abandonment the right ceases to exist. (*Smith v. Hawkins*, *supra*, 110 Cal. at 126.) Water
(continued...)

Consistent with the requirements of Article X, section 2, the purpose of the forfeiture doctrine, and the due diligence requirements for perfecting an appropriative water right, is to ensure that appropriators do not simply hold their rights, preventing water resources from being put to the maximum beneficial use for all. (*Smith v. Hawkins, supra*, 110 Cal. at 127; see also *North Kern Water Storage Dist. v. Kern Delta Water Dist. (North Kern II)* (2007) 147 Cal.App.4th 555, 577, 584 [allowing a diverter to freeze an entitlement to appropriate water, regardless of nonuse, would contravene the important public policy embodied in article X, section 2, of the California Constitution].)

STATEMENT OF FACTS

I. THE BOARD'S INVESTIGATION OF MILLVIEW'S DIVERSION OF WATER UNDER THE WALDTEUFEL CLAIM OF RIGHT.

A. Lee Howard Filed an Administrative Complaint.

The Board's investigation of Millview's diversion of water under the Waldteufel claim of right began when Lee Howard, a Ukiah resident, filed an administrative complaint by letter alleging an unauthorized diversion of water. (AR 1352.) Mr. Howard alleged that Millview was diverting water under claim of a pre-1914 water right which it had purchased from Plaintiffs Hill and Gomes, and which no longer existed because it had not been used continuously since 1914. (AR, 607, 1352.)

(...continued)

rights can be lost, and conversely acquired, by prescription based on the continuous, uninterrupted, and adverse use for a period of five years. (*Ibid.*) However, prescription will not lie as against the State when it seeks to enjoin unauthorized use. (*People v. Shirokow* (1980) 26 Cal.3d 301, 312, fn. 15.)

B. Millview County Water District Diverted Water Under the Waldteufel Claim of Right Which It Purchased From Thomas Hill and Steven Gomes.

In 1998, Plaintiffs Hill and Gomes acquired from the Robert Wood Living Trust a parcel of land approximately 32 acres in size, located on the Russian River near the City of Ukiah. (AR 1269, 1284.) Hill and Gomes also acquired all water rights associated with the parcel including the Waldteufel claim of right. (AR 1269, 1284.) In 2001, Hill and Gomes sold most of the parcel to Creek Bridge Homes, LLP., which constructed 125 homes on the property. (AR 1189, 1276, 1284.)

In 2002, Plaintiffs Hill and Gomes leased the Waldteufel claim of right to Millview for four years, and sold Millview an option to purchase the right. (AR 1279-1282; 1396:13-17.) Millview's option remained valid until 2009, when it purchased the entire Waldteufel claim of right, with a substantial down payment, and a loan for the remainder of the purchase price.⁴ (AR 1365, 1368-1369; CT 2160:19-20; 2182:11-18.) Millview paid approximately \$700,000, in lease, option, and down payments. (CT 2160:19-20; 2182:11-18.)

C. The History of the Waldteufel Pre-1914 Appropriative Claim of Right Prior to Its Purchase By Plaintiffs Hill and Gomes.

On March 24, 1914, J.A. Waldteufel recorded a notice of appropriation of water pursuant to Civil Code section 1415. (AR 1327.) Mr. Waldteufel's notice stated that:

NOTICE is hereby given that I hereby claim the water flowing in the West fork of Russian River in Mendocino county, California, at the point where this notice is posted to extent of

⁴ Initially, Hill and Gomes reserved a portion of the Waldteufel claim of right under the lease agreement, but eventually the reserved portion of the claim of right was sold to Millview.

One Hundred (100) inches measured under a four inch pressure that the purpose for which I claim it is for domestic and culinary purposes *upon the lands owned by me*, hereinafter described, contiguous to said River and for the irrigation of said lands; the place of intended use is on Lot #103 of Healeys survey and Map of Yokayo and that I intend to divert said water by means of an Electric motor and a six inch centrifugal pump at said point of diversion.

(AR 1327, emphasis added.) Lot #103, referred to in Waldteufel's notice, was a 165 acre parcel located on the west side of the West Fork of the Russian River to the north and south of what is now Lake Mendocino Drive. (AR 1328.) At the time of recording his notice of appropriation, Mr. Waldteufel owned a 33.88 portion of Lot #103. (AR 1325-1326.) This parcel changed hands many times until it was acquired by Plaintiffs Hill and Gomes, along with the Waldteufel claim of right. (AR 1206-1207, 1269-1274.)

At the time Mr. Waldteufel purchased his property it was in agricultural production, and the sellers reserved "all fruit producedduring the year 1913, together with first cutting of alfalfa grown thereon in said year with full right to ingress and egress thereon for the purpose of harvesting said fruit and alfalfa." (AR 1325.) By 1917, Mr. Waldteufel, and later his successors in interest, diverted water from an eight-foot hole in the West Fork of the Russian River using a gasoline pump and a 6-inch suction line. (AR 1206-1207; 1209; 1210:19-1211:20; 1214:3-17; 1227:16-1230:19; 1259-1264; 1344-1345.) After Mr. Waldteufel sold the property to Mr. Dowling in 1918, Mr. Dowling grew alfalfa which he flood irrigated, cutting three or four crops a year; had a three to four acre pear orchard, and grew some oat hay. (AR 1234:12-24; 1236:23-1237:24; 1238:16-24.)

There is no direct evidence of the amount of water that was diverted to flood irrigate the alfalfa crops, or maintain the orchard. Based on the

opinion of an expert hired by Plaintiff Millview, Dr. Putnum; and using Dr. Putnum's assumptions about the amount of water needed to flood irrigate alfalfa on a per acre basis, and the time period during which flood irrigation typically occurred; at most 243 acre feet of water was needed to flood irrigate thirty acres of alfalfa between April and October. (AR 631-632; 1054:17-1057:19; 1340-1343; 1347-1350.)

Subsequently, the area of the property used to grow alfalfa was converted to a vineyard. (AR 1238:25-1239:4.) By 1967, Lester Wood, the owner at the time, grew 15 acres of walnuts and 15 acres of grapes on the property, and diverted no more than 15 acre feet of water to irrigate those crops. (AR 632-633; 933, 963, 1021:21-1022:25; 1259-1261; 1288 (questions 6 and 7); 1295.) Mr. Wood continued to irrigate the same acreage and the same crops through 1987. (AR 1262-1264.) There is no direct evidence of water use under the Waldteufel claim of right between 1988 and 1998 when Plaintiffs Hill and Gomes bought the property and associated Waldteufel claim of right.

D. Water Use Under the Waldteufel Claim of Right Increased Significantly After 2001.

In 2001, Creek Bridge Homes used 21.85 acre feet of water under the Waldteufel claim of right for irrigation of 10.5 acres of fruit trees, construction dust control, and domestic water for 51 homes. (AR 125-1278.) Plaintiffs Hill and Gomes used 15.11 acre feet in 2002, 31.73 acre feet in 2003, and 43.84 acre feet in 2004, for domestic use for 350 people. (AR 1265-1266.)

During this time frame, Millview also was diverting water under the Waldteufel claim of right. Millview claims to have diverted 3.76 acre feet in 2001; 19.14 acre feet in 2002; 40.12 acre feet in 2003; 58.86 acre feet in 2004; 1,174.75 acre feet in 2005; 55.167 acre feet in 2006; 623.12 acre feet

in 2007; and 808.23 acre feet in 2008. (AR 1184; 1193-1195, ¶13⁵.) Millview claims the right to divert up to approximately 1,400 acre feet per year under the Waldteufel claim of right, based on the assumption that it is entitled to divert year-round at the maximum rate identified in the notice of appropriation. (AR 1028:17-1029:4; 1081: 8-17.) In addition, Millview changed the point of diversion under the Waldteufel claim of right from the West Fork of the Russian River to the main stem of the Russian River below the confluence of the West and East forks of the Russian River. (AR 1286-1287.) Millview also changed the place of use from the acre 33 acre parcel to Millview's entire 8-10 square mile service area. (AR 1076:23-1077:6; 1094:2-14; 1369; 1859.)

II. THE BOARD'S ADMINISTRATIVE ENFORCEMENT PROCEEDING AGAINST MILLVIEW, HILL AND GOMES, FOR UNAUTHORIZED DIVERSION AND/OR THREATENED UNAUTHORIZED DIVERSION OF WATER.

On April 10, 2009, James Kassel, the Assistant Deputy Director for the Board's Division of Water Rights at the time, issued notice of the Division's intent to proceed with an enforcement action for the unauthorized diversion of water. (AR 1-2.) The Division also issued a draft cease and desist order based on a determination that the right to divert more than 15 acre feet per year under Waldteufel claim of right was forfeited. (AR 3-10.)

Plaintiffs requested a hearing on the draft cease and desist order, and expressed their understanding that the scope of the Waldteufel claim of

⁵ Millview diverts water under several bases of right including the Waldteufel claim of right, a water license, a water permit, and two contracts for purchase of water from the Mendocino County Flood Control District. (AR 1193, 1301-1309:¶13.) And, there is some inconsistency in the amount of water that Millview claims to have diverted under each basis of right. (AR 1081:18-1088:11; 1301-1309:¶13; 1366, 1369.)

right was at issue, and that Division of Water Rights staff had only concluded that the Waldteufel claim of right likely had a valid basis. (AR 13, 20, 50:18-20.) The Board noticed a hearing for January 26, 2010. (AR 29-48.)

Plaintiffs requested that they be allowed to conduct discovery under the Civil Discovery Act as to the Board's previous water rights determinations on the west fork of the Russian River, including any prior quantification of the Waldteufel claim of right made in connection with the Board's determination that the Russian River was fully appropriated; the evidence the Board's staff relied on in making its determination of forfeiture; and what authority the Board asserts over the issues in the matter. (AR 49; 53:20-54:7.) Plaintiffs indicated they would propound requests for interrogatories, demands for inspection, requests for admission, as well as notice various depositions. (AR 54:5-16.)

The Board's hearing officer denied the request, and noted that the Water Code allows parties to notice depositions of witnesses, and subpoena documents without Board approval. (AR 102, citing Wat. Code, § 1100, Gov. Code, §§ 11450.10, 11450.20, and Cal. Code Regs., tit. 23, § 649.6.) The hearing officer noted the prosecution team would provide its witnesses' written testimony, and its exhibits prior to the hearing. The hearing officer also noted that any information about the Board's prior decisions, and information about the Board's determination that the Russian River was fully appropriated could be obtained more easily by showing up during business hours and reviewing the Board's files which are publically available. (AR 102.) Finally, the hearing officer indicated that if after reviewing the information that could be obtained without discovery, Plaintiffs believed that additional discovery was necessary, it could initiate discovery under the Water Code. (AR 103.)

On January 26, 2010, the Board held a hearing on the draft cease and desist order. (AR 903.) On October 18, 2011, the Board issued Order WR 2011-0016, cease and desist order. (AR 602-650.) Plaintiffs filed petitions seeking reconsideration. (AR 657-862.) On January 10, 2012, the Board denied the requests to reconsider its order. (AR 891-900.)

ARGUMENT

I. STANDARDS OF REVIEW.

A. The Trial Court Reviewed the Board's Decision to Issue the Cease and Desist Order Under the Independent Judgment Standard.

In undertaking to issue the cease and desist order in this case, the Board performed an adjudicatory function, and consequently the trial court reviewed the Board's decision under Code of Civil Procedure section 1094.5. "The inquiry in such a case shall extend to the question whether the [Board] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., §1094.5, subd. (b).) "Abuse of discretion is established if [the State Board] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*)

The Water Code specifically provides that "the court shall exercise its independent judgment on the evidence in any case involving the judicial review of a cease and desist order." (Wat. Code, § 1126, subd. (c).)⁶

⁶ Plaintiffs asserted in the trial court that independent judgment review was required because the Waldteufel claim of right is a vested property right. (CT 2376:21-23.) The cases cited provide no separate legal ground for the Court to exercise its independent judgment on the evidence. As the Supreme Court noted, in passing Code of Civil Procedure section 1094.5, the Legislature "empowers [the Supreme Court] to establish
(continued...)"

Therefore, in this case abuse of discretion is established if the Court determines that the findings are not supported by the weight of the evidence. (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 721.) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

A trial court may not set aside an agency's findings as unsupported if the evidence is uncontradicted. (*David Kikkert & Associates, Inc. v. Shine* (1970) 6 Cal.App.3d 112, 116.) And, a trial court may not rely on contradictory inferences based on uncontradicted evidence if the contradictory inference is not reasonable. An inference can not be "based on mere possibility, or flow from suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580.)

As to issues of the proper interpretation of the law, the Court also utilizes an independent judgment standard. However, the Court's independent judgment on issues of law is different than its independent judgment as to issues of fact. As to legal issues, "Courts must, in short,

(...continued)

standards for determining which cases require such independent judgment review." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 140.) In this case, in passing Water Code section 1126, subdivision (c), the Legislature has already established that the Court shall exercise its independent judgment, and the Court need look no further for its authority. Calling the Waldeufel claim of right a vested property right adds nothing to the Court's review, and does not establish what amount of water use was authorized, the nature of any forfeiture, or the scope of the Board's jurisdiction.

independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8. With limited exceptions, decisions and orders issued by the Board as a Board, as opposed to the actions of staff or individual Board Members, are considered precedential. (Sawyer, *Improving Efficiency Incrementally: The Governor's Commission Attacks Waste and Unreasonable Use* (2005) 36 McGeorge L. Rev. 209, 212 fn. 18; see Gov. Code, § 11425.60.)

B. The Standard of Review On Appeal From the Trial Court's Order.

This Court reviews the trial court's factual determinations, for which it applied the independent judgment standard, under the substantial evidence test. (*Fukuda, supra*, 20 Cal.4th at 824.) "[T]he question would be whether, with all contrary evidence disregarded, there was substantial evidence in the administrative record to support the superior court's findings." (*David Kikkert and Associates, Inc., supra*, 6 Cal.App.3d at 116.) However, in a case like this one in which the facts are undisputed and the evidence is uncontradicted, "the superior court cannot assess the 'weight' of evidence . . . which is uncontradicted, nor exercise its 'independent judgment' with respect to such evidence, because the determination of its effect presents a question of law alone." (*Ibid.*) "[B]ecause the function of an appellate court is to decide questions of law (citation omitted), [the appellate court is] not bound by the substantial evidence test upon appeal from the superior court's judgment." (*Ibid.*) As this Court previously

stated in *David Kikkert and Associates*, “[it] will . . . reverse a judgment if it operates to set aside an administrative decision which is supported by undisputed facts as shown by uncontradicted evidence.” (*Ibid.*)

As to issues of the proper interpretation of the law, this Court reviews the trial court’s determinations de novo, and does not defer to the trial court’s conclusions as to the appropriate interpretation of the law. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 285; see e.g., *Gilliland v. Medical Bd. of California* (2001) 89 Cal.App.4th 208, 219.)

II. THE BOARD DID NOT PROCEED IN EXCESS OF ITS JURISDICTION.

The trial court erred when it found that the Board proceeded in excess of its jurisdiction. (CT 2711.) The trial court found that:

The court need not here reprise the authorities cited and analyzed by the parties in their briefs. The whole weight of authority found in the constitution, statutes, and cases, as well as the board’s publications⁷, argues against the jurisdiction which the board seeks to exercise in this matter. Well established rules of statutory construction support the finding here made. No case has been cited which extends jurisdiction to the board in the facts shown on this record.

(CT 2711.) Contrary to the trial court’s conclusion, the whole weight of the authority it relied on supports the Board’s exercise of jurisdiction in this matter. Moreover, after the trial court issued its decision in this case, the Third Appellate District Court of Appeal held that the Board has

⁷ The publications cited by Plaintiffs, in the trial court as evidence of the Board’s interpretation of its jurisdiction in this case are not regulations adopted by the Board. (AR 62-63.) They can not be used as guidance in this proceeding. (See Gov. Code, §§ 11340.5, subd. (a); 11342.600; see Sawyer, *Improving Efficiency Incrementally: The Governor’s Commission Attacks Waste and Unreasonable Use*, *supra*, at 212 fn. 18.) And they provide no basis to find that the Board lacks jurisdiction to issue the cease and desist order in this case.

jurisdiction to make all preliminary determinations, such as the scope of a pre-1914 water right, including the amount of its continuous use or forfeiture, in order to determine whether a diversion is unauthorized and illegal. (*Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 403-407, review denied Nov. 13, 2013, S213672 .) Because the trial court did not provide any explanation for its conclusion, the Board will address each of the authorities referenced by the trial court, and establish that it acted within the scope of its delegated authority.

A. The Board Has Authority Under the Constitution.

The Board's statutory authority under division 2 of the Water Code, including its authority to conduct administrative enforcement proceedings to impose civil liability or issue a cease and desist order in response to the unauthorized or illegal diversion or use of water, is in furtherance of Article X, section 2 of the California Constitution. (Wat. Code, § 1050; see *id.* §§ 1052, subds. (a)&(b), 1831 et seq.)

Article X, section 2, requires water resources to be put to beneficial use to the fullest extent of which they are capable, and limits all water rights to the amount of water reasonably required for the beneficial use to be served. (*Erickson v. Queen Valley Ranch Co.*, *supra*, 22 Cal.App. 3d at 582-584.) It is in this context, among others discussed below, that the policy against cold storage of appropriative water rights is significant. In issuing the cease and desist order in this case the Board stated that "[t]he purposes of the forfeiture doctrine and the due diligence requirements [upon which the Board relied] is to ensure that appropriators do not hold water rights in 'cold storage,' thereby preventing water resources from being put to beneficial use." (AR 616, citing *Smith v. Hawkins*, *supra*, 110 Cal. at 127-128; see also *North Kern II*, *supra*, 147 Cal.App.4th at 577, 584 [allowing a diverter to freeze an entitlement to appropriate water, regardless

of nonuse, would contravene the important public policy embodied in article X, section 2, of the California Constitution.])

Rather than being inconsistent with Article X, section 2, the Board's enforcement authority is in furtherance of that provision. (Wat. Code, § 1050.)

B. The Board Has Authority Under the Water Code to Investigate the Validity of a Pre-1914 Claim of Right.

In addition to being self executing, Article X, section 2, authorizes the "Legislature to enact laws in furtherance of the policy in [Article X, section 2]." (Cal. Const., art. X, § 2.) Under this provision the Legislature has delegated to the Board the authority to investigate, take testimony, and ascertain whether water is being appropriated in accordance with state law. (Wat. Code, §§ 183, 1051.) The California Supreme Court has recognized that the investigatory powers of the Board's predecessor included investigation to ascertain validity of diversion or use made under claim of pre-1914 right. (*Meridian, Ltd., v. San Francisco* (1939) 13 Cal.2d 424, 450 ["The State Water [Board]⁸ . . . has the power under [the Water Commission Act] to investigate all streams of the state for the purpose of ascertaining whether the use of water therein is in conformity with the water appropriation laws of the state. And the power extends to the use of water made under appropriations or attempted appropriations acquired or asserted prior to the passage of the act."].)

The Legislature's delegation of the power to investigate pre-1914 claims of right was based in part on the Legislature's concern that, similar to Plaintiffs, in this case, claimants to pre-1914 rights were attempting to hold those rights in "cold storage." In 1911, the California Legislature

⁸ The agency responsible for water right administration in California has changed several times over the past 100 years. For ease of reading, we refer to the Board and its predecessor agencies as the Board.

created the California Conservation Commission and directed the Commission:

to prepare and recommend to the legislature, laws, statutes and constitutional amendments revising, systematizing, and reforming the laws of this State upon forestry, water, the use of water, water power, electricity, electrical and other power.

(Cal. Stats. 1911, chap. 408, p. 822.) The Conservation Commission then prepared and submitted to the Legislature a proposed "Water Commission Act" which the Legislature subsequently enacted as revised and amended. (Cal. Stats. 1913, chap. 586, §§ 1-23; Hugh W. Ferrier, *Administration of Water Rights in California*, 44 Cal. L.Rev. 833, 834 (1956); A.E. Chandler, *The "Water Bill" Proposed by the Conservation Commission of California*, 1 Cal. L.Rev. 148 (1913).)

The report of the Conservation Commission specifically identified as a failing of the prior water rights system the placement of unused water rights in "cold storage." As explained by the Commission:

[N]othing has prevented appropriators of the right to use water from holding appropriations, year after year, without doing much, if any, work upon them. Furthermore, as soon as one appropriation lapsed because of a failure to do work upon it, the same appropriator was permitted to post and file a new notice of appropriation. Thus year after year, a very valuable public asset and natural resource could be, and often has been kept in cold storage and monopolized without rendering the public, who gave it away for nothing, any benefit whatever.

(Report of the Conservation Commission of the State of California (1913) at 20-21; CT 2587-2588, 2601-2602.)

According to the Commission, "[a] valuable natural resource like water should not be allowed to be kept in cold storage; and no individual should be compelled to go to the annoyance, trouble and expense, in time and money, necessary to the declaration by the State that the State's property is being held in cold storage in contravention of public policy and

the law.” (Report of the Conservation Commission of the State of California (1913) at 33, 39; CT 2587-2588, 2614-2620.) The Conservation Commission accordingly recommended that the Water Commission, the statutory predecessor to the State Board, be granted investigative authority to examine such “cold storage” abuses of the appropriative water rights system. (*Id.* at 21, 34; CT 2587-2588, 2602, 2615.)

While the tactics of the Plaintiffs in this case are slightly different than the tactics described by the Conservation Commission, the resulting attempt to reserve rights in cold storage is the same. The Conservation Commission’s denunciation of the cold storage of unused water cannot be reconciled with trial court’s view that the Board has no authority to investigate the extent of the diversions authorized under the Waldteufel claim of right. (CT 2711.) Because the Waldteufel claim of right is subject to the policy against cold storage of appropriative rights, and because the Legislature granted the predecessor to the Board investigative authority to examine such “cold storage” abuses of the appropriative water rights system, the Board has the authority to investigate claimed pre-1914 water rights, like the Waldteufel claim of right in this case. (See *Smith v. Hawkins, supra*, 110 Cal. at pp.127-128; *Meridian, Ltd., v. San Francisco, supra*, 13 Cal.2d at p. 450.)

C. The Board Has Authority Under Water Code Section 1831 to Issue a Cease and Desist Order Based on Unauthorized Diversions Under a Claim of Pre-1914 Right.

1. The Plain Language of Water Code Section 1831 Grants the Board Authority to Issue the Cease and Desist Order in This Case.

In 2002, the Legislature amended Water Code section 1831, and expanded the Board’s enforcement powers by authorizing the Board to issue administrative cease and desist orders against any unauthorized

diversions. (Stats. 2002, ch. 652, § 6 (AB 2267).) Since 2002, section 1831 has stated:

- (a) When the board determines that any person is violating, or threatening to violate, any requirement described in subdivision (d), the board may issue an order to that person to cease and desist from that violation.

* * *

- (d) The board may issue a cease and desist order in response to a violation or threatened violation of any of the following:

- (1) The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division [division 2].

- (2) Any term or condition of a permit, license, certification, or registration issued under this division.

- (3) Any decision or order of the board issued under this part, Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

(Wat. Code, § 1831, subds. (a), (d).) As set forth above, section 1831, subdivision (a) authorizes the Board to issue a cease and desist order whenever the Board determines that any of the violations listed in subdivision (d) is occurring or threatened. Subdivision (d)(1) lists as one of the violations for which the Board may issue a cease and desist order the unauthorized diversion or use of water subject to division 2 (commencing with section 1000) of the Water Code. Water subject to division 2 of the Water Code includes unappropriated water. (Wat. Code, §§ 1201, 1202; see id., § 1052, subd. (a).) Unappropriated water includes:

- (1) Water that has never been appropriated. (Wat. Code, § 1202, subd. (a).)

(2) Water subject to a pre-1914 right, but which was not perfected by putting the water to beneficial use with due diligence. (Wat. Code, § 1202, subd. (b).)

(3) Water for which a right had been perfected by putting the water to use under a pre-1914 right, but where the use later ceased. (Wat. Code, § 1202, subd. (b); see also § 1240 [appropriative rights are lost for non-use]; *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 582 [forfeiture applies to both pre-1914 and Water Code appropriations.])

Under the Water Code's definition of unappropriated water, any water claimed under a pre-1914 right that exceeds the actual right constitutes unappropriated water subject to division 2. The diversion or use of unappropriated water without a water right permit is unauthorized and constitutes a trespass against the State. (Wat. Code, § 1052, subd. (a); *People v. Shirokow* (1980) 26 Cal.3d 301, 309-310.) Thus, if the Board finds that the water is validly claimed under a riparian or pre-1914 right, the Board does not have cease and desist authority under Water Code section 1831, subdivision (d)(1) for diversion or use of that water. But if the Board finds that the water is not validly claimed, the water is unappropriated water subject to division 2 of the Water Code, and the Board may issue a cease and desist order under subdivision section 1831, subdivision (d)(1) in response to the unauthorized diversion or use of that water. (Wat. Code, §§ 1202, 1831, subd. (d)(1).)

Moreover, water that was at one time diverted to a beneficial use, but which has reverted to the public domain as a result of five years of consecutive non-use, in other words forfeited, is also unappropriated water subject to division 2 of the Water Code, and is subject to the Board's cease and desist authority as described in section 1831, subdivision (d)(1). (Wat. Code, §§ 1240, 1241; 1831, subd. (d)(1).)

Recently, in *Young v. State Water Resources Control Board, supra*, the Court held that the plain language of Water Code section 1831 means

the Board has jurisdiction to determine whether a diversion and use is authorized by a valid pre-1914 right, and to issue a cease and desist order if the Board determines that the diversion is unauthorized, as it did in this case. (*Id.*, 219 Cal.App.4th at 403-407.)⁹

2. The History of the Board's Expanding Enforcement Authority Demonstrates a Legislative Intent to Provide the Board Jurisdiction to Determine if a Diversion is Authorized Under a Pre-1914 Claim of Right.

Though the Court need not consider anything other than the plain language of Water Code section 1831, to the extent the Court considers the wider historical circumstances of the Board's enforcement authority, those historical circumstances support the conclusion that the Board had jurisdiction to issue the cease and desist order in this case. (See *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1386-1387)

Over the past 100 years, the Legislature has expanded the Board's enforcement authority against the unauthorized diversion or use of water. The Water Commission Act became effective in 1914 (Stats. 1913, ch. 586) and was later codified in division 2 of the Water Code. Section 11 of the Water Commission Act, later amended and codified as Water Code sections 1201 and 1202, described the water over which the Board acquired

⁹ The Court in *Young* specifically rejected the argument that somehow Water Code section 1831, subdivision (e) strips the Board of its jurisdiction simply because an individual claims a pre-1914 or riparian right. (*Young v. State Water Resources Control Board, supra*, 219 Cal.App.4th at 406-407.) The *Young* Court's conclusion is consistent with cases that establish an administrative agency has jurisdiction to determine whether it has jurisdiction. (See *Weinberger v. Hynson, Westcott and Dunning, Inc.* (1973) 412 U.S. 609, 627.)

permitting authority as all water not otherwise properly diverted or used under a pre-Water Commission Act (riparian or pre-1914) right.¹⁰

Section 10 of the Water Commission Act, codified as Water Code section 1051, granted the Board power to investigate waters of the State, take testimony regarding water rights, and ascertain whether water had been appropriated under the laws of the State. (Stats. 1913, ch. 586, § 10.)

Section 38 of the Water Commission Act, codified as Water Code section 1052, stated:

The diversion or use of water subject to the provisions of this division other than as authorized in this division is a trespass, and the [Board] may institute in the trial court in and for any county wherein such diversion or use is attempted appropriate action to have such trespass enjoined.

(Stats. 1913, ch. 586, § 38.)

Thus, when the statute now codified as Water Code section 1052 was first enacted, the Board had to seek judicial recourse to enjoin unauthorized diversions of water. The Board's threshold power under Water Code section 1051 to investigate unauthorized diversions and to seek judicial recourse under section 1052, however, included investigations into whether a diverter who claimed to hold a riparian or pre-1914 right actually had such a right. The Supreme Court confirmed this principle over 70 years

¹⁰ Water Code section 1201 provides:

All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.

(See also Wat. Code, § 1202 [describing unappropriated water].)

ago in *Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424.

The *Meridian* case involved diversions by the City of San Francisco alleged to be in excess of its pre-1914 rights for the Hetch Hetchy project. The California Supreme Court affirmed that the Board has the power under section 10 [of the Water Commission Act, later codified as Water Code section 1051] to investigate all streams of the state for the purpose of ascertaining whether the use of water therein is in conformity with the water appropriation laws of the state. And the power extends to the use of water made under appropriations or attempted appropriations acquired or asserted prior to [1914].” (*Meridian, supra*, 13 Cal.2d at p. 450.) Thus, as things stood following *Meridian*, the Board could investigate unauthorized diversions of any kind, even those claimed under riparian or pre-1914 rights. The Board’s enforcement remedy was limited to filing judicial actions, but that was true for unauthorized diversions based on claim of post-1914 water rights, as well as claims of riparian and pre-1914 rights.

Beginning in 1980, the Legislature began to expand the Board’s enforcement authority. That was the year that the Legislature enacted Water Code section 1831. Section 1831 authorized the Board to issue a “preliminary” cease and desist order against “any person holding a permit or license to appropriate water” who was “violating any term or condition of the permit or license.” (Former Wat. Code, § 1831, added by Stats. 1980, ch. 933, § 13.) This allowed the Board to enforce the terms of permits or licenses through its own administrative action.

In 1987, the Legislature amended Water Code section 1052 to again expand the Board’s administrative enforcement powers. (Former Wat. Code, § 1052, amended by Stats. 1987, ch. 756, § 1.) The amendments authorized the Board to petition the trial court to impose civil liability of up to \$500 per day for diverting water “other than as authorized” in division 2

of the Water Code. (*Id.*, subds. (a), (d).) The Legislature also granted the Board the authority to impose civil liability administratively, though only in years declared critically dry by the Department of Water Resources. (*Id.*, subds. (a), (b).) In 1991, the Legislature removed the “critically dry” limitation, allowing the Board to impose administrative civil liability in response to any unauthorized diversion or use of water. (Former Wat. Code, § 1052, amended by Stats. 1991, ch. 1098, § 1 (AB 2017), subds. (a), (b).)

In 2002, the Legislature amended Water Code section 1831 and again expanded the Board’s enforcement powers by authorizing the Board to issue administrative cease and desist orders against any unauthorized diversions. (Stats. 2002, ch. 652, § 6 (AB 2267).)

Section 1831 is the culmination of the Legislature’s expansion of the Board’s enforcement authority over unauthorized diversions, including those under claimed riparian or pre-1914 rights. The California Supreme Court in *Meridian* recognized the Board’s power to investigate diversions (including those exercised under a pre-1914 right) and to seek judicial enforcement if the diversion was unauthorized. (*Meridian, supra*, 13 Cal.2d at p. 450.) The underlying principle in *Meridian* has never changed, but the Legislature has continually expanded the Board’s power to remedy unauthorized diversions leading to the creation of its administrative cease and desist power in section 1831, subdivision (d)(1).

3. The Courts have Consistently Held That the Board Has Jurisdiction to Make All Threshold Determinations Necessary to Execute Its Responsibilities, Such As the Validity and Extent of a Pre-1914 Claim of Right.

The trial court erred to the extent that it accepted the Plaintiffs’ argument that only a trial court can adjudicate the validity and extent of a pre-1914 claim of right, and that the Board’s jurisdiction to enjoin an illegal

diversion does not arise until a trial court has made such a determination.
(CT 2648:25-2649:3, 2650:5-19; 2711.)

As described above, the Supreme Court in *Meridian* held that the Board had authority to determine whether a diverter who claimed its diversion was “made under appropriations or attempted appropriations acquired or asserted prior to [1914],” actually had such a right. (*Meridian, supra*, 13 Cal.2d 424, 450.)

In *Temescal Water Company v. Dept. of Public Works* (1955) 44 Cal.2d 90, the Supreme Court addressed an argument analogous to the one made by Plaintiffs, in this case. In *Temescal* a water company and a water district challenged the Board’s decision to issue a water permit to a conservation district. In granting the permit the Board made a threshold determination that there was water available for appropriation. A water company and water district with prior rights to divert water argued that the threshold determination of the availability of water could only be made by the trial court, and not by the Board. (*Id.* at 93-95.)

The Supreme Court rejected the argument stating:

Under the present procedure, the department's determination as to the availability of unappropriated water concludes no *right* to a permit to appropriate water but merely decides a fact upon which the department bases the exercise of its discretion. Necessarily, the department must make that determination as a prerequisite to any exercise of its discretion in the issuance of a permit.

... There appears to be little reason to conclude that the requirement that unappropriated water exist is more “jurisdictional” than any other fact necessary to be established as a condition for obtaining a permit.

(*Temescal, supra*, 44 Cal.2d at 103-104.)

Recently, in *Young*, the Court relied on *Meridian* and *Temescal* to conclude that “the Supreme Court has consistently held that the [State]

Water Board has the power or authority to make the threshold determination necessary to execute its responsibility to regulate water in the state of California.” (*Young, supra*, 219 Cal.App.4th at 404-405.) In this case, those threshold determinations include the validity and extent of the Waldteufel claim of right, and whether any water was forfeited for non-use. (AR 629-634.)

In *Phelps v. State Water Resources Control Board*, in an enforcement proceeding similar to this one, the Board concluded that individuals had diverted and used water illegally, and in that context addressed the diverter’s claims of riparian and pre-1914 rights. On appeal the Third District Court of Appeal upheld the Board’s conclusions about the riparian and pre-1914 claims of right. (*Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, 116-119.) The Board’s authority to decide the validity of the riparian and pre-1914 claims of right was not challenged. Nonetheless, the conclusion that the Board did not exceed its authority is implicit in the Court’s holding. (*Ibid.*; see also, *North Gualala Water Co. v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, 1589 [the Board’s interpretation of the statutory definition of a subterranean stream was entitled to judicial deference because the Board’s permitting authority over groundwater is limited to water flowing in subterranean streams and the Board has the power to determine whether groundwater is subject to the Board’s permitting authority].) While the *Phelps* and *North Gualala* decisions are not directly on point, they are additional examples of where Courts have recognized that the Board has jurisdiction to determine the extent of its own jurisdiction, and *Phelps* involved a determination of a pre-1914 claim of right.

Because the Board has authority under the Constitution and the Water Code as recognized by the Courts both to make the threshold determinations necessary to exercise its authority, and to enjoin

unauthorized or illegal diversions of water, it did not exceed its jurisdiction when it issued the cease and desist order to Plaintiffs in this case.

III. THE TRIAL COURT ERRED WHEN IT HELD THAT THE FINDINGS ESSENTIAL TO THE CEASE AND DESIST ORDER ARE NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

The trial court found that the Board abused its discretion because “the findings essential to the cease and desist orders are not supported by the weight of the evidence.” (CT 2711.) However, the trial court provided no guidance to this Court as to the reasons for its ruling, or any analysis of the evidence presented, or the appropriateness of the findings the Board made. (CT 2711.) Consequently, this Court must look to the Board’s decision for guidance as to the findings the trial court found unsupported by the evidence. (*James v. Board of Dental Examiners* (1985) 172 Cal.App.3d 1096, 1107.) In this case, the Board made the findings necessary to support the cease and desist order enjoining Millview’s illegal diversion in excess of the valid diversions under the Waldteufel claim of right, and those findings are supported by uncontradicted evidence and undisputed facts.

A. To the extent that the Waldteufel Claim of Right Could Have Been Perfected, It Was Originally Perfected in the Amount of 243 Acre Feet Per Year.

The Board made the preliminary determination that it did not appear that a pre-1914 appropriative right could have been perfected based on the Waldteufel claim because the historic diversion and use of water on the 33.88 acre parcel owned by J.A. Waldteufel and his successors in interest appears to have been authorized by an overlapping riparian right. (AR 614-615, 628-629.) Nonetheless, the Board did not order the diversion and use of water under the Waldteufel claim of right to cease altogether because the hearing notice did not adequately raise the issue of the validity of the claim of right in its entirety. (AR 647-648.) To the extent that an appropriative right could have been perfected, the Board also determined that the

Waldteufel claim of right, as originally perfected, authorized diversion of 243 acre feet per year. (AR 629-632.) Because the Waldteufel claim of right is a pre-1914 claim initiated under the Civil Code, this Court's analysis of the evidence the Board relied on begins with the notice posted by J.A. Waldteufel. (Civ. Code, § 1415.)

On March 24, 1914, J.A. Waldteufel recorded a notice of appropriation of water pursuant to Civil Code section 1415. (AR 1327.) Mr. Waldteufel's notice stated that:

NOTICE is hereby given that I hereby claim the water flowing in the West fork of Russian River in Mendocino County, California, at the point where this notice is posted to extent of One Hundred (100) inches measured under a four inch pressure that the purpose for which I claim it is for domestic and culinary purposes *upon the lands owned by me*, hereinafter described, contiguous to said River and for the irrigation of said lands; the place of intended use is on Lot #103 of Healey's survey and Map of Yokayo Rancho and that I intend to divert said water by means of an Electric motor and a six inch centrifugal pump at said point of diversion.

(AR 1327, emphasis added.) Lot #103, referred to in Waldteufel's notice, was a 165 acre parcel located on the west side of the West Fork of the Russian River to the north and south of what is now Lake Mendocino Drive. (AR 1328.) At the time of recording his notice of appropriation, Mr. Waldteufel owned a 33.88 portion of Lot #103. (AR 1325-1326.) This evidence is uncontradicted, and raises but one reasonable inference which the Board found—that the 33.88 acre parcel owned by J.A. Waldteufel was the intended place of use. (AR 14.)

The prosecution team initially assumed that the J.A. Waldteufel owned the entire 165 acres of Lot #103. (AR 34, ¶2.) On cross examination at the hearing before the Board by counsel for Sonoma County Water Agency, staff for the prosecution team admitted that they had no basis upon which to draw the conclusion that J.A. Waldteufel owned all

165 acres of Lot #103, and only had evidence that he owned a 33.88 acre parcel. (AR 1028:5-7; 1029:10-1030:21.) There simply is no evidence upon which to base an inference that J.A. Waldteufel owned anything other than the 33.88 acre parcel on Lot #103.¹¹

Plaintiffs understood that the extent of the Waldteufel claim of right was at issue, and that the Division of Water Rights staff had concluded only that the Waldteufel claim of right likely had a valid basis. (AR 13, 20, 50:18-20.) Moreover, the party claiming the right to divert has the burden of establishing the prerequisite factual basis of the water right at issue. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 535, 565-566.) Plaintiffs should not be heard to complain that they have not had an opportunity to present contradictory evidence, because they have acknowledged they have no other evidence. (RT, December 18, 2012, 20:14-28, 34:6-9; May 10, 2013, 11:4-24.)

The Board also found that “some irrigation took place on the Waldteufel parcel within a reasonable period of time after J.A. Waldteufel filed a notice of appropriation.” (AR 631, see Civ. Code, § 1416.) Again, the Board’s finding is the only reasonable conclusion based on the uncontradicted evidence. (AR, 629-631; see Statement of Facts above, section I., C., citing AR 1325; 1206-1207; 1209; 1210:19-1211:20; 1214:3-17; 1227:16-1230:19; 1234:12-24; 1236:23-1237:24; 1238:16-24; 1259-1264; 1344-1345.)

¹¹ Plaintiffs cited to aerial photographs from 1952 and 1953 that they argue show all of Lot #103 in agricultural production. (CT 2651:17-20, citing AR 1330-1331.) This evidence is insufficient to raise the inference that J.A. Waldteufel owned all of Lot #103, or that water diverted under the Waldteufel claim of right irrigated all of Lot #103 in the early 20th century. At best, it is wishful thinking by Plaintiffs, and not a reasonable inference. (*Kidron v. Movie Acquisition Corp.*, *supra*, 40 Cal.App.4th at 1580.)

Next, in order to determine the limit of the amount of water authorized for diversion under the Waldteufel claim of right, the Board determined the amount of water that J.A. Waldteufel and his immediate successor in interest put to beneficial use. (AR 631-632; *Smith v. Hawkins*, *supra*, 120 Cal. at 88; See also, *Hufford v. Dye*, *supra*, 162 Cal. at 153.) Because there is no direct evidence of the amount of water used in those earliest years, the Board relied on the opinion, and analytical approach, of Dan Putnum, Ph.D., an expert offered by Millview, Hill, and Gomes. (AR 631-632.) Based on Dr. Putnam's assumptions about the amount of water that was needed to flood irrigate alfalfa in the early 20th century, and the method of irrigation and crops being irrigated established by the uncontradicted evidence, the Board concluded that J.A. Waldteufel, or his immediate successor in interest, diverted no more than 243 acre feet per year, with a season of diversion between April and October. (AR 631-632, citing 1054:17-1057:19; 1340-1343; 1347-1350.)

Given, that the Board accepted Plaintiffs' expert's opinion and methodology as to the amount of water used to flood irrigate the land owned by J.A. Waldteufel, Plaintiffs can not reasonably contend that the Board's conclusion as to the amount of water used for the beneficial purposes described in J.A. Waldteufel's notice is against the weight of the evidence. The Board's conclusion as to the amount of water put to beneficial use recognizes the Waldteufel claim of right at the highest amount reasonably supported by the uncontradicted evidence.

Rather than refer to other evidence that either contradicts the evidence relied on by the Board, or identify another contradictory but still reasonable inference, Plaintiffs argued that Board staff made admissions binding on the Board that the Waldteufel claim of right was perfected at approximately 1400 acre feet per year. (CT 2658:6-26 citing AR 1299, 1520-1521; see also, AR 1081:13-17.) Plaintiffs identify the Board staff's initial

investigative report, a follow up letter from the Chief of the Division of Water Rights, and a hearsay statement by a Board staff member. (CT 2658:6-26 citing AR 1299; 1520-1521; 1395:13-1396:3; 1122:1-1124:13.)

A cursory examination of these statements show that Board staff did not make any conclusion about the amount of water that was put to beneficial use by J.A. Waldteufel, or his immediate successor in interest, or state any basis upon which to conclude that the Waldteufel claim of right authorized any specific amount of diversion. (*Id.*) The Board staff's statements are preliminary and not binding on the Board, and do not otherwise raise any reasonable inference as to the amount of water put to beneficial use under the Waldteufel claim of right.

To the extent that Plaintiffs continue to argue that the limit of water that can be diverted under the Waldteufel claim of right is the maximum amount of water that could be diverted through a six inch suction line, they are simply wrong on the law. It is well established that an appropriative water right is limited to the amount of water put to actual beneficial use, not the capacity of the diversion works. (*Smith v. Hawkins, supra*, 120 Cal. at 88; See also, *Hufford v. Dye, supra*, 162 Cal. at 153; *Trimble v. Heller supra*, 23 Cal.App. at 443; *Thayer v. California Development Co., supra*, 164 Cal. at 137; *Erickson v. Queen Valley Ranch Co., supra*, 22 Cal.App.3d at 584.)

B. The Right To Divert and Use More Than 15 Acre Feet Per Year Under the Waldteufel Claim Of Right Was Forfeited For Non-Use For More Than Twenty Years.

The Board found "that partial forfeiture occurred when the owner of the parcel switched from growing alfalfa to less water-intensive crops." (AR 632.) The Board based this conclusion on statements of diversion filed by Lester Wood between 1967 and 1987, that identified the amount of water used and the types of crops being irrigated; and expert testimony that

converted estimates of water use from gallons per minute to acre feet per year. (AR 632-633, citing AR 632-633; 933, 963, 1021:21-1022:25; 1259-1261; 1288 (questions 6 and 7); 1295.) Based on this evidence the Board concluded that “it is unlikely that Lester Wood’s diversion and use of water varied significantly between approximately 1967 and 1987, or that he diverted and used more than 15 acre-feet, or that he diverted water at a rate greater than 1.1 [cubic feet per second], during the irrigation season (April through September) in any given year during that period. [footnote omitted.]” (AR 633.) As with the other findings of the Board, its conclusion is the only reasonable inference based on the uncontradicted evidence.

C. The Board Applied the Appropriate Legal Standard to Determine Forfeiture—Five Years of Non-Use.

Pre-1914 appropriative rights are subject to forfeiture in whole or in part if water is not used for a five year period. (*Smith v. Hawkins, supra*, 110 Cal. at 1127-1128; *Erickson v. Queen Valley Ranch, supra*, 22 Cal.App.3d at 582; Wat. Code, § 1240.) Under this standard, the Waldteufel claim of right was partially forfeited during the twenty year period that Lester Woods irrigated less water intensive crops. (*Id.*)

The trial court erred to the extent it accepted Plaintiff’s arguments based on *North Kern Water II, supra*. (CT 2711, 2401:26-2402:9.) Plaintiffs, argued that the Court in *North Kern II* held that in order to establish forfeiture, non-use must be proven for a five year period of time immediately preceding an adverse claim by a conflicting claimant to the water. (CT 2401:26-2402:9.) Fundamentally, *North Kern II* is distinguishable because the Court in that case did not even attempt to address the scope and standards guiding the Board’s authority when an issue of forfeiture arises as a preliminary determination in a Board enforcement proceeding to enjoin unauthorized use of water, rather than in

a lawsuit between two parties each claiming the right to use the same water. (*North Kern II, supra.*)¹²

In *North Kern II*, North Kern Water Storage District (North Kern) filed a legal action against Kern Delta Water District (Kern Delta), seeking to establish that Kern Delta's pre-1914 appropriative water rights had been forfeited in part due to non-use. (*North Kern II, supra*, 147 Cal.App.4th at 561-562.) The Court of Appeal issued two opinions in the case, the first of which was unpublished. In order to understand the limited holding of *North Kern II*, this Court must understand the relationship between the published and unpublished decisions, and the reasoning which underlies the published decision. (See *Id.* at 559, 560, 566 citing *North Kern Water Storage Dist. v. Kern Delta Water Dist. (North Kern I)*, 2003 WL 215821 (Jan. 31, 2003, F033370).)¹³

In the first opinion, the Court stated that, in order to establish forfeiture, North Kern was required to prove that Kern Delta or its predecessors-in-interest had failed to use some portion of Kern Delta's entitlement under a decree continuously during a five-year period no later

¹² The Board provided a detailed and thorough analysis distinguishing *North Kern II*, and explaining why it does not stand for the proposition that the Board may find a forfeiture only under circumstances where two parties claim conflicting rights to divert water, or that the five year period of non-use must be the five years immediately prior to an adverse claim by the conflicting claimant. (AR 634-636.)

¹³ Unpublished opinions are not precedential. (Cal. Rules of Court, rule 8.1115.) The second, published opinion in *North Kern II* reviewed whether the trial court acted consistent with the opinion in *North Kern I*, not whether *North Kern I* was correctly decided. (See, *North Kern II, supra*, 147 Cal.App.4th at 566, fn.5.) Consequently, it is unclear whether the legal conclusions reached in *North Kern I & II* are applicable outside of the facts of those cases. The Board cites to the unpublished opinion in *North Kern I* to establish what the law of the case was in *North Kern II*. (Cal. Rules of Court, rule 8.1115, subd. (b)(1).) A copy of *North Kern I* is attached to this brief. (*Ibid.*)

than the five years immediately preceding North Kern's assertion of its conflicting right to the water, resulting in a "clash of rights." (*North Kern I, supra*, 2003 WL 215821 at *18.) The Court rejected the contention that the five year period must be immediately preceding the lawsuit between the parties, but concluded that the period must "bear a direct temporal relationship to the contrary claim made." (*Ibid.*) The Court reasoned that "[t]he doctrines of forfeiture, adverse possession, abandonment and prescription are all related [citation omitted] and, without exception, are evaluated in the context of competing claims of the right to use water. [citations omitted.]" (*Ibid.*) The Court remanded to the trial court for further proceedings to determine the exact five year period to be utilized. (*Id.* at fn. 7.) In the second, published opinion, the Court affirmed the trial court's ruling on retrial of the issue of the appropriate five year period to be used based on the analysis in its first unpublished opinion. (*North Kern II, supra*, 147 Cal.App.4th 565-567.)

The Court of Appeal in the *North Kern I* was wrong and departed from prior precedent, and *North Kern II* is wrong to the extent it read as an application of the law of water rights, and not just the law of the case, when the Court conflated the doctrines of prescription and forfeiture, finding that these doctrines uniformly arise in the context of competing claims for use of water by individual parties. (See e.g., *North Kern II, supra*, 147 Cal.App.4th at 566, citing *North Kern I, supra*, 2003 WL 215821 at *18.) The doctrines of forfeiture and prescription are distinct.

Forfeiture is based on non-use for a five year period. (Wat. Code §§1240, 1241; *Crane v. Stevinson, supra*, 5 Cal.2d at 398 [stating that failure to maintain beneficial use under a pre-1914 appropriative right results in forfeiture of the right, without specifying that the five-year period must bear any relationship to a clash of rights].) And forfeiture is based on the public's interest in maximizing beneficial use for the benefit of all.

(*Smith v. Hawkins*, *supra*, 110 Cal. at 127; Cal. Const. art. X, § 2; see also *North Kern II*, *supra* 147 Cal.App.4th 555, 577, 584 [allowing a diverter to freeze an entitlement to appropriate water, regardless of nonuse, would contravene the important public policy embodied in article X, section 2, of the California Constitution.])

In contrast, the doctrine of prescription or adverse possession is based on adverse use by an individual of water claimed by a competing claimant for a period of five years. (See *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926-927 [a wrongful appropriation may ripen into a prescriptive right when the use is actual, open, notorious, hostile, and adverse to the original owner, continuous and uninterrupted for a period of five years, and under claim of right].) And prescription will not lie as against the State when it seeks to enjoin unauthorized use. (*People v. Shirokow* (1980) 26 Cal.3d 301, 312, fn. 15.)

The Board's application of the forfeiture doctrine can arise in situations that do not involve a dispute between two competing claimants. The Board's administrative enforcement proceeding to enjoin Plaintiffs' unauthorized diversion of water is the most immediate example. Similarly, the Board may evaluate whether a pre-1914 right has been forfeited in determining whether surplus water is available for appropriation by a water right applicant, whether or not a competing claimant asserts a right to water unused under the pre-1914 right in question. (See *United States of America v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102-104 [The Board must examine riparian and prior appropriative rights in order to determine whether surplus water is available for appropriation].) The issue of forfeiture could also arise in a statutory adjudication to determine all the rights to water of a stream, in the absence of a clash of rights with a competing claimant. (Wat. Code, §§ 2500-2900.)

Applying *North Kern II*'s clash of rights criteria to the Board's enforcement proceeding in this case would be inconsistent with the beneficial use doctrine embodied in Article X, section 2. In effect, applying *North Kern II*'s clash of rights criteria to this case would allow pre-1914 rights holders to place their rights in cold storage, and retain unexercised rights unless and until a competing claimant advanced its claim, preventing other prospective appropriators from obtaining permits to appropriate unused water. Preventing such a situation is the very reason that over one hundred years ago, the Legislature delegated to the Board the power to investigate the legitimacy of the water rights claims in this state, and delegated the authority to take all appropriate actions. (See, Report of the Conservation Commission of the State of California, *supra* at 20-21, found at CT 2587-2588, 2601-2602; Wat. Code, §§ 100, 102, 105, 275; *People v. Shirokow*, *supra*, 26 Cal.3d at 309 [The Water Code should be interpreted so that the "waters of the state be available for allocation in accordance with the code to the fullest extent consistent with its terms."].)

To the extent that the beneficial use doctrine which underlies forfeiture embodies a concern about a clash of rights between the public's interest, including all other water diverters, fishery protection, and recreational use, this case demonstrates that clash of interests. The West and East Forks of the Russian River and a portion of the main stem in Mendocino County are fully appropriated July 1 to October 31. (AR 644 citing Board Order WR 98-08, Apen. A, p.26.) Sonoma County Water Agency is required to maintain specified instream flows for fishery protection, and recreation use. (AR 645, 1144:9-13, 1147:9-1150:9, 1851-1852.) The Sonoma County Water Agency and the Mendocino County Flood Control District presented evidence that Plaintiffs' increased diversions under the Waldteufel claim of right injured their rights to store and use water from Lake Mendocino, which is located on the East Fork of

the Russian River upstream of the confluence of the West and East Forks. (AR 146-150; 1852-1855.)¹⁴

D. The Non-Use During the Forfeiture Period Was Not Due to the Lack of Water Availability.

In order to establish forfeiture for non-use for a period of five years, that non-use can not be caused by a lack of available water to divert during the time period. (*North Kern II, supra*, 147 Cal.App.4th at 580-582; *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1372.) The Board found “that non-use during the 1967-1987 forfeiture period was not attributable to a lack of water availability. Instead, the amount of water used during that period likely was attributable to the irrigation demand of the less water-intensive crops being grown on the Waldteufel parcel at the time.” (AR 639.) This conclusion was based on data from the United States Geological Survey’s instream surface flow gage immediately upstream of the point of diversion for the Waldteufel claim of right since 1952, and other evidence presented by Millview, Hill, Gomes, and the Sonoma County Water Agency. (AR 638-639 citing AR 1190, ¶9; 1854, ¶17; 1860; 1167:15-1169:24; 1659-1672; 1232:3-1233:20; 1822; 1126:19-1127:25.) The Board’s finding is the only reasonable inference based on uncontradicted evidence. There is no evidence to suggest that the reduction in the amount of water used during the 1967-1987 period of time was based on unavailability of sufficient water to divert the full 243 acre feet of the original Waldteufel claim of right.

¹⁴ To the extent that this Court requires that in order to establish forfeiture non-use for a period of five years must bear a temporal relationship to the clash of rights, that clash is also demonstrated by the evidence presented in the administrative proceeding. (See AR 637-638, 644-645.)

E. Plaintiffs' Diversions Under the Waldteufel Claim of Right Exceeded and Threatened to Exceed the Scope of the Waldteufel Claim of Right.

The diversion and use of water outside the scope of the Waldteufel claim of right amounts to the initiation of a new right without authorization, and is a trespass against the State. (Wat. Code, § 1052.) The Board found that Plaintiffs' diversions exceeded the scope of the Waldteufel claim of right between 2002 and 2008. (AR 642-643.) This finding was based on Plaintiffs' own data and reports of water usage that established Plaintiffs used more than 15 acre feet per year during that time period. (*Id.* citing AR 1193-1195, ¶ 13; 1265-1267; 1295; 1301-1309; 1082:8-1089:13; 1104:1-15.) Millview claims the right, and consequently threatened, to divert up to 1400 acre feet per year under the Waldteufel claim of right. (AR 1081:13-17.) In addition, Plaintiffs, diverted water outside the limited, authorized season of use under the Waldteufel claim of right. (AR 643 citing AR 1194, 1265-1267, 1301-1309.) The Board's conclusion that Millview, Hill and Gomes have and threaten to divert more than the 15 acre feet per year authorized under the Waldteufel claim of right is the only reasonable inference based on the uncontradicted evidence.

In addition, and as an alternative finding of an unauthorized diversion of water, the Board concluded that when Millview changed the point of diversion to a place below the confluence of the West and East Forks of the Russian River (AR 1286-1287), and changed the place of use to its entire service area (AR 1076:23-1077:6; 1094:2-14; 1369; 1859), it likely injured other legal users of water in violation of Water Code section 1706. (Wat. Code, §1706.) This finding was based on evidence of impacts to the Sonoma County Water Agency, and fishery resources and recreational uses. (AR 644-645, citing 1144:9-13, 1147:9-1150:9, 1851-1852.)

In sum, the Board's findings of fact are supported by undisputed facts established by uncontradicted evidence, and the trial court abused its discretion in concluding that the Board's findings were not supported by the weight of the evidence. (*David Kikkert and Associates, Inc., supra*, 6 Cal.App.3d at 116.)

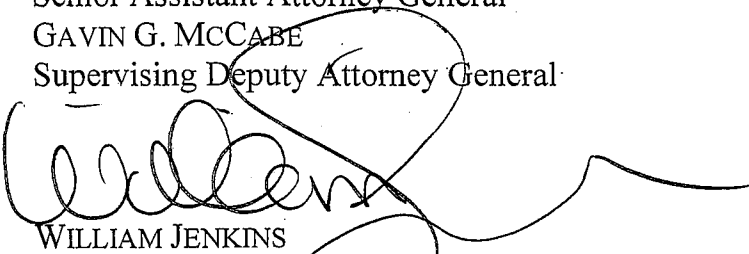
CONCLUSION

Because the Board had jurisdiction to issue the cease and desist order in this case, and because the Board's findings were not against the weight of the evidence, the trial court erred when it granted the petition for writ of mandamus in this case. Therefore, the Board requests that the Court reverse the trial court and remand with instructions to deny the petition and enter judgment for the Board.

Dated: December 17, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the ATTACHED APPELLANT STATE WATER
RESOURCES CONTROL BOARD'S OPENING BRIEF uses a 13 point
Times New Roman font and contains 13,844 words.

Dated: December 17, 2013

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read 'William Jenkins', is written over the printed name and title of the Deputy Attorney General.

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Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fifth District, California.
 NORTH KERN WATER STORAGE DISTRICT,
 Plaintiff, Cross-Defendant, Cross-Complainant, Re-
 spondent and Appellant,
 v.
 KERN DELTA WATER DISTRICT, Defendant, Cross-
 Complainant, Cross-Defendant and Appellant;
 CITY OF BAKERSFIELD, Cross-Defendant, Cross-
 Complainant and Respondent.

No. F033370.
 (Super.Ct.No. 172919).
 Jan. 31, 2003.

As Modified on Denial of Rehearing March 3, 2003.

Inferior appropriative water rights holder brought action against superior appropriative water rights holder alleging, among other claims, that superior appropriative water rights holder had lost some portion of rights it held to Kern River water, which rights had passed to inferior appropriative water rights holder. The Superior Court, Tulare County, No. 172919, Kenneth E. Conn, J., found that superior appropriative water rights holder had forfeited by nonuse a significant portion of its historic right to Kern River water and that the forfeited water had reverted to nonappropriated status subject to the jurisdiction of the State Water Resources Control Board (SWRCB). Both parties appealed. The Court of Appeal, Dibiasco, J., held that: (1) Miller-Haggin Agreement (MHA) and Shaw Decree did not preclude forfeiture; (2) doctrine of contractual estoppel did not prevent forfeiture action; (3) doctrine of laches did not apply; and (4) trial court should have selected a specific five year period for use in determining amount of appropriative use by superior appropriative water rights holder for purposes of forfeiture.

Reversed and remanded.

West Headnotes

[1] Water Law 405 1607

405 Water Law

405VII Appropriation of Waters

405VII(A) Nature and Elements in General

405k1606 Abandonment, Relinquishment,
 Cancellation, or Forfeiture of Rights

405k1607 k. In general. Most Cited Cases
 (Formerly 405k151)

Miller-Haggin Agreement (MHA) and Shaw Decree, which together formalized practices and agreements of those who held appropriative rights to Kern River water, did not preclude forfeiture by superior appropriative water rights holder of rights to 300 cubic feet per second (cfs) daily of Kern River water by continuous nonuse; although the documents created a contractual right to assert, among disputing claimants, a priority appropriative right to water put to beneficial use, they neither insulated such rights from operation of general state water law nor gave them eternal life. West's Ann.Cal.Water Code § 1411; West's Ann.Cal. Const. Art. X, § 2.

[2] Water Law 405 1673

405 Water Law

405VII Appropriation of Waters

405VII(C) Private Civil Actions to Determine,
 Establish, or Protect Rights

405k1673 k. Limitations and laches. Most
 Cited Cases

(Formerly 405k152(2))

Miller-Haggin Agreement (MHA) and Shaw Decree, which together formalized practices and agreements of those who held appropriative rights to Kern River water, did not reflect a waiver by inferior appropriative water rights holder or city of right to challenge superior appropriative water rights holder's retention of its appropriative rights to 300 cubic feet per second (cfs) daily of Kern River water; although Shaw Decree and MHA may have subsumed competing claims underlying lawsuits settled by documents, neither instrument

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was susceptible of being read as an intentional relinquishment in perpetuity by inferior appropriative water rights holder or city of ability to question superior appropriative water rights holder's beneficial use of its entitlement.

[3] Estoppel 156 62.6

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.6 k. Contracts. Most Cited Cases

Estoppel 156 78(1)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k78 Contracts

156k78(1) k. In general. Most Cited Cases

Doctrine of contractual estoppel did not prevent inferior appropriative water rights holder and city, as successors in interest to parties bound by Miller-Haggin Agreement (MHA) and Shaw Decree, which together formalized practices and agreements of those who held appropriative rights to Kern River water, from asserting that superior appropriative water rights holder forfeited rights to 300 cubic feet per second (cfs) daily of Kern River water by nonuse; inferior appropriative water rights holder and city did not question contents of documents, did not contend agreements did not express intentions of parties at time, and did not take positions inconsistent with those taken by their predecessors in interest when documents were created. West's Ann.Cal.Evid. Code § 622.

[4] Water Law 405 1609

405 Water Law

405VII Appropriation of Waters

405VII(A) Nature and Elements in General

405k1606 Abandonment, Relinquishment, Cancellation, or Forfeiture of Rights

405k1609 k. Proceedings to determine

rights. Most Cited Cases

(Formerly 405k152(2))

Doctrine of laches did not prevent inferior appropriative water rights holder and city from asserting that superior appropriative water rights holder forfeited rights to 300 cubic feet per second (cfs) daily of Kern River water by continuous nonuse; although inferior appropriative water rights holder and city waited for over 100 years after senior appropriative water rights holder commenced surplus releases to bring their actions for forfeiture; no dispute arose until more than 80 years later when superior appropriative water rights holder sought to increase its own use beyond historical amounts, and after that date inferior appropriative water rights holder and city objected to any increased use and commenced negotiations with superior appropriative water rights holder to resolve dispute. West's Ann.Cal.Civ. Code § 3527.

[5] Water Law 405 1607

405 Water Law

405VII Appropriation of Waters

405VII(A) Nature and Elements in General

405k1606 Abandonment, Relinquishment, Cancellation, or Forfeiture of Rights

405k1607 k. In general. Most Cited Cases

(Formerly 405k151)

Superior appropriative water rights holder's historical practice of releasing surplus water to junior appropriators was not a beneficial use that precluded forfeiture to rights to 300 cubic feet per second (cfs) daily of Kern River water by nonuse; Miller-Haggin Agreement (MHA) and Shaw Decree, which together formalized practices and agreements of those who held appropriative rights to Kern River water, did nothing to establish any independent right or duty with respect to any released water, and releases of water to junior appropriators, which was mandated by law and followed by practices of parties and watermaster, were not a sale, a transfer or a beneficial use. West's Ann.Cal.Water Code § 1411; West's Ann.Cal. Const. Art. X, § 2.

[6] Water Law 405 1607

405 Water Law

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405VII Appropriation of Waters

405VII(A) Nature and Elements in General

405k1606 Abandonment, Relinquishment,
 Cancellation, or Forfeiture of Rights

405k1607 k. In general. Most Cited Cases

(Formerly 405k151)

Trial court should have selected a specific five year period no later than five years immediately preceding date that dispute arose between parties for use in determining amount of appropriative use by superior appropriative water rights holder for purposes of forfeiture of water rights, rather than relying on 45 year period; dispute arose when superior appropriative water rights holder sought to increase its own water use beyond historical amounts. West's Ann.Cal.Water Code § 1241..

[7] Water Law 405 1607

405 Water Law

405VII Appropriation of Waters

405VII(A) Nature and Elements in General

405k1606 Abandonment, Relinquishment,
 Cancellation, or Forfeiture of Rights

405k1607 k. In general. Most Cited Cases

(Formerly 405k151)

Determination of amount of water forfeited by superior appropriative water rights holder for continuous nonuse required a determination of what was actually not used for entire statutory five year period, not what exceeded average use for that period without regard to daily, monthly or seasonal usage, and thus, trial court improperly relied on superior appropriative water rights holder's yearly average use of "approximately 159,286 acre feet per year on average." West's Ann.Cal.Water Code § 1241..

[8] Water Law 405 1695

405 Water Law

405VII Appropriation of Waters

405VII(C) Private Civil Actions to Determine,
 Establish, or Protect Rights

405k1695 k. Rehearing and review. Most
 Cited Cases

(Formerly 405k152(12))

Superior appropriative water rights holder waived

objection to form of trial court's orders in favor of city on its claims for indemnification and breach of contract by failing to raise issue at trial court and conceding that minute order, made in open court, finally disposed of the causes of action.

APPEAL from a judgment of the Superior Court of Tulare County. Kenneth E. Conn, Judge. Law Offices of Young Wooldridge, Ernest A. Conant, Scott K. Kuney and Steven M. Torigiani; Best, Best & Krieger, Gregory K. Wilkinson and Arthur L. Littleworth for Plaintiff, Cross-defendant, Cross-complainant, Respondent and Appellant North Kern Water Storage District.

McMurtrey & Hartsock, Gene R. McMurtrey and James Worth; Smiland & Khachagian, William M. Smiland and Theodore A. Chester, Jr. for Defendant, Cross-complainant, Cross-defendant and Appellant Kern Delta Water District.

Duane, Morris & Hecksscher, Thomas M. Berliner and Colin L. Pearce; Bart J. Thiltgen, Alan D. Daniel and Duane Morris, LLC, for Cross-defendant, Cross-complainant and Respondent City of Bakersfield.

OPINION

DIBIASO, J.

STATEMENT OF THE CASE

*1 Plaintiff and cross-appellant North Kern Water Storage District (North Kern) filed an action against defendant and appellant Kern Delta Water District (Kern Delta) ^{FN1} alleging, among other claims, that Kern Delta had lost some portion of the rights it held to Kern River water, which rights had passed to North Kern. The complaint relied upon a number of legal theories, including purchase, forfeiture for nonuse, forfeiture by unreasonable use, abandonment, intervening public use and prescription.

^{FN1}. North Kern was formed and has operated as a water storage district pursuant to division 15 of the California Water Code, sections 39000 et. seq. Kern Delta is a public entity and political subdivision formed and existing under the authority of division 13 of the code, sec-

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tions 34000 et. seq.

Kern Delta filed a cross-complaint, which named North Kern and respondent City of Bakersfield (Bakersfield) as cross-defendants. The cross-complaint, by a number of legal theories, sought a determination that Kern Delta had lost none of its Kern River water rights and, in the alternative, a determination that Bakersfield was obliged to indemnify Kern Delta to the extent such rights had been lost. Bakersfield filed its own cross-complaint which named Kern Delta and North Kern as cross-defendants and sought, on several legal grounds, a declaration that Kern Delta and North Kern had forfeited some of their Kern River rights. North Kern filed a cross-complaint against Bakersfield and Kern Delta.

Prior to trial, Bakersfield moved for summary adjudication of the fourth, fifth and ninth causes of action (indemnification and breach of contract) of Kern Delta's cross-complaint. The motion was granted.^{FN2}

FN2. This order is challenged on appeal by way of two footnotes, Nos. 15 and 48, in Kern Delta's opening brief.

After a lengthy trial without a jury, the trial court issued its statement of decision. In essence, the trial court found that Kern Delta had forfeited by nonuse a significant portion of its historic right to Kern River water and that the forfeited water had reverted to nonappropriated status subject to the jurisdiction of the State Water Resources Control Board (SWRCB). The trial court rejected all other claims raised by the parties in their respective pleadings, including North Kern's contention that the water lost by Kern Delta had passed to North Kern as a junior appropriator.

Both Kern Delta and North Kern have appealed, challenging the trial court's decision.

STATEMENT OF FACTS

A. Introduction

The Kern River is a natural watercourse, which originates in the Sierra Nevada mountain range and drains into the southern San Joaquin Valley through a series of

forks and sloughs a few miles northeast of Bakersfield. The flow of the Kern River, like most rivers originating in the Sierra Nevada, varies widely from season to season and year to year, ranging from less than 200,000 acre feet of water to more than 2,500,000 acre feet per year (afy). The maximum seasonal flow, derived from melting snows of the Sierra Nevada, occurs in late spring or early summer. The water of the Kern River has been diverted for agricultural use since the early 1860's through a series of canals managed by a number of canal companies. Since the late 1800's, all of the natural flow of the Kern River has been fully appropriated and beneficially used by the canal companies and area landowners. Not surprisingly given the ebb and flow of the river, disputes over water rights have arisen when the water supply runs short. Water shortage is the rule, rather than the exception, on the Kern River, especially during peak irrigation seasons.

*2 The existing rights to Kern River water date back to the 1860's. Kern Delta's primary right was first established in 1870, when one of its predecessors, Kern Island Irrigation and Canal Company (Kern Island) filed a notice of appropriation.^{FN3} The right is considered a pre-1914 appropriative right because it antedated the 1913 Water Commission Act (WCA), legislation that created a system of statutory appropriative water rights now administered by the SWRCB. Both North Kern and Bakersfield also hold rights to Kern River water which date back to the 1860's and thus also predate the WCA. The administration of these rights among the parties and their predecessors in interest has been accomplished by an intricate, careful system of measurement in effect since 1894 and principally governed by two documents, the Miller-Haggin Agreement (MHA) and the Shaw Decree, which together have formalized the practices and agreements of those who hold appropriative rights to Kern River water.

FN3. Though in this opinion we may use only the name of a party to this appeal, we intend any such reference to include, whenever necessary for historical accuracy, the party's respective predecessor or predecessors in interest, as appropriate.

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B. MHA

In the late 1800's, a dispute arose between upstream appropriative users of Kern River water (including the predecessors in interest to all three parties) and downstream riparian right holders. Ultimately at issue was whether the riparian rights were recognized by California law and, if so, whether they were paramount to the appropriative rights. In the historic decision of *Lux v. Haggin* (1886) 69 Cal. 255, the Supreme Court legitimized the riparian rights under California law and found them superior to the appropriative rights *unless* an appropriative right predated the acquisition of the riparian property. The matter was remanded for retrial to determine the age of the rights in question,^{FN4} but, to settle the dispute, the upstream users (known as first point users) and the downstream landowners (known as second point users) entered into the MHA on July 28, 1888. All the current uses of Kern River water are subject to the MHA and are limited to those who hold a right specified in the agreement as either a first or second point user.

FN4. It appears undisputed that Kern Island's appropriative filing predated the purchase dates of the riparian claimants. Thus, Kern Island's rights were paramount to those held by the riparian downstream users.

The MHA requires Kern River water to be measured on a regular basis at two locations, the first at an upstream point then known as the Beardsley Ditch and the second at a downstream point then known as the Joyce Canal.^{FN5} The parties do not dispute that these measurements have been made continuously on a daily basis since the inception of the MHA and are accurate. The agreement also confirmed the apportionment of Kern River water between the first point users and the second point users in accordance with preexisting rights. The MHA thus did not convey or create any water rights; instead, it merely recognized the rights previously held by the parties and apportioned the water between the two groups of litigants. The agreement did, however, recognize that Kern Island had a first priority right to 300 cubic feet per second (cfs) daily and that only after this entitlement had been satisfied did the ap-

portioned rights among the remaining holders, first and second point alike, begin. Specifically, the agreement provided:

FN5. Currently, Bakersfield is responsible for the measurements.

*3 "When the amount of said waters flowing at said First Point of Measurement does not exceed three hundred (300) cubic feet flowing per second, the Kern Island Irrigating Canal Company, one of the parties of the second part [first point users], its successors and assigns, shall be entitled to all thereof.

"When the amount of said waters flowing at said First Point of Measurement during said months of *March, April, May, June, July and August [irrigation season or MHA season]* exceeds three hundred (300) cubic feet flowing per second, then of the amount thereof over and in excess of said first three hundred (300) cubic feet per second, the parties of the first part [second point users], their heirs, executors, administrators and assignees, shall be entitled to one-third (1/3), and the parties to the second part [first point users], their heirs, executors, administrators and assignees, shall be entitled to two-thirds (2/3)... The water allotted to the [first point users], other than the three hundred (300) cubic feet flowing per second, above specifically allotted to the Kern Island Irrigating Canal Company, ... to be taken out, used and disposed of by them in any manner, at any place and for any purpose they may think proper, or arrange or agree upon among themselves. Said three hundred (300) cubic feet of water flowing per second, so specifically allotted to said Kern Island Irrigating Canal Company, to be by it taken out, used and disposed of in any manner, at any place and for any purpose it may think proper.

"During the months of *January, February, September, October, November and December [off season months]* of each and every year, the Kern Island Irrigation Canal Company, its successors and assigns, as to the first three hundred (300) cubic feet flowing per second, and the parties of the second part [first point users], their heirs, executors, administrators and as-

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signs, as to all over and above said first three hundred (300) cubic feet flowing per second, shall be entitled to all the water flowing in said Kern River at any point above said Second Point of Measurement, and may intercept, divert, take out, use and consume the same in such manner, and at such points and places, and for such purposes, as they may desire. Any and all water to which the parties of the second part [first point users] are entitled hereunder, which shall not have been diverted by the parties of the second part [first point users], their heirs, executors, administrators or assigns, or some of them, before reaching said Second Point of Measurement, shall, upon and after passing said Second Point of Measurement, belong to the parties of the first part [second point users], their heirs, executors, administrators and assigns, to be used and enjoyed by them as the other waters which they shall receive as hereinabove provided." (Emphasis added.)

The agreement further required that the rights held by the parties shall be "diminished so as to make each contribute pro rata to the amount by this Instrument allotted to the [second point users]; and to the said three hundred (300) cubic feet allotted to the Kern Island Irrigating Canal Company."

*4 The MHA has been amended from time to time by the parties and their successors in interest, but the agreement has remained essentially the same.

C. Shaw Decree

A few years after execution of the MHA, again when the available water was not sufficient to meet all the demands of the claimants, a new dispute arose among the first point users concerning diversions. This dispute also ended in litigation. The first point users sought an injunction against diversions by Kern Island ^{FN6} which interfered with the remaining first point appropriative rights.^{FN7}

FN6. Kern Delta now administers the appropriations of Kern Island, Buena Vista, Stine and Farmers. However, it is clear the parties are primarily fighting over the Kern Island rights, which have first priority and provide the meas-

ure for all other first point rights. Nonetheless, by limiting our discussion to the Kern Island rights, we do not mean that any amount forfeited is correspondingly limited to Kern Island rights. Any amount forfeited may well include portions of Kern Delta's other appropriations.

FN7. There are 31 historic first point rights or entitlements, which are now held by three entities; all are parties to this action.

In 1901, Judge Lucien Shaw issued a decision thereafter known as the "Shaw Decree." The decree reaffirmed the MHA, set a maximum flow available for diversion and appropriation by each first point user, and established an order of priority for diversions among them, including Kern Island. These conditions are sometimes referred to as "theoretical" or "paper" entitlements and apply whenever there is insufficient water to meet the claims of all right holders—a frequent occurrence. The second point users were not impacted by the Shaw Decree.

The Shaw Decree rested upon the existing historical rights identified in the MHA and confirmed Kern Island's priority to the first 300 cfs of flow.^{FN8} The decree listed each right holder and the specific quantity of water to which the holder was entitled when there is sufficient water to be apportioned.^{FN9} The decree also confirmed that the rights of the first point users are subordinate to Kern Island's 300 cfs priority and to the second point priorities, which had been set by the MHA.

FN8. Kern Island was also awarded an additional 56 cfs entitlement, which had a much later priority, fifteenth of fifteen.

FN9. The decree states in relevant part: "... the right of each of said plaintiffs to divert and appropriate said waters includes the right to use the same and furnish the same to others to be used ..., but not to suffer the same to be wasted, and that as between themselves, when there is not sufficient water available for all of said plaintiffs, the order of right and priority shall

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be as follows: [Fifteen separate priorities then follow, including Kern Island's 300 cfs daily (approximately 210,000 afy) and those held by North Kern's predecessors.]”

The Shaw Decree noted that the custom on the river had always been to divert only that amount of water required for use by a particular appropriator and to allow the unused water to flow back to the river for use by holders of junior rights, a practice which continued after the decree.^{FN10} The unused water has been traditionally termed “release water,” although neither the MHA nor the Shaw Decree contains these words.

FN10. The decree states that the water in dispute (that of the Kern River) was necessary for irrigation, domestic and mechanical purposes, had been used for these purposes when diverted and had not been wasted. Both the Shaw Decree and the MHA appear to accept that the parties who hold rights to water from the Kern River have perfected those rights by reasonable and beneficial use of the water claimed. Both documents frame the issue decided as a dispute upon holders of a perfected right when water is unavailable to satisfy all existing water rights.

Land ownership along the Kern River has changed through the years, but the rights and the obligations identified in the MHA and the Shaw Decree run with the land. The MHA and the Shaw Decree together have governed the river's use for more than a hundred years. The entitlements recorded in the documents are measured daily and the extent of the actual uses vary significantly from day to day, month to month and year to year.^{FN11} The parties have consistently referred to the two documents in light of historical demand, historical use and historical practices when setting policy for administering the river. All river users share the costs of the facilities and operations required to move the water along the system. The first point users also share amongst themselves the costs of measuring and reporting.^{FN12}

FN11. A “normal” year for the Kern River occurs when flows are between 74 percent and

125 percent of “average.” Less than one third of the years are “normal” under this standard.

FN12. Currently, half the cost of operations and facilities is borne by the first point users and half is borne by the second point users. Reporting costs are divided in, thirds—one-third paid by Kern Delta, one-third by North Kern and one-third by Bakersfield.

D. North Kern

North Kern was formed in 1935. In 1950, it undertook to develop its water supply system. As part of this project, North Kern acquired water rights in 1952 from several holders of pre-1914 appropriative rights, some of which were and remain subject to the MHA and the Shaw Decree.^{FN13} North Kern assessed its water supplies based on its paper entitlements as well as upon the historic availability of release water. North Kern then made substantial investments in its water storage and delivery systems. Since 1968, the land within the North Kern district has been fully developed for agricultural purposes.

FN13. North Kern holds the following paper entitlements to water under the MHA/Shaw Decree: James (1st), Anderson (1st), Meacham, Plunkett, Joyce, Johnson, Pioneer (1st), Beardsley (1st) (30 percent), Anderson (2d), James & Dixon, McCaffrey, McCord (51 percent), Calloway (80 percent), Railroad (80 percent), James (2d), Pioneer (2d), Beardsley (2d) (30 percent).

*5 From 1954 to 1996, North Kern used an average of 167,000 afy of Kern River water, of which 92,000 came from its own paper entitlement ^{FN14} and the rest, an average of 66,000 acre feet, from release water of which, 95 percent, or an average of 63,000 acre feet, was from Kern Delta or its predecessors.^{FN15} Obviously, the amount of release water used by North Kern varied substantially from month to month and season to season.

FN14. North Kern has used its full entitlement every year but one. North Kern's use of release

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water has not caused any problem for Bakersfield, which has sufficient water to meet its current needs.

FN15. The experts testifying at trial each selected their own time period for purposes of calculating annual averages, excluding or including wet years or dry years or taking other factors into account. Their respective numbers diverged accordingly.

E. Bakersfield

In April of 1976, Bakersfield acquired, from Tenneco West, several of the appropriated water rights identified in the MHA and the Shaw Decree.^{FN16} The Kern River is an important water source for the city. Bakersfield works in close cooperation with the other MHA parties in managing the entitlements, especially in its present role as river administrator.

FN16. The contract between Bakersfield and Tenneco described the Kern Island rights and their relationship to the MHA and the Shaw Decree as follows: "said rights are known and identified by the names used herein, and have certain priority dates, priorities and quantities. Said priority dates, priorities and quantities are more particularly described in the [MHA] of 1888, ... and subsequent amendments thereto and were interpreted in the Shaw decree of 1900 ..., and the acquisition herein of said water rights is intended to include said priority dates, priorities and quantities enumerated in said documents."

In June 1976, Bakersfield^{FN17} sold to Kern Delta certain of the Tenneco water rights and canal facilities. The rights conveyed included the Kern Island 300 cfs priority, were transferred by quitclaim deed, and were described as "whatever they may be." Both parties were aware of the history of the river, the historical practices and the governing agreements. Both parties were also aware that the entitlement acquired by Kern Delta historically had not been put to full use. The purchase agreement was made subject to the MHA and Shaw Decree, as well as to other agreements governing the river.

The rights were conveyed "subject to the legal consequences, if any, of the actual administration of said agreements, documents and decrees...." At the time of the sale, Bakersfield knew that North Kern took a substantial portion of the water released by Kern Island and its successors.

FN17. Bakersfield holds paper entitlements to the following rights: Kern River Conduit, Castro, South Fork, Beardsley (1st) (70 percent), Wilson, McCord (49 percent), Calloway (20 percent), Railroad (20 percent), and Beardsley (2d) (70 percent).

F. Release Water

As both the MHA and the Shaw Decree reflect, each day the use of the river water begins with the Kern Delta, which now holds the former Kern Island entitlement. Kern Delta's decision to either use or release some or all of its entitlement sets the amount available each day for use by junior right holders. The daily amount released by all first point users is governed by the amount of water available in the river^{FN18} and the amount of water requested by more senior right holders, beginning with Kern Delta. Each subsequent user either uses or releases water based on the amount of water available to it and its particular needs for the day. Thus, each subsequent right holder makes its own decisions based on the daily decisions of more senior right holders, subject always to the amount of water provided by the river itself, in accordance with the historical practices.

FN18. For example, even though Kern Delta's paper entitlement is 300 cfs, the river's natural flow might be less on any given day in any given year.

Release water is not recorded or treated as a transfer or sale to junior right holders. Release water is not ordered and cannot be used until it is relinquished each day by a more senior right holder. Most of Kern Delta's release water is generated during the winter when Kern Delta historically has not had a use for all the available water by reason of low crop demands, the lack of spreading^{FN19} facilities, the significant use of ground

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water instead of river water for irrigation by farmers in the district, or other factors. Both Kern Delta and North Kern have lesser irrigation needs in the winter, but North Kern has an established spreading practice.

FN19. Spreading consists of flooding fallow land with excess water for the purpose of recharging the underlying ground water basin.

*6 During the period from 1954 to 1976, the predecessors in interest to Kern Delta released an average of 87,000 acre feet of water to the river each year, primarily during the winter months. This use was less than the full MHA entitlement. Ninety percent of all the release water in the river originated with Kern Delta. Although that figure has increased since 1976, Kern Delta cur-

rently does not have a demand for more than 200,000 afy on average; this number would be higher if Kern Delta constructed spreading facilities.

After acquiring the water rights from Bakersfield, Kern Delta made public its intention to increase diversions in excess of its historical use. Both Bakersfield and North Kern objected to any diversion beyond Kern Delta's historical use. Despite these objections, and since 1981, Kern Delta has consistently diverted and used more Kern River water than did its predecessors. Kern Delta's expert compared Kern Delta's use with that of its predecessors as follows:

Year	Actual Entitlement	Use	Release
1968-1976 Pre-Kern Delta	250,277 afy	163,370 afy	87,000 afy
1981-1994 Post-Kern Delta	250,498 afy	182,175 afy	68,000 afy

The increase in use necessarily has reduced the amount of release water available to junior right holders. From 1977 to 1996, the period following Kern Delta's acquisition of the rights, approximately 52,000 acre feet of release water was available to North Kern, an amount less than what was available both before 1977 and historically.

G. SWRCB

The SWRCB declared in 1964 that the waters of the Kern River were fully appropriated. (SWRCB decision No. 1196.) As a result, the SWRCB will not consider application for an appropriative right to the waters of the Kern River unless the application is accompanied by a study showing unappropriated waters are available. The decision was reaffirmed in 1989. Anticipating that the trial court might find that some of Kern Delta's rights had been forfeited, the parties petitioned for the appropriation of any such forfeited water. These applications are currently pending before the SWRCB, which has deferred any action until the conclusion of this litigation.^{FN20}

FN20. Kern Delta has asked this court to take judicial notice of a letter from the SWRCB

dated October 8, 1999, which expresses SWRCB's decision to defer action on the petitions while this case is pending. We grant the request.

H. Key Findings of the Trial Court

The trial court made numerous findings in its statement of decision. Many are not challenged by any party on this appeal, such as the trial court's decision that North Kern failed to prove its contentions that Kern Delta had abandoned its rights and that North Kern had acquired a portion of Kern Delta's water right by prescription, inverse condemnation or an intervening public use. Bakersfield has not appealed from the trial court's adverse ruling on Bakersfield's cross-complaint for damages against Kern Delta for breach of contract.

In defining the water rights held by the parties, the trial court found:

1. The water rights in question are appropriative rights, not contractual rights. The MHA did not create water rights, but merely confirmed the rights held at the time of the agreement. The agreement also was never intended to and did not remove any right held outside the purview of California water law.

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*7 2. The Shaw Decree also did not create any rights, but merely confirmed and allocated the rights already obtained by appropriation. The Shaw Decree eliminated any need to perfect the appropriative rights because it confirmed a given quantity to each right holder.

3. The rights held by the parties are appropriative and not riparian because the South Fork of the Kern River, the watercourse involved in Kern Delta's riparian claim, ceased to be a natural waterway in 1868.

4. North Kern did not purchase any release water in 1952. A fair reading of the 1952 purchase agreement discloses no guarantee of any specific quantity of water.

5. The 1976 Bakersfield/Kern Delta agreement for the sale of water rights was not ambiguous-Bakersfield only sold the water rights it had "whatever they may be" and the sale was subject to the actual administration of the water under the MHA and the Shaw Decree.

As to the administration of the river, particularly the practice of releasing water to junior appropriators, the trial court found:

1. Kern Delta holds the first priority right, through its predecessor Kern Island, to divert and appropriate from the Kern River 300 cfs daily. The entitlements established by the Shaw Decree are calculated on a daily basis.

2. The historical practice was to release water to the river whenever there was, on any given day, a surplus above the actual demand of the particular right holder, which water was available for use by junior right holders having a demand for the water on that day. All parties understood that the release of any quantity of water on a given day was available on that day only and that each day on the river is a "new" one for purpose of calculating release water.

3. Use of release water was at all times permissive, without formalization, prior communication, acknow-

ledgement or transfer agreement. There existed historically "cooperation and consent" among the first point users with respect to the practice of releasing water and the use of released water.

4. Release water is not addressed directly in either the Shaw Decree or the MHA.

5. The existing system of diversion and distribution works well and results in a predictable distribution system and full beneficial use of all the water available, a state of affairs which should be preserved insofar as possible.

6. During the period 1954-1976, Kern Delta released on average 87,000 afy of water per year. During the same period, North Kern diverted and beneficially used on average 66,000 afy of water, of which 63,000 afy was water released by Kern Delta.

Finally, with respect to forfeiture, the trial court found:

1. Kern Delta's pre-1914 rights were subject to the rule of statutory forfeiture. The five-year period may be any period of continuous historic nonuse and need not be the five-year period immediately preceding the commencement of the legal action seeking to prove forfeiture.

2. Kern Delta has forfeited a portion of its appropriative rights by nonuse for a continuous five-year period based on annual averages over 45 years. Kern Delta has used on average approximately 159,286 afy, which is the extent of its preserved entitlement. The remaining portion of Kern Delta's entitlement has been forfeited through nonuse.

*8 3. Article X, section 2 of the California Constitution (article X, section 2) precludes Kern Delta's use of water rights in excess of historic amounts; to do so would be an unreasonable use because it would harm other water right holders.

4. When an appropriative right is forfeited under the statute, the right reverts to public use. Because a portion of the water rights formerly held by Kern Delta

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has been forfeited, the Kern River is no longer fully appropriated. That portion of the water, which has become unappropriated, is now subject to appropriation under the applicable procedures and the jurisdiction of the SWRCB.

DISCUSSION

Kern Delta Appeal

I.

[1] Although the record is complex, as are the arguments of the parties, this case for the most part involves competing legal principles, and the critical facts are generally not disputed by the parties. The trial court's statement of decision is detailed and well organized, and separates the court's findings and analysis by the various theories raised by the parties, and the parties in large part do not challenge the trial court's factual findings. North Kern lost all its claims against Kern Delta except for two-forfeiture for nonuse and a contention under article X, section 2, which prohibits unreasonable use of water resources. Essentially, the trial court found that Kern Delta had not used its full entitlement under the MHA and therefore had forfeited a portion of its rights. Kern Delta contests this determination and disputes the method used by the trial court to measure nonuse.

North Kern and Bakersfield, while agreeing with the trial court that a portion of Kern Delta's rights were forfeited for nonuse, disagree that the forfeited water reverted to public use. They assert instead that the forfeited water rights reverted to the holders of junior appropriative rights.

II.

A.

It goes without saying that water is one of the most, if not the most, important of this state's natural resources. The history of California water law commenced with the pueblo rights held by owners of the early Spanish land grants.^{FN21} Although all water within the state is the property of the people (Wat.Code, § 102 ^{FN22}), the right to use water may be acquired and held in a variety of forms, including riparian and appropriative. The right to use water, once acquired, is a vested property right, although it is usufructuary and sub-

ject to the limitations established by law. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d 82, 227 Cal.Rptr. 161.) Article X, section 2 ^{FN23} (adopted in 1928 as former art. 14, § 3) sets the primary limitations upon water rights in the state, as follows: 1) the right to use water is restricted to that amount of water reasonably required for a beneficial use; 2) the right does not extend to the waste of water; and 3) the right does not extend to unreasonable use or unreasonable methods of use or diversion. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367, 40 P.2d 486.) These principles hold whether the rights are riparian or appropriative. (*Ibid.*, see also *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240, 99 Cal.Rptr.2d 294, 5 P.3d 853.) The courts have consistently found that article X, section 2 is intended to insure the water resources of the state are put to a reasonable use and are made available for the constantly increasing and changing needs of all the state's citizens. (*City of Barstow v. Mojave Water Agency*, *supra*, at p. 1240, 99 Cal.Rptr.2d 294, 5 P.3d 853; *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 751-752, 126 Cal.Rptr. 851.)

FN21. There are excellent summaries of the history of California water law in two published cases, *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 227 Cal.Rptr. 161, and *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 72 Cal.Rptr.2d 1.

FN22. All further references are to the Water Code unless otherwise noted.

FN23. Article X, section 2 (1976 version) 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 waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and

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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 unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

*9 By virtue of the constitutional provision, water rights are quantified by the amount of water devoted to a beneficial use and water rights are restricted or reduced by the amount of water not so used. No title or right can be acquired to any amount of water which exceeds that which can be put to a reasonable beneficial use. (*Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8, 22, 276 P. 1017.) Being usufructuary, water rights cannot be obtained by diversion, by deed, by title, or by contract, nor can they be sustained simply by possession of a license from the SWRCB. Instead, the legal right to use particular water exists only so long as the water is put to a reasonable beneficial use. (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 141, 60 Cal.Rptr. 377, 429 P.2d 889 [wasteful use is not beneficial use and thus no legal right to waste water exists]; *Joerger v. Pacific Gas & Electric Co.*, *supra*, at p. 22, 276 P. 1017 [diversion not sufficient to preserve right]; *Southside Imp. Co. v. Burson* (1905) 147 Cal. 401, 81 P.

1107 [contract right to water limited to amount put to beneficial use]; *United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 97, 227 Cal.Rptr. 161 [if license holder fails to put water to beneficial use, license is revoked]; *Big Rock M.W. Co. v. Valyermo Ranch Co.* (1926) 78 Cal.App. 266, 275, 248 P. 264 [diversion without use confers no right]; *Witherill v. Brehm* (1925) 74 Cal.App. 286, 294, 240 P. 529 [extent of the user's right is limited, not by the quantity of water diverted or by capacity of the ditch but by the quantity applied for beneficial purposes]; *Simons v. Inyo Cerro Gordo Co.* (1920) 48 Cal.App. 524, 192 P. 144 [discovery of springs does not convey ownership if not used].) Water rights carry no specific property right in the corpus of the water itself. (*Big Rock M.W. Co. v. Valyermo Ranch Co.*, *supra*, at p. 275, 248 P. 264.)

B.

The trial court found that Kern Delta's predecessors in interest held appropriative water rights to the first 300 cfs of Kern River water. This finding is supported by the evidence and is not seriously challenged by the parties.^{FN24} The overwhelming weight of the evidence established that Kern Delta and its predecessors always considered the rights appropriative and acted consistently. The parties' historical use of water and the administration of the watercourse is the best evidence of their relative water rights. (*Pleasant Valley Canal Co. v. Borror*, *supra*, 61 Cal.App.4th 742, 72 Cal.Rptr.2d 1.) The Kern Island rights can be directly traced to the notice of appropriation filed on December 1, 1889. Both the MHA and the Shaw Decree refer to the rights as appropriative.

FN24. Kern Delta argues, as it did-with considerably more conviction-in the trial court, that its rights are also riparian in nature and thus cannot be lost through nonuse. (See *Fresno Canal & Irrigation Co. v. People's Ditch Co.* (1917) 174 Cal. 441, 450, 163 P. 497; *Mt. Shasta Power Corp. v. McArthur* (1930) 109 Cal.App. 171, 191, 292 P. 549.) Even if this was a correct statement of present law, and we are not certain it is (see *Joslin v. Marin Mun. Water Dist.* *supra*, 67 Cal.2d at p. 134, 60

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Cal.Rptr. 377, 429 P.2d 889 [riparian rights attach only insofar as the amount of water which can be used consistent with article X, § 2]; *Fell v. M. & T., Incorporated* (1946) 73 Cal.App.2d 692, 166 P.2d 642 [constitutional mandate of beneficial use applies to all water "under whatever right the use may be enjoyed"]; *Orange County Water District v. City of Riverside* (1959) 173 Cal.App.2d 137, 184, 343 P.2d 450 [riparian users may not lose right by nonuse, but amount not used becomes available for appropriation which becomes a legitimate claim against the riparian right], the trial court found that any such riparian right had been extinguished prior to Kern Delta ownership because of a change in the watercourse of the South Fork of the Kern River (the watercourse from which Kern Island would have held riparian rights) which occurred in the mid-1800's. When a waterway changes its channel through natural causes, riparian rights are contemporaneously altered. (See *McKissick Cattle Co. v. Alsaga* (1919) 41 Cal.App. 380, 388-389, 182 P. 793.) Having changed its flow, the Kern River no longer runs contiguous to the former Kern Island land. Only land which borders a natural watercourse is endowed with riparian rights. (*Gallatin v. Corning Irr. Co.* (1912) 163 Cal. 405, 416, 126 P. 864; *Lux v. Haggin, supra*, 69 Cal. at pp. 424-425.)

An appropriative right is the right to use an identified quantity of water, to the exclusion of subsequent right holders, provided the entire quantity is necessary for the beneficial purposes for which it was appropriated; the right holder is entitled to meet all its water needs up to the amount appropriated before any subsequent right holder may take any water from the subject watercourse. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926, 207 P.2d 17; *Senior v. Anderson* (1900) 130 Cal. 290, 297, 62 P. 563; *Hoffman v. Stone* (1857) 7 Cal. 46, 49; *Ortman v. Dixon* (1859) 13 Cal. 33, 38; *Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal. 143, 153-154; Hutchins, *The California Law of Water Rights* (1956) pp. 154-157.)

*10 Since 1914, the statutory scheme created by the WCA is the exclusive method of acquiring appropriated rights to water. To secure such a right, an application must be filed with the SWRCB for a permit authorizing construction of the necessary water works and the taking and use of a specified quantity of water. (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 102, 227 Cal.Rptr. 161.) If the appropriation is not secured by such a permit, the claimant must prove the appropriation was accomplished prior to 1913 and not since lost by prescription, abandonment or forfeiture. (See *Crane v. Stevinson* (1936) 5 Cal.2d 387, 398, 54 P.2d 1100.)

Here, Kern Delta proved, by its notice of appropriation and by the MHA and the Shaw Decree, that it holds superior appropriative rights to 300 cfs daily of the Kern River water. The core dispute in this case thus focuses upon the second element of the necessary proof—whether Kern Delta forfeited all or a portion of this right through nonuse.

III.

A.

An appropriative right is neither infinite nor indefinite. An appropriative right cannot be held in perpetuity if the water is not put to a beneficial use. (*Baset v. Nugget Bar Placers, Inc.* (1931) 211 Cal. 607, 617, 296 P. 616; *Duckworth v. Watsonville Etc. Co.* (1907) 150 Cal. 520, 531-534, 89 P. 338.) "[An] appropriator [can] hold, as against one subsequent in right, 'only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser.' (*Smith v. Hawkins* (1898) 120 Cal. 86, 52 P. 139.) " (*Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450, 455, 173 P. 994.)

A water right is forfeited when the holder fails to put the water right to full beneficial use for a period of five consecutive years. (§ 1241, formerly Civ.Code, § 1411 (1872 enactment).) This statute codifies common law. (*Wright v. Best* (1942) 19 Cal.2d 368, 380, 121 P.2d 702; *Smith v. Hawkins* (1895) 110 Cal. 86, 122; *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 582, 99 Cal.Rptr. 446; Hutchins, *The*

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California Law of Water Rights, *supra*, pp. 295-296.) Pre-1914 appropriative rights may be lost by nonuse in the same manner as post-1914 appropriative rights. (*Pleasant Valley v. Borrer*, *supra*, 61 Cal.App.4th at p. 754, 72 Cal.Rptr.2d 1.) The party asserting such a forfeiture bears the burden of proof. (*Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 820, 108 P.2d 425.)

The trial court decided that, although Kern Delta initially held the first priority right to divert and appropriate 300 cfs per day from the Kern River, Kern Delta lost a portion of its right through nonuse because "[t]he evidence is persuasive that Kern Delta's predecessors failed to use beneficially the full extent of their theoretical or paper rights during various periods of five continuous years prior to the 1976 acquisition by Kern Delta." The trial court found that Kern Delta used, on average, only about 159,286 afy, and released, on average, 87,000 afy during several continuous five-year periods between 1954 and 1976, the timeframe selected for measurement. Ultimately, the trial court concluded that Kern Delta forfeited all its right in excess of 159,286 afy.

*11 Kern Delta challenges the trial court's decision on several grounds, including the following:

1. Because the law abhors a forfeiture, the MHA and the Shaw Decree must be read expansively so as to avoid forfeiture, and when so read, both documents preclude North Kern and Bakersfield from asserting any claim to the water released by Kern Delta.

2. North Kern and Bakersfield are estopped from asserting any claim to such water because they failed to raise it in a timely fashion and their predecessors in interest agreed to Kern Delta's release practices.

3. Releasing water under the agreements to other first point users was a beneficial use of Kern Delta's entitlement.

4. The amount of water found to have been forfeited is excessive because the trial court used the wrong period of measurement and the increased diversions after 1976 were not unreasonable.

B.

1. The MHA and The Shaw Decree

Kern Delta does not dispute that, during the 45-year evaluation period, it released on average 87,000 afy for use by junior appropriators.^{FN25} It argues, however, that, by virtue of the MHA and the Shaw Decree, North Kern and Bakersfield, through their predecessors, waived all future claims to released water and, alternatively, are estopped to deny Kern Delta's right to its full MHA entitlement-300 cfs daily.

FN25. It does maintain that this is not an appropriate measurement, a claim we discuss later in this opinion.

The trial court concluded there was nothing in the MHA which transformed the existing water rights into a "guaranteed right having attributes of permanence" or a right "insulated from the application of the water law of the State of California." The court also questioned whether a guaranteed or paramount, but dormant, water right would be valid under current law, and implicitly found that the Shaw Decree did nothing to foreclose a later claim of forfeiture by North Kern or Bakersfield.

As Kern Delta sees it, its right to 300 cfs daily is inviolate because the MHA established the right for any purpose selected by Kern Delta. Under this theory, Kern Delta is free to waste water or entirely abandon the right for decades and then reassert it to the full extent of the MHA entitlement-300 cfs daily. In other words, according to the Kern Delta, the MHA and the Shaw Decree invalidated the legal doctrines of prescription, forfeiture, and abandonment, all of which exist and have always existed to ensure that the limited water resources of this state are fully put to beneficial use.

In the absence of disputed extraneous evidence, which is the case here, the interpretation of a document is a question of law subject to de novo appellate review. (*CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 906, 110 Cal.Rptr.2d 889.) In our estimation, the construction of the MHA and the Shaw Decree advanced by Kern Delta violates public policy and would require this court to declare it null and void. (See *Safeway Stores v. Retail Clerks etc. Assn.* (1953)

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41 Cal.2d 567, 574-575, 261 P.2d 721 [contracts may be declared violative of public policy when policy is declared in statute or Constitution]; *Kreamer v. Earl* (1891) 91 Cal. 112, 117, 27 P. 735 [California courts are loathe to enforce contract provisions offensive to public policy]; *Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1073, 95 Cal.Rptr.2d 496, 997 P.2d 1153 [same]; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 381, 33 Cal.Rptr.2d 63, 878 P.2d 1275 [same].) When the public policy of this state outweighs the interest in the enforcement of a contract, the courts will not give effect to the offending agreement. (*Cariveau v. Halferty* (2000) 83 Cal.App.4th 126, 133-134, 99 Cal.Rptr.2d 417.)

*12 We are hard pressed to identify any physical resource in this state more worthy of protection as a matter of enlightened public policy than water; it is simply too precious a commodity to be allowed to be wasted under the auspices of a private contract or otherwise. (See *Joslin v. Marin Mun. Water Dist.*, *supra*, 67 Cal.2d at p. 141, 60 Cal.Rptr. 377, 429 P.2d 889; *Joerger v. Pacific Gas & Electric Co.*, *supra*, 207 Cal. at p. 22, 276 P. 1017 [for this reason, water rights in California are defined and quantified by beneficial use].)

In any event, whether Kern Delta's construction of the documents would conflict with an overriding public policy is an issue we need not get into, because we do not find anything in the MHA or the subsequent Shaw Decree which, expressly or impliedly, evinces an intent to insulate the covered rights from the operation of the laws of water then (or now) in effect in this state. In an absence of such an intent, we must read the documents in conjunction with the water law at the time the contract was made. (See *Miracle Auto Center v. Superior Court* (1998) 68 Cal.App.4th 818, 821, 80 Cal.Rptr.2d 587 [existing laws become part of an agreement].)

The law in 1888 and 1900, before the Constitution was amended to include the precursor to article X, section 2, defined water rights by reference to beneficial use, as the law does today. Thus, though the documents created a contractual right to assert, among the disputing claimants, a priority appropriative right to water put to beneficial use, they neither insulated such rights from

the operation of general California water law nor gave them eternal life. Accordingly, even though the MHA and the Shaw Decree "confirmed" Kern Delta's 300 cfs daily, the right was at all times thereafter subject to forfeiture through nonuse under the applicable principles of general California water law. (See *Fell v. M. & T., Incorporated*, *supra*, 73 Cal.App.2d 692, 166 P.2d 642.)

[2] The documents also do not reflect a waiver by North Kern or Bakersfield of the right to challenge Kern Delta's retention of its appropriative right. ^{FN26} The waiver of a legal right comes about only by the holder's intentional act with knowledge of the facts. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572, 150 P.2d 422.) Though the Shaw Decree and the MHA may have subsumed the competing claims underlying the lawsuits settled by the documents (see *Wackerman Dairy, Inc. v. Wilson*, *supra*, 7 F.3d 891, 897), neither instrument is susceptible of being read as an intentional relinquishment in perpetuity by North Kern or Bakersfield of the ability to question Kern Delta's beneficial use of its entitlement.

FN26. A water right may be relinquished by contract. (See *Southside Imp. Co. v. Burson*, *supra*, 147 Cal. at pp. 407-408, 81 P. 1107; *Wackerman Dairy, Inc. v. Wilson* (9th Cir.1993) 7 F.3d 891, 896-897.)

[3] For the same reasons, neither document operates to estop North Kern or Bakersfield. The doctrine of contractual estoppel is based on the notion that parties who have expressed their mutual assent are bound by the contents of the instrument they have signed and may not later claim that its provisions do not express their intentions or understanding. (See Evid.Code, § 622; *Estate of Wilson* (1976) 64 Cal.App.3d 786, 801-802, 134 Cal.Rptr. 749; *City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1176, 99 Cal.Rptr.2d 198.) North Kern and Bakersfield here do not question the contents of the documents, do not contend the agreements did not express the intentions of the parties at the time, and do not take positions inconsistent with those taken by their predecessors in interest when the documents were created. North Kern and Bakersfield instead maintain that, under well accepted

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principles of water law, Kern Delta has, over time, lost all or part of its acknowledged MHA entitlement because it has, for at least one five-year period, failed to put all of its allocation to beneficial use. And, even if there was something in either of the two documents which might be read to preclude any party from challenging another's beneficial use of the contractually confirmed right-and there is nothing-we would be reluctant to enforce such a provision for the public policy reasons expressed earlier.

*13 None of the opinions relied upon by Kern Delta are apposite. Each deals with either a contract for the sale of water rights or a deeded transfer of land to which water rights attached and a claim by one party to the sale or transfer that certain additional rights were intended to be included in the deal, situations far from the issues here. (See *Copeland v. Fairview Land Etc. Co.* (1913) 165 Cal. 148, 131 P. 119; *Duckworth v. Watsonville Etc. Co.*, *supra*, 150 Cal. 520, 89 P. 338; *Williams v. Laras* (1955) 131 Cal.App.2d 217, 280 P.2d 220; *City of Coronado v. City of San Diego* (1941) 48 Cal.App.2d 160, 119 P.2d 359; *Crane v. East Side Canal Etc. Co.* (1935) 6 Cal.App.2d 361, 44 P.2d 455; *Wackerman Dairy Inc., v. Wilson*, *supra*, 7 F.3d 891.) A case on point, however, is *Allen v. California Water & Tel. Co.* (1946) 29 Cal.2d 466, 176 P.2d 8. In *Allen*, the defendant claimed that the city plaintiff was estopped from objecting to the defendant's pumping and exporting of water from a river basin because the city had entered into an earlier contract, which obligated the defendant's predecessor to develop an independent supply of water for the pumping operation. The court rejected this argument, finding that the recital in the contract between the city and the defendant's predecessor did not contain any representation, express or implied, that the city would not raise available legal objections to the defendant's future activities. (*Id.* at p. 490, 176 P.2d 8.) Analytically, this is also the case here.

To conclude, the MHA and the Shaw Decree did not transfer any rights between the parties, and instead resolved existing disputes over acknowledged, preexisting, competing water rights. Neither document included any explicit or implicit representations about the future

actions of any party, nor did either purport to forever insulate the rights from the application of established California law.^{FN27} The trial court therefore did not err when it found that neither the MHA nor the Shaw Decree precluded the current claims of North Kern and Bakersfield.

FN27. The notion of beneficial use embodied in article X, section 2 anticipates exactly this scenario; increased need and changed circumstances often require a readjustment of historically held water rights. (See *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348, 158 Cal.Rptr. 350, 599 P.2d 656 [prospective riparian right can be limited by beneficial use doctrine]; *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 106, 280 P.2d 1 [judicial determination of existing appropriative rights rests on present use which may be quite different at later time]; *Miller & Lux, Inc. v. Bank of America* (1963) 212 Cal.App.2d 719, 28 Cal.Rptr. 401 [owner of recognized superior right cannot prevent use by another of water not needed by holder of superior right]; *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 22 P.2d 5 [constitutional amendment's intent is to preserve present and future well-being of state by full beneficial use of water resources].)

2. Laches

[4] Kern Delta contends the trial court erred by rejecting Kern Delta's affirmative defense of laches (Civ.Code, § 3527). According to Kern Delta, North Kern and Bakersfield unreasonably waited until 1995, more than 100 years after Kern Delta commenced surplus releases, to bring their actions for forfeiture. North Kern replies that the equitable defense of laches is not available in this action in law and that, in any event, Kern Delta did not prove the elements of the defense. Because we agree with this latter proposition, we will ignore the former.

"The affirmative defense of laches requires unreasonable delay in bringing suit and resulting prejudice to the defendant. [Citation .] Whether laches has occurred

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in a particular case is primarily a question of fact for the trial court and an appellate court will not interfere with the trial court's decision unless it is obvious a manifest injustice has occurred or the decision lacks substantial support in the evidence. [Citation.]” (*Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 506, 53 Cal.Rptr.2d 887; see also *County of Orange v. Smith* (2002) 96 Cal.App.4th 955, 963, 117 Cal.Rptr.2d 336; *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1046, 116 Cal.Rptr.2d 38 [“The defense of laches is derived from the maxim that ‘[t]he law helps the vigilant, before those who sleep on their rights.’ (Civ.Code, § 3527.)”].)

*14 The trial court made no express findings on the subject. However, implicit in the trial court's judgment is a determination that laches was not proved. Unlike the cases relied upon by Kern Delta,^{FN28} this case does not involve the failure of a party to protect its legal rights or to object to threatening action by another. Prior to 1976, North Kern's and Bakersfield's predecessors in interest, consistent with the practice and agreement of the parties, used whatever release water was made available to them by Kern Delta for nearly a century. This use was permissive, and, because the released water was surplus as to Kern Delta, the use of it by North Kern and Bakersfield did not adversely affect Kern Delta's water needs.

FN28. *Miller & Lux v. James* (1919) 180 Cal. 38, 179 P. 174; *Conaway v. Yolo Water & Power Co.* (1928) 204 Cal. 125, 135, 266 P. 944; and *Empire West Side Irr. Dist. v. Straford Irrigation Dist.* (1937) 10 Cal.2d 376, 74 P.2d 248.

The use also did not pose a threat to North Kern's or Bakersfield's rights until 1976, at the earliest, when Kern Delta sought to increase its own use beyond historical amounts ^{FN29} and thereby reduce the release water available downstream.^{FN30} In effect, there was nothing for North Kern or Bakersfield to fight about, and thus nothing for North Kern or Bakersfield to “acquiesce” in, so long as Kern Delta confined its usage within historical patterns. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 82 Cal.Rptr.

337, 461 P.2d 617 [defendant asserting laches must show that plaintiff has *acquiesced* in defendant's wrongful acts and has unduly delayed seeking equitable relief to defendant's prejudice].)

FN29. When Kern Delta purchased its interests in 1976, the parties believed the first priority entitlement was limited to historical usage. Kern Delta acquired the rights knowing full well the issue would someday have to be resolved, if not consensually then by resort to the courts.

FN30. There is no evidence that, prior to 1976, Kern Delta's predecessors ever curtailed the release of surplus water normally made available to North Kern. Had there been such evidence, the failure to make an earlier claim might well have supported a laches defense. The claim simply did not exist until 1976 when there was a clash in the rights of the competing right holders. This date becomes important in determining the designation of the five-year statutory forfeiture period of measurement, as we will discuss in section III., *post*.

After 1976, North Kern and Bakersfield objected to any use by Kern Delta beyond the historical. At first, it appeared that Kern Delta had been convinced not to exceed past usage, but later, when it became apparent that Kern Delta intended to and in fact had increased diversions ^{FN31} and decreased release waters, North Kern and Bakersfield commenced negotiations with Kern Delta to attempt to resolve the brewing dispute short of litigation. This action followed immediately upon the breakdown of the settlement talks. The record does not support a conclusion that the lengthy negotiations in this complex matter were unreasonable as a matter of law. (*Transwestern Pipeline Co. v. Monsanto Co.*, *supra*, 46 Cal.App.4th at pp. 521-522, 53 Cal.Rptr.2d 887.)

FN31. The point at which North Kern and Bakersfield acquired actual knowledge of Kern Delta's increased use cannot be pegged by simply identifying the particular date when in-

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creased diversions began. The amount of water available for release depends upon the flow of the river, which varies considerably from year to year, and increased upstream diversions will be detected only after sufficient time has passed to establish a pattern.

The record amply supports the trial court's implicit conclusion that laches was not proved by Kern Delta.

3. Practice of Releasing Water

[5] Kern Delta argues that its historical practice of releasing surplus water to junior appropriators itself precluded forfeiture. Kern Delta's position has several distinct but related components, to wit: 1) the MHA and Shaw Decree addressed the release practice and, therefore, Kern Delta's participation in the practice waived the right to claim a forfeiture; 2) participation in the practice created an implied promise not to claim a forfeiture; 3) the release to junior appropriators who used the water for beneficial purposes ^{FN32} must be found to be a "beneficial use" precluding forfeiture because the MHA and Shaw Decrees provided for the practice and constituted a transfer or sale by Kern Delta of the release waters; and 4) the lack of demand for the water, a condition beyond Kern Delta's control, determined the amount of surplus water available for release. The trial court rejected all these theories and concluded that the release of water was equivalent to nonuse, which ultimately amounted to a forfeiture.

FN32. There is no dispute that the released water diverted by North Kern and Bakersfield was put to legitimate beneficial uses.

*15 The terms of the MHA and the Shaw Decree do not support the implied contract or waiver contentions advanced by Kern Delta. We have been unable to locate any reference, either direct or indirect, to the concept of release water in either document. Instead, the documents merely note the practice as the custom of the parties, but do nothing to establish any independent right or duty with respect to any released water.

Moreover, for the entire time the MHA and the Shaw Decree have existed, the release of surplus water

to downstream appropriators has been *required* by the doctrine of beneficial use, and an appropriative user has not been able to retain more than necessary to supply its own requirements. (See *City of Barstow v. Mojave Water Agency*, *supra*, 23 Cal.4th at p. 1240, 99 Cal.Rptr.2d 294, 5 P.3d 853 [where there is surplus, holder of prior rights may not enjoin its appropriation by others]; *Duckworth v. Watsonville Etc. Co.*, *supra*, 150 Cal. 522 [a prior appropriator may not prevent appropriation or use by others of surplus waters]; *Smith v. O'Hara* (1872) 43 Cal. 371, 375.) Indeed, the principles of prescription, appropriation, forfeiture and abandonment would have little reason to exist in the absence of a demand that water be released if not beneficially used, and, by applying these principles in a variety of contexts, the California courts have, for more than a century, confirmed the perfection or loss of rights by reference to beneficial use and to the expectation that surplus water *must* be released to junior claimants. (*Erickson v. Queen Valley Ranch Co.*, *supra*, 22 Cal.App.3d 578, 99 Cal.Rptr. 446 [nonuse may result in forfeiture]; *Thorne v. McKinley Bros.* (1936) 5 Cal.2d 704, 56 P.2d 204 [nonuse during certain period of day defines appropriative right]; *Akin v. Spencer* (1937) 21 Cal.App.2d 325, 69 P.2d 430 [actual use, not amount diverted, defines right]; *Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th 742, 72 Cal.Rptr.2d 1; *Miller & Lux, Inc. v. Bank of America*, *supra*, 212 Cal.App.2d 719, 28 Cal.Rptr. 401 [the requirement that surplus water be released assumes that the water cannot be put to beneficial use by the priority right holder]; *Lindblom v. Round Valley Water Co.*, *supra*, 178 Cal. 450, 173 P. 994 [plaintiff claimed right to water not used by defendant].) Kern Delta's practice of releasing water it could not use therefore cannot be deemed a "beneficial use" by them or others, and we have found no authority to the contrary.

Likewise, we have found no authority which remotely suggests lack of demand as a reason for the alleged nonuse is of any moment in determining whether there has been a forfeiture. The Supreme Court has held exactly the opposite, and decided that a water company's appropriative right was subject to forfeiture despite a declining demand from its customers. (See *Lind-*

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blom v. Round Valley Water Co. (1918) 178 Cal. 450, 173 P. 994.) This result makes eminent sense under the rule of "use it or lose it" in a state such as California, where water is scarce and a lessened demand by one user is invariably matched with an increased demand by another.

*16 Finally, as the trial court correctly found, the MHA and the Shaw Decree do not treat release water as a sale or transfer to junior appropriators and instead treat each water entitlement as a separate right in descending order of more senior rights. Consistently, the parties meticulously maintained each entitlement as a separate right, even when ownership interests merged, and each entitlement was traced to an independent notice of appropriation. Each day the watermaster has individually calculated the entitlements and has never categorized or identified the use of release water as a transfer or sale of water to a junior appropriator, temporary or otherwise.

The practices of the parties and the watermaster have been in accord with the law, which mandates that surplus water be released by the senior appropriator. Such releases have never been regarded as a sale, a transfer or a beneficial use. (See *Smith v. O'Hara*, *supra*, 43 Cal. at p. 375; *Hewitt v. Story* (9th Cir.1894) 64 Fed. 510, 515.) Thus, the released water which exceeded the quantity Kern Delta actually required to satisfy its needs was *nonuse* by Kern Delta and subject to competing claims by junior appropriators. (See *Lindblom v. Round Valley Water Co.*, *supra*, 178 Cal. 450, 455, 173 P. 994.)

The cases cited by Kern Delta to support the proposition that its release practice constitutes a beneficial use are not persuasive. In *Calkins v. Sorosis Fruit Co.* (1907) 150 Cal. 426, 88 P. 1094, Calkins sold the surplus water to a neighbor and the court found, in the absence of an express contract provision to the contrary, that the competing appropriator could not assert that the sale was not a beneficial use because the appropriation included a right to sell surplus water. Neither the MHA nor the Shaw Decree included any equivalent or comparable provision. In addition, in *Calkins*, the court found that the sale did not affect the defendant's appro-

priation, not the case here.

In *Davis v. Gale* (1867) 32 Cal. 26, the plaintiff failed to fend off the defendant's adverse claim even though the defendant had released water to downstream miners "from time to time." The issue in *Davis* did not involve a claimed forfeiture for nonuse by the defendant, but rather involved the plaintiff's loss of its priority appropriation by virtue of the defendant's prescriptive use. The court's opinion did not address whether a continuous release for the statutory period would have resulted in forfeiture.

Finally, in *East Side Canal & Irrigation Co. v. U.S.* (Ct.Cl.1948) 111 Ct.Cl. 124, 76 F.Supp. 836, the trial court found that the plaintiff's custom of holding water as a reserve in the upper reaches of a canal system was a beneficial use precluding forfeiture. The case obviously did not concern water released to junior users. Interestingly, the opinion supports the trial court's decision here, because the *East Side Canal & Irrigation Co.* court also concluded that any amount not used or held in reserve was lost by forfeiture, despite a contract provision establishing the right in the plaintiff to a given quantity of water.

*17 The trial court did not err in determining that Kern Delta's practice of releasing surplus water, however consistent, did not constitute a beneficial use which precluded its forfeiture.

C.

The controlling law of forfeiture, for both pre- and post-1913 rights, is section 1241 and the interpretive case law. (§ 1241; *Smith v. Hawkins*, *supra*, 120 Cal. at p. 88, 52 P. 139; *Erikson v. Queen Val. Ranch Co.*, *supra*, 22 Cal.App.3d 578, 99 Cal.Rptr. 446.)^{FN33} The statute provides:

FN33: Kern Delta's challenge to the trial court's finding that Kern Delta's use in excess of historical levels would constitute unreasonable use under article X, section 2, is moot. The trial court's decision rested on its conclusion that article X, section 2 precluded Kern Delta from claiming water rights which had been unexer-

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cised for almost a century. There was never any contention made that Kern Delta misused or wasted water, issues found in more conventional challenges to alleged unreasonable uses. On these facts, article X, section 2 does not provide an independent ground for affirming the judgment. Because we will conclude the amount unused by Kern Delta was forfeited, we need not address the constitutional question directly. We have already noted the strong public policy that water in this state be beneficially used.

"When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, such unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water" (§ 1241, emphasis added.)^{FN34}

FN34. The law abhors a forfeiture and when a statute calls for the forfeiture of a recognized property interest, it must be given a fair, reasonable construction in order to avoid harsh results. (*Contra Costa Water Co. v. Breed* (1932) 139 Cal. 432, 441, 73 P. 189, overruled in part on other grounds in *Miller v. McKinnon* (1942) 20 Cal.2d 83, 90, 124 P.2d 34.)

The five-year period under section 1241 means five continuous years of nonuse for the purpose for which the water was appropriated. (*Erickson v. Queen Valley Ranch Co.*, *supra*, 22 Cal.App.3d 578, 99 Cal.Rptr. 446.) The amount lost by forfeiture is measured by the amount not continuously used during the statutory period. (See *Smith v. Hawkins*, *supra*, 120 Cal. at p. 88, 52 P. 139 [the amount not lost is the maximum quantity put to use during statutory period]; *Lindblom v. Round Valley Water Co.*, *supra*, 178 Cal. 450, 173 P. 994; *Northern California Power Co., Consolidated v. Flood* (1921) 186 Cal. 301, 199 P. 315.) However, the case law makes clear that the "continuous use" necessary to defeat an alleged forfeiture does not necessarily mean "constant use" (*Irrigated Valleys L. Co. v. Altman* (1922) 57

Cal.App. 413, 207 P. 401), and the concept of continuous use is directly related to the nature of the initial appropriative use. (*Id.* at p. 429, 207 P. 401, citing *Hesperia Land & Water Co. v. Rogers* (1890) 83 Cal. 10, 11, 23 P. 196; see also § 1241.)

The determination of the amount of water required to satisfy an appropriative use is a question of fact to be determined by the trial court (*Gray v. Magee* (1930) 108 Cal.App. 570, 292 P. 157), as is the determination of the time of use and nonuse and the quantity of use and nonuse (*Erickson v. Queen Valley Ranch Co.*, *supra*, 22 Cal.App.3d at p. 582, 99 Cal.Rptr. 446; *Joerger v. Pacific Gas & Electric Co.*, *supra*, 207 Cal. 8, 276 P. 1017; *Pabst v. Finmand* (1922) 190 Cal. 124, 211 P. 11; *Mt. Shasta Power Corp. v. McArthur* (1930) 109 Cal.App. 171, 179, 292 P. 549). The appellate courts review such findings under the substantial evidence rule. (See *Erickson v. Queen Valley Ranch Co.*, *supra*, at p. 582, 99 Cal.Rptr. 446, citing *Chowchilla Farms, Inc. v. Marin* (1933) 219 Cal. 1, 9-10, 25 P.2d 435; *Pabst v. Finmand*, *supra*, 190 Cal. 124, 135, 211 P. 11.)

The trial court here examined the period from 1932 to 1976 during which Kern Delta did not use its full MHA entitlement. However, the court did not identify any specific five-year timeframe upon which to base its ruling, and rather relied upon, and quantified Kern Delta's annual use during, a 45-year "evaluation" period. The court then decided that Kern Delta retained a "preserved entitlement to ... approximately 159,286 acre feet per year on average," a figure apparently derived from exhibit 5142,^{FN35} which derives its figures from the 45-year "evaluation" period.^{FN36}

FN35. Although the parties at oral argument claimed that exhibit 5142 is "incorporated into the judgment by reference," and that it is not based on averages but actual use, we do not find this apparent from the judgment itself or the court's statement of decision. The court does refer to exhibit 5142, but it does not expressly or implicitly incorporate the exhibit into the judgment. It states that "the evaluation of preserved entitlement set forth in Exhibit 5142

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is an accurate portrayal of water use during the period in question as attributed to each of the rights acquired by Kern Delta." The exhibit itself is entitled "Preserved Entitlement and Average Actual Use of Kern Delta Diversion Rights Based on 45-Year Evaluation Period." This is a statement pointing to the evidence which supports the court's findings. The exhibit itself uses the words "Average Actual Use." As it currently stands, the judgment identifies the amount of water forfeited as an annual average without regard to daily, monthly or seasonal usage and we find this to be error. If the parties' representation at argument is correct, and this is not the way the 159,286 afy figure was obtained, the error is not so much how the figure was calculated but rather how the judgment is constructed. Either way, remand is required. Furthermore, the figure is unacceptable because it was not extracted from an appropriate five-year period. (See discussion, *post.*)

FN36. We asked the parties for additional briefing on the issues of measurement and time. We have the discretion to propose and consider questions of law on appeal, especially where all due process considerations have been satisfied. (See, e.g., *Cabrera v. Plager* (1987) 195 Cal.App.3d 606, 611, 241 Cal.Rptr. 731.) "We are at liberty to consider, and even to decide, a case upon any points that its proper disposition may seem to require, whether taken by counsel or not." (*Noguera v. North Monterey County Unified Sch. Dist.* (1980) 106 Cal.App.3d 64, 72, fn. 5, 164 Cal.Rptr. 808.)

*18 We think the trial court erred in two respects. First, we believe it failed to identify an appropriate period for measuring whether there was a statutory forfeiture. Second, we believe the court erred when it measured the amount of water forfeited by Kern Delta using an annual average or annual figure without restricting its decision to more accurately reflect historical use patterns.

1. The Five-Year Period

[6] We hold that the trial court erred in not selecting a specific five-year period, but choosing instead to rely on the 45-year evaluation period. Because section 1241 requires the showing of nonuse for a continuous five years, due process concerns mandate that the relevant period be expressly identified by the trial court, and the failure to do so precludes meaningful review in violation of the 14th Amendment of the United States Constitution. (See *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 419, 102 Cal.Rptr.2d 157 [due process requires meaningful review]; *Nasir v. Sacramento County Off. of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 986, 15 Cal.Rptr.2d 694 [forfeiture statutes must afford due process of law and provide both notice and meaningful hearing].)

In addition, although we disagree with Kern Delta that the law limits the five-year period to the exact five years immediately preceding the lawsuit (see *Hufford v. Dye* (1912) 162 Cal. 147, 121 P. 400; *Witherill v. Brehm*, *supra*, 74 Cal.App. 286, 240 P. 529), we do believe the period selected must bear a direct temporal relationship to the time the contrary claim was made. The doctrines of forfeiture, adverse possession, abandonment and prescription are all related (see *Smith v. Hawkins*, *supra*, 110 Cal. 122, 42 P. 453) and, without exception, are all evaluated in the context of competing claims of the right to use water. They are not doctrines which are adjudicated in the abstract without the presence of a competing claim. (See *Orange County Water Dist. v. City of Riverside*, *supra*, 173 Cal.App.2d at p. 184, 343 P.2d 450 [although riparian users do not lose their right by nonuse, the amount not used is subject to appropriation which becomes a legitimate claim against the rights of the riparian]; *Pabst v. Finmand*, *supra*, 190 Cal. at pp. 128-129, 211 P. 11 [prescriptive rights must be obtained by actual clash of rights]; *Lindblom v. Round Valley Water Co.*, *supra*, 178 Cal. at p. 452, 173 P. 994 [doctrine of forfeiture prevents appropriator from diverting and storing amounts over its legitimate needs and thereby prevent use by others; appropriator cannot hold amount forfeited against claim by one subsequent in right]; *Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th at pp. 784-785, 72 Cal.Rptr.2d 1 [party cannot complain of unlawful diversion unless he is in-

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jured thereby].) In this case, for reasons we have already identified in our discussion of the laches doctrine, *ante*, there was no competing claim until 1976 when Kern Delta sought to expand its historical use, which in turn impacted the amount of water it released each day to junior appropriators. Therefore, we believe the appropriate five-year period must be no later than the five years immediately preceding 1976,^{FN37} although the period of measurement can be adjusted for drought years, if there were any, where the nonuse is not the result of a voluntary act of the appropriator but rather the result of a lack of supply. (See *Irrigated Valleys L. Co. v. Altman*, *supra*, 57 Cal.App. 413, 207 P. 401.)

FN37. We do not define the exact period of measurement but leave that for the trial court because we recognize there are other issues and evidence relevant to selecting the appropriate time period. Both parties represent that there were tolling agreements and earlier suits and objections arising from the clash of rights. These may well play a role in selecting the appropriate period of measurement.

*19 Although the cases cited by North Kern in support of their position, *Hufford v. Dye*, *supra*, 162 Cal. 147, 121 P. 400, *Erickson v. Queen Valley Ranch*, *supra*, 22 Cal.App.3d 578, 99 Cal.Rptr. 446 and *Witherill v. Brehm*, *supra*, 74 Cal.App. 286, 240 P. 529, base their analysis on more than a five-year historical pattern of use, none of the cases stand for the proposition that the statutory five-year period can be plucked from any point during the period of ownership, even decades prior to the assertion of any adverse claim. *Witherill* is an adverse possession case in which the claimant was seeking to defend a claim previously perfected under the rules of adverse possession. *Hufford* involves a claimant seeking to define a prior claim established by prescription. *Erickson* was a quiet title action looking to define the claim existing at the time a competing claim was made. All three cases looked to the historical patterns of use in order to define the nature of the right held subject to a later claim. This approach represents a proper assessment of the relevant historical evidence. However,

none of these cases used historical patterns over an extended period of time to establish forfeiture in the absence of a claim. In other words, in each, the court looked back to the prior clash of rights, when both parties were asserting competing claims. It did not allow a current claimant to define and perfect a current claim by means of a reach back to a period when there was no clash of rights. We note the seminal Supreme Court forfeiture case of *Smith v. Hawkins*, *supra*, 120 Cal. 86, 52 P. 139, used the five years preceding the action as the appropriate period of measurement.^{FN38}

FN38. The question about when the statutory five-year period commences would appear to be an appropriate issue for the Supreme Court to address, given the ambiguity of the existing authorities on the subject.

2. Nonuse

[7] It also appears that the trial court premised its finding upon Kern Delta's use (i.e., "approximately 159,286 acre feet per year on average") rather than upon Kern Delta's nonuse. In other words, the court turned the fundamental principle of forfeiture on its head. (*Gray v. Magee*, *supra*, 108 Cal.App. 570, 292 P. 157; *Orange County Water Dist. v. City of Riverside*, *supra*, 173 Cal.App.2d at pp. 196-197, 343 P.2d 450 [loss of right by nonuse measured by how much is appropriated by others].) ^{FN39} The determination about whether there has been a continuous nonuse for purposes of forfeiture (or for the related doctrines of abandonment and adverse possession) requires an assessment of the beneficial use for which the water was appropriated. (See *Montgomery & Mullen L. Co. v. Quimby* (1912) 164 Cal. 250, 128 P. 402; *Hesperia Land etc. v. Rogers*, *supra*, 83 Cal. at p. 11, 23 P. 196; *Witherill v. Brehm*, *supra*, 74 Cal.App. 286, 294, 240 P. 529; *Davis v. Gale*, *supra*, 32 Cal. 27 [with appropriative right, use and nonuse are the tests of the right and must be decided upon facts of case]; see also *City of Barstow v. Mojave Water Agency*, *supra*, 23 Cal.4th at pp. 1254-1256, 99 Cal.Rptr.2d 294, 5 P.3d 853 [actual measurement of use defines right].) The historical beneficial use is the best evidence of the parties' characterization of the base appropriative right. (See *Pleasant Valley Canal Co. v.*

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Borror, supra, 61 Cal.App.4th 742, 72 Cal.Rptr.2d 1.) However, forfeiture is based on nonuse. (§ 1241; see *Gray v. Magee, supra*, 108 Cal.App. 570, 292 P. 157 [court rejected minimum use finding and instead looked to see what was lost by nonuse].)

FN39. The measurement must include both quantity and time, since the evidence here suggests both are variables which govern the "law of the river." The task of measuring water use and nonuse for irrigation purposes is complicated because it involves factors not subject to precise human control. (*Pabst v. Finnmand, supra*, 190 Cal. 124, 211 P. 11; *Mt. Shasta Power Corp. v. McArthur, supra*, 109 Cal.App. at p. 179, 292 P. 549 [quantity of water required for irrigating is governed by the nature of the soil, climatic conditions, and circumstances surrounding the land and crop].) For

this reason, there is no uniform rule of usage or nonusage applicable to all cases. (*Joerger v. Pacific Gas & Electric Co., supra*, 207 Cal. 8, 276 P. 1017.)

*20 The law is unambiguous that what is forfeited is what is actually not used for the entire statutory five-year period, not what exceeds the average use for that period.^{FN40} The distinction is not meaningless pedantry, as the following hypothetical demonstrates. Consider the following fictional average annual usages for a prior appropriator with a 160,000 afy entitlement:

FN40. This analysis is based on our assumption that the judgment means what it says. See footnote 35.

1970
1971
1972
1973
1974

145,000 afy
135,000 afy
125,000 afy
150,000 afy
140,000 afy

The average of these averages is 139,000 afy. Under the "use" approach applied by the trial court, the appropriator would have a "preserved entitlement" in this amount, and thus would have forfeited 21,000 afy (160,000 minus 139,000 afy). Under the "nonuse" approach required by the laws of forfeiture, however, the party has lost only 10,000 afy, which represents the difference between the highest use in the five-year period and the full entitlement. (See *Smith v. Hawkins, supra*, 120 Cal. at p. 88, 52 P. 139.) The result of this latter, correct approach carries out section 1241's mandate that the amount forfeited is only that part of the right which has not been continuously used for the particular five-year period (§ 1241). In the hypothetical, that amount is 10,000 afy.

The record evidence does not support a conclusion that Kern Delta's predecessors failed to use the entire

entitlement during every part of every year within the 45-year evaluation period, even if we agreed this was an appropriate period for measurement, which we do not. To the contrary, there were many instances when Kern Delta's predecessors used the full entitlement *during* certain months of a particular year. For example, in 1959-1961, 1964, 1966, 1968, 1970-1972, 1976, 1979, 1981-1982, Kern Delta's predecessors did not release any surplus water during one or more of the months of June, July and August and a finding of forfeiture for these months in any five-year period that included one of the noted years would be improper. When the nature of the initial beneficial use is linked to a particular time of day, a certain month, or a particular season of the year, the finding of forfeiture must also be thus linked.^{FN41} (*Armstrong v. Payne* (1922) 188 Cal. 585, 600, 206 P. 638; *Orange County Water District v. City of Riverside, supra*, 173 Cal.App.2d 137, 197, 343 P.2d 450.) Consequently, it is possible to forfeit a right to

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use water for a portion of the year or a certain hour of the day but not for other such periods.^{FN42} (See *Santa Paula Waterworks v. Peralta* (1896) 113 Cal. 38, 44, 45 P. 168 [forfeiture six out of seven days a week]; *Scott v. Henry* (1925) 196 Cal. 666, 239 P. 314 [continuous use for irrigation season]; *Bazet v. Nugget Bar Placers, Inc.* (1931) 211 Cal. 607, 296 P. 616 [winter/summer]; *Gray v. Magee* (1930) 108 Cal.App. 570, 292 P. 157 [same]; *Garbarino v. Noce* (1919) 181 Cal. 125, 183 P. 532 [one day in three]; *Haight v. Costanich* (1920) 184 Cal. 426, 194 P. 26 [two months out of four].)

FN41. The MHA anticipates that water use will vary from month to month and season to season. The parties concede as much when they distinguish between the "MHA season" and the "non MHA season."

FN42. This is not to say that North Kern may extract the most favorable portions of a year over a 45-year period to establish forfeiture. At argument North Kern asserted that exhibit 5142 represented the lowest amount of use for January over a five-year period, and the lowest amount of use for February over what may well be a different five-year period. The statute requires that forfeiture be measured during a continuous five-year period. (§ 1240 .) And, although forfeiture can be for the entire year or only a part of the year (a designated day, month or time), the period of measure is a single continuous five-year period. There is no authority for the pick and choose method advanced by North Kern.

The amount released by Kern Delta each day is directly dependent on the amount of water available and the demand for irrigation deliveries. An annual average is entirely too simplistic as a measurement of the loss of Kern Delta's vested right. (See *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.3d 489, 569-570.) We will illustrate, with another hypothetical, the law's demand that the amount forfeited be linked to actual need and actual use and that the right lost be quantified by concrete references to actual historical use. Consider the following yearly use pattern

for five continuous years by a fictional right holder with a 15,000 acre feet *per month* entitlement:

*21 January through March-5,000 acre feet per month

April through May-10,000 acre feet per month

June through August-15,000 acre feet per month

September through December-5,000 acre feet per month

In this scenario, the average monthly use is 8,333 acre feet, far below what was put to beneficial use during April through August of each hypothetical year. If forfeiture is determined by mathematical averages unrelated to this actual use, the party would have its right reduced to 8,333 acre feet per month for every month of every year, even though in reality it used its full entitlement from June through August in every examined year, when it obviously had and satisfied beneficial needs.

While the evidence here may support a finding of continuous nonuse based upon a defined season, month or day,^{FN43} no such finding was made by the trial court, which precludes further meaningful appellate review and, if the judgment was intended to limit the forfeiture to a defined season, month or day, creates an unacceptable ambiguity.^{FN44}

FN43. The actual calculation of the water ordered, used, and released by right holders is calculated on a daily basis. However, day, month and season measurements are found in the MHA. What is not found is an annual measurement or the use of averages.

FN44. See *Pabst v. Finmand*, *supra*, 190 Cal. 124, 211 P. 11 (failure to limit finding to particular time or season requires inference that finding is based on continuous use for five-year period).

The record suggests the evidence would support a finding based on daily use. (the actual measurement under the MHA) or some other larger period of time if it can be linked to the initial need and historical beneficial

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use. In this connection, many of the reports generated for the parties used monthly averages, which allow for some segregation between on and off-season periods. We are in no position, nor is it our function, to make these determinations of fact, which may require the taking of additional evidence. We simply hold that, because the judgment measures the forfeiture using an annual average it is erroneous as a matter of law, and reversal and remand is required for further appropriate proceedings.

We reiterate that, whatever base measurement period (i.e., day, month, season, etc.) the trial court selects, the choice must have evidentiary support and the nonuse, if any, must be calculated by reference to the maximum quantity beneficially used by Kern Delta for each such period during the five-year span before the 1976 claim by North Kern selected by the trial court as the appropriate period for evaluating whether a forfeiture occurred. (See *Smith v. Hawkins*, *supra*, 120 Cal. at p. 88, 52 P. 139; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, *supra*, 3 Cal.2d 489, 569-570, 45 P.2d 972.) The court may consider the effect (or lack of effect) of any other factor or variable, beyond the control of Kern Delta and not related to demand, suggested by the record as having some potential relevance to nonuse, such as climate and water supply. (See *Irrigated Valleys Land Co. of Cal. v. Altman*, *supra*, 57 Cal.App. 413, 207 P. 401.)

IV.

[8] In two footnotes, Kern Delta challenges the trial court's order, dated June 10, 1998, granting summary adjudication in favor of Bakersfield on the fourth, fifth and ninth causes of action (indemnification and breach of contract claims) of Kern Delta's cross-complaint. Kern Delta's argument on these issues is set out in its footnote 48, which asserts that the court's ruling "denied [Kern Delta] its day in court with respect to the damage issue raised in the fourth, fifth and ninth causes of action of its cross complaint" and was not reduced to a proper, formal order.

*22 First, Kern Delta has waived any objection to the form of the order by failing to raise the issue at the trial court and conceding that the minute order, made in

open court, finally disposed of the three causes of action. (*Guardianship of Stephen G.* (1995) 40 Cal.App.4th 1418, 1422, 47 Cal.Rptr.2d 409.) Secondly, Kern Delta has waived the points for purposes of appeal by its conclusory presentation. An appellate court may treat as waived an issue which, although raised in the brief, is not supported by pertinent or cognizable legal argument or proper citation to authority. (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1016, fn. 4, 67 Cal.Rptr.2d 516; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700, 46 Cal.Rptr.2d 119 [issue abandoned where supported only by assertion of general legal principles without argument or application to facts on appeal].) It is the appellant's duty to demonstrate affirmatively trial error. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal.Rptr.2d 457.) Kern Delta's general assertion of error, unsupported by specific argument or authority, that it was "denied its day in court" is patently insufficient to raise the issue on this appeal.

Third, Kern Delta has waived the issue for purposes of appeal by its abbreviated footnote treatment. (See Cal. Rules of Court, rule 15(a) [each argument must be stated under separate headings in the briefs]; *In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, 44 Cal.Rptr.2d 822, fn. 7 ["We interpret this casual treatment as reflecting [the appellant's] lack of reliance on this argument"].)

North Kern Cross-Appeal

The trial court determined that the portion of the rights forfeited by Kern Delta had reverted to the public. Alternatively, the trial court found that the forfeited rights passed to North Kern, a junior appropriator. Not surprisingly, North Kern now challenges the trial court's first conclusion and contends the court's alternate conclusion is the correct one.

All parties agree that none of the water of the Kern River is subject to an appropriative SWRCB permit. Therefore, in order to secure the right to any water forfeited by Kern Delta, North Kern was required to prove that its claim was perfected before 1914.^{FN45} However, our resolution of Kern Delta's appeal effectively moots the issue because the lack of a sustainable

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finding that Kern Delta forfeited any of its rights means, obviously, that there are yet no forfeited rights to which North Kern may have succeeded. (See *Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 594, 138 P. 751 [once the amount forfeited has been quantified, the claimant may prove up a subsequent appropriation of the same].) The issue must therefor be addressed on remand, if necessary.

FN45. As we said earlier, one who lacks a permit and who claims a right to appropriative water in this state must prove the appropriation was made prior to 1913 and not thereafter lost by prescription, abandonment or forfeiture. (See *Crane v. Stevinson*, *supra*, 5 Cal.2d at p. 398, 54 P.2d 1100.) Since 1914, all appropriations of water in California must be approved by the SWRCB. (§§ 1201, 1225, 1252.) The claimant for a permit must submit an application to the SWRCB which sets forth, among other items, "[t]he nature and amount of the proposed use" (§ 1260, subd. (c)) and "[t]he place where it is intended to use the water." (*Id.*, subd. (f); *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 976, 84 Cal.Rptr.2d 179.)

We do, however, offer some observations which may be relevant on remand. First, the MHA and the Shaw Decree, which quantify North Kern's and Kern Delta's respective entitlements, do not appear to support a claim by North Kern to any of Kern Delta's rights because neither document evidences a pre-1914 appropriative claim to an increased entitlement by North Kern. Though under the documents North Kern's entitlements are "junior" to Kern Delta's when there is insufficient water in the river to satisfy both parties' entitlements, a finding on remand that Kern Delta has forfeited some portion of its entitlement will not necessarily result in the enhancement, by an equivalent amount, of North Kern's rights. It only will mean that, when water is scarce, there is an increased likelihood that North Kern's entitlement will be satisfied because Kern Delta's claim will have been reduced. North Kern will gain an increase in its entitlement only if it proves a pre-1914

appropriation. (See *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.* (1943) 104 Utah 448, 462, 137 P.2d 634 [where water is scarce and existing junior appropriators, whether under permit or common law, claim more water than is ordinarily available, the forfeited water will actually feed the existing entitlements of the junior appropriators, a practical result not equivalent to the expansion of the existing junior entitlements].) Any pre-1914 appropriation by North Kern must be defined by the actual quantity of water forfeited and the actual quantity of water subsequently put to beneficial use.^{FN46} (*City of Barstow v. Mojave Water Agency*, *supra*, 23 Cal.4th at p. 1241, 99 Cal.Rptr.2d 294, 5 P.3d 853.)

FN46. It would appear from the position taken by North Kern at trial, and the records of water use before us, that a pre-1914 appropriation of any water forfeited would be less than the amount of water now claimed by North Kern. North Kern's predecessors, like those of Kern Delta, did not practice winter ground water recharge. Therefore, the increased need for water for this purpose, occurring in the middle of the 20th century, could not be part of any pre-1914 appropriation. (*Armstrong v. Payne*, *supra*, 188 Cal. at p. 600, 206 P. 638 [an appropriation of water has always been defined by the amount used].) An appropriation cannot be expanded except by a new appropriation. (*Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th at p. 753, 72 Cal.Rptr.2d 1.)

*23 Second, the trial court determined there was no prescriptive use by North Kern or abandonment by Kern Delta, findings which have not been challenged on this appeal. (See *Dogherty v. Creary* (1866) 30 Cal. 290 [abandoned water right subject to subsequent appropriation]; *Gallagher v. Montecito Valley Water Co.* (1894) 101 Cal. 242, 35 P. 770 [right acquired by prescription]; *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450, 173 P. 994 [nonuser forfeits water rights which become available to subsequent appropriator].) Thus, the only remaining possibility is that Kern Delta's predecessors in interest forfeited a portion of their rights prior

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to 1914, which were to some extent subsequently appropriated by North Kern's predecessors prior to 1914. (See *Smith v. O'Hara* (1872) 43 Cal. 371.)

Third, if North Kern is unable to prove a pre-1914 appropriation, its claim, like any other post-1914 claim, will be subject to the statutory mandates because the clear intent of the WCA is to provide for the uniform administration of California's water resources. (Art. X, § 2; § 1201; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367-368, 40 P.2d 486.) Thus, the pre-1914 nature of Kern Delta's right does not preclude application of the WCA if that right is found to have been lost after 1914. We find no authority to support North Kern's position that, once established, a pre-1914 appropriation is subject to future management outside the statutory scheme. Though certain constitutional provisions restrict a state from altering or extinguishing an existing property interest, such as a preexisting water right (see *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp* (1927) 202 Cal. 56, 68, 259 P. 444), there appears to be no barrier to the application of a statutory scheme if the preexisting right is legitimately extinguished by operation of common law principles. This result is particularly compelling when strong public policy considerations make a strong case for statewide uniform management of an essential resource such as California water.

On this subject, there is no doubt about the public policy of the state. The SWRCB has exclusive jurisdiction over appropriative claims made after 1914. (§§ 1201, 1202, 1225, 1250; *Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th at p. 754, 72 Cal.Rptr.2d 1; *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102, 227 Cal.Rptr. 161.) After 1914, a claimant may not establish an appropriative right merely by use. (§§ 1225, 1201, see *People of State of Cal. v. United States* (9th Cir.1956) 235 F.2d 647.) Water forfeited reverts to the public and becomes available for appropriation by others ^{FN47} through the permit procedures. (§ 1241.) This furthers the Legislature's aim of "foster[ing] the most reasonable and beneficial uses of the state's scarce water resources. [Citation]." (*Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th at p. 754, 72 Cal.Rptr.2d 1; see

also *National Audubon Soc. v. Superior Court* (1983) 33 Cal.3d 419, 447, 189 Cal.Rptr. 346, 658 P.2d 709 [legislative intent is to grant SWRCB broad expansive authority to undertake comprehensive planning and allocation of water resources].)

FN47. The language of the statute which requires a finding of the SWRCB and notice to the parties, is intended to provide procedural guidelines to be followed before forfeiture when the SWRCB is the agency determining whether forfeiture has occurred. (See 12 Pacific L.J. 526, 527.) In this case, the competing rights of the parties were fully litigated and full procedural protection was afforded.

*24 Fourth, while we have been unable to uncover any authority for the proposition that a forfeited pre-1914 entitlement reverts to the public, this subject is not now before us. The irreducible issue raised by North Kern's appeal is whether any amount forfeited by Kern Delta *has been appropriated as a matter of law by North Kern*, but this issue is not ripe for decision given our disposition of Kern Delta's appeal. On the other hand, if on remand North Kern cannot prove its entitlement to any water found to have been forfeited by Kern Delta, whether the water has instead become a part of the public domain would seem to be irrelevant to the interests of North Kern, at least in this action.

Other Issues

The remaining issues raised by the parties, whether on the appeal or on the cross-appeal, are moot. Resolution of all such issues first requires the resolution of the issue whether Kern Delta forfeited some portion of its rights by nonuse and if so the quantification of the amount forfeited.

DISPOSITION

The judgment is reversed. The case is remanded for retrial of:

((1) the question whether Kern Delta forfeited by nonuse any part of its paper entitlements, based upon a measurement (day, month, season, etc.), a specific five-year period, and a consideration of all other relevant

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factors disclosed by the evidence; and

(2) all other issues (1) expressly raised by the parties on this appeal but (2) not resolved by this opinion and not found in this opinion to have been waived or abandoned for purposes of this appeal, and (3) put in controversy by reason of the trial court's determination of the issues described in (1) above.

The parties are not limited on retrial under this remand to the evidence introduced during the previous proceeding, and may offer whatever additional evidence they desire to have admitted, subject to the trial court's rulings on the admissibility of such evidence.

Each party shall bear its own costs on this appeal.

WE CONCUR: ARDAIZ, P.J., and LEVY, J.

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END OF DOCUMENT

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Millview County Water District, et al. v. SWRCB, et al.**
 Court of Appeal Case No.: **A139481**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 17, 2013, I served the attached **APPELLANT STATE WATER RESOURCES CONTROL BOARD'S OPENING BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 17, 2013, at San Francisco, California.

Joan Randolph
Declarant


Signature

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

WR ORDER 2002-0010-DWR

**IN THE MATTER OF STATEMENT OF WATER DIVERSION AND USE S015151
PETITION FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF UP TO 1,015 ACRE-FEET OF WATER
TO INSTREAM USE WITHIN THE NORTH FORK TULE RIVER
UNDER PRE-1914 APPROPRIATIVE WATER RIGHT CLAIM**

ORDER DENYING TEMPORARY CHANGE IN PLACE OF USE AND PURPOSE OF USE
BY THE CHIEF OF THE DIVISION OF WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On June 25, 2001,

Ms. Dagny Grant
c/o Dan Suyeyasu
5655 College Ave. Ste. 304
Oakland, CA 94618

filed a Petition for Temporary Change under Water Code sections 1725-1732 and 1707 with the State Water Resources Control Board (SWRCB). The petitioner requests that the SWRCB approve a temporary change of the place of use under a claimed pre-1914 appropriative water right to allow use of the water for the purpose of preserving recreational and fish and wildlife resources in an approximate two-mile stretch of the North Fork Tule River adjacent to Battle Mountain Ranch (Ranch). The temporary change would be effective for a period of one year following issuance of an order.

2.0 BACKGROUND

The petitioner requests a temporary change to a pre-1914 water right claim (Statement of Water Diversion and Use file No. S015151) under Water Code sections 1707 and 1725-1732, for the purpose of dedicating approximately 1,015 acre-feet of water to instream use. The proposed place of use under the proposed change is a portion of the North Fork Tule River that fronts on the Ranch, further described as being between the historic Dillion Ditch diversion headworks located within the NE¼ of the NW¼ of section 19, T19S, R30E, MDB&M, and the downstream boundary of the Ranch, located within the NW¼ of the SW¼ of section 25, T19S, R29E, MDB&M. In the absence of the proposed transfer, the water would likely remain in the stream, as records indicate that diversion and use of water has not occurred since approximately 1995 and petitioner currently lacks the diversion infrastructure to apply the claimed right to the Ranch.

2.1 Substance of Ms. Grant's claimed water rights On June 25, 2001, Ms. Grant filed Statement of Water Diversion and Use No. S015151. The statement indicates that 100 miners inches of water (2.0 cubic feet per second [cfs]), based on the Southern California standard for miner's inches), has been diverted from the North Fork Tule River to irrigate 90 acres of pastureland and to water stock on the Ranch since 1880. In addition to the pre-1914 claim, portions of the property appear to be riparian to North Fork Tule River, and there are springs located on the property that serve the Ranch.

2.2 Purpose of the Proposed Transfer Under the proposed change, 1.5 cfs, approximately 1,015 af of water, would remain in the stream for instream use rather than be diverted. The proposed place of use is that portion of the North Fork Tule River that fronts on the Ranch, further described as being between the historic Dillion Ditch diversion headworks located within the NE¼ of the NW¼ of section 19, T19S, R30E, MDB&M, and the downstream boundary of the Ranch, located within the NW¼ of the SW¼ of section 25, T19S, R29E, MDB&M.

3.0 AVAILABILITY OF WATER FOR TRANSFER

The Tule River Watershed, including all tributaries to the Tule River system that have hydraulic continuity during any part of the year, are identified in the SWRCB records as being fully appropriated. (See Order WR 98-08). In the Declaration of Fully Appropriated Stream Systems, the SWRCB finds that water is not available for the development of any new use of water, with the exception of valid riparian rights. Ms. Grant claims a pre-1914 appropriative water right in the amount of 2.0 cfs. The claimed water right is identified in Department of Water Resources Bulletin 94 –1 (1964), Land and Water Use in Tule River Hydrographic Unit Table 3, Descriptions of Surface Water Diversions In Tule River Hydrographic Unit. In addition, the topographic and parcel maps of the Springville area indicate that the Ranch, or portions thereof, are riparian to North Fork Tule River, as the Ranch contains approximately two miles of frontage along the river.

4.0 COMMENTS RECEIVED ON THE PROPOSED TRANSFER/EXCHANGE

The SWRCB issued a public notice of the proposed temporary change on January 18, 2002. The SWRCB received comments and objections from five parties: Larry Otter, Rita A. Portwood, James Drumm, Robert Donlan, and Douglas Philips. The comments and objections raised the issue of whether a valid basis of right still exists for the claimed pre-1914 appropriative water right of the Dillon Ditch. The commentators provided some evidence indicating that little or no use of the water occurred for the period, conceptually beginning about 1972 to the present time.

Petitioners Response:

The petitioner's response discussed the construction, size, and operation of the Dennison/Dillon Ditch following the consolidation of the ditch companies after flooding occurred in 1966. However, petitioner presented no evidence or record of actual usage for the 1972-1989 period. The flume that carried water from the Dennison Ditch was in disrepair by 1989 when Ms. Grant purchased the property. In 1991-1992 a new 4-inch line was installed, and water was periodically used on the Ranch until January 1995. From 1995 through 1999, water was not diverted pending resolution of the conflict between the Grants and the Dennison Ditch Company. Dennison Ditch installed a control at the diversion facility to limit its diversions, and Ms. Grant ceased to use, and claim the right to use, the facility altogether. The control returns any diverted water above Dennison Ditch Company's allotment back to the river. From 1999 to the present, water from the North Fork Tule River has not been diverted or used on the Ranch.

Petitioner contends that an appropriator does not lose a right under the forfeiture statute, if despite a long period of nonuse, application of the water to beneficial use recommences prior to the initiation of the forfeiture proceedings. (See June 6, 2002 letter from Dan Suyeyasu at 3 (citing Sax et al., Legal Control of Water Resources [2d ed. 1991].) The casebook quoted by petitioner to support this contention cites Idaho and Wyoming law. The casebook includes a discussion explaining how western states have different approaches to statutory forfeiture. (Sax et al., at p. 277.) In some states, forfeiture is automatic, where others provide a variety of defenses, some including recommencement prior to the initiation of forfeiture proceedings. California law does not include the recommencement of use defense in its statute or case law.

5.0 CRITERIA FOR APPROVING PROPOSED CHANGE:

In considering approval of a temporary change petition, the SWRCB must make the findings specified in Water Code section 1725:

The transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change;

The transfer would not injure any legal user of the water; and

The transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses.

5.1 The transfer would only involve the amount of water that would have been consumptively used or stored in the absence of the proposed temporary change: To paraphrase Water Code section 1725, a party may temporarily change the point of diversion, place of use or purpose of use due to a transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored by the party in the absence of the proposed temporary change. The record of information provided by all parties indicates that diversion of water by the Ranch did not occur last season, nor has it occurred since at least 1995. The evidence indicates that water will not be used consumptively this year due to lack of a means to divert the water. Therefore, the SWRCB cannot find that the proposed transfer would involve only the amount of water that would have been consumptively used or stored in the absence of the proposed temporary change.

5.2 The transfer would not injure any legal user of the water: Although an action has not been taken by parties in the watershed to define the nature and extent of the Grant's claimed pre-1914 right, it appears that the claimed pre-1914 appropriative water right may have been lost in accordance with Water Code sections 1240 or 1241. If the claimed pre-1914 right has been forfeited, any reactivation of use could act to the detriment of legal users in light of the fact that the Tule River Watershed is fully appropriated. Since the validity of the pre-1914 right is in question, the SWRCB cannot conclude the proposed transfer would not injure any legal users of water.

Since the property or portions thereof would appear to be riparian, proper riparian diversions may begin at any time to the extent that they are reasonable and take only their correlative share of the available flow. This petition did not request a transfer of riparian water, however, petitioner is free to petition the SWRCB to transfer a riparian right for the purposes of preserving or enhancing instream flow under Water Code section 1707.

5.3 The transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses: Instream beneficial uses are discussed in Section 6.0

6.0 ENVIRONMENTAL CONSIDERATIONS

In accordance with Water Code section 1729, temporary changes involving transfer of water are exempt from the requirements of the California Environmental Quality Act (CEQA) (Pub. Resources Code § 21000 et seq.). However, the SWRCB must consider potential impacts on fish, wildlife and other instream beneficial uses in accordance with Water Code section 1727(b)(2).

The water available for the transfer is currently flowing in the North Fork Tule River, and would remain in the river. Therefore there would not be any effect on any natural streamflow or hydrologic regime.

7.0 SWRCB'S DELEGATION OF AUTHORITY

On May 16, 2002, the SWRCB adopted Resolution 2002-0106 section 2.6.17, delegating to the Chief of the Division of Water Rights the authority to act on petitions for temporary changes, except where the SWRCB conducts a hearing to accept additional evidence.

8.0 CONCLUSIONS

The SWRCB has adequate information in its files to make the evaluation required by Water Code section 1725, et. seq. and therefore I find as follows:

In accordance with Water Code section 1725, the proposed transfer does not involve only water that would have been consumptively used or stored in the absence of the temporary change.

In accordance with Water Code section 1727(b)(1), the proposed transfer may cause injury to legal users of the water.

In accordance with Water Code section 1727(b)(2), the proposed transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for a temporary change in the place of use under Statement of Water Diversion and Use No. S015151 is not approved.

ORIGINAL SIGNED BY

Harry M. Schueller
Chief Deputy Director

Dated: September 20, 2002

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

ORDER WR 2011-0016

In the Matter of the Threat of Unauthorized Diversion and Use of Water
by Thomas Hill, Steven Gomes, and
Millview County Water District

Participants

Water Rights Prosecution Team
Thomas Hill, Steven Gomes, and
Millview County Water District
Sonoma County Water Agency

Interested Parties

Mendocino County Russian River Flood Control and Water Conservation Improvement District
California Department of Fish and Game

Source: Russian River and Russian River Underflow

County: Mendocino County

CEASE AND DESIST ORDER

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ORDER

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

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California Department of Fish and Game

Source: Russian River and Russian River Underflow

County: Mendocino County

CEASE AND DESIST ORDER

BY THE BOARD:

1.0 INTRODUCTION

By this order, the State Water Resources Control Board (State Water Board or Board) requires Millview County Water District (Millview) to cease and desist the threatened unauthorized diversion of water under a claimed pre-1914 appropriative right, referred to herein as the Waldteufel claim of right. We find that, to the extent that an appropriative right could have been developed, the right to divert more than approximately 243 acre-feet per annum (afa) was not perfected, and the right to divert more than 15 afa between April and September has been forfeited for non-use.

¹ The Water Rights prosecutorial team members included: (1) David Rose, Staff Counsel; (2) Charles Rich, Senior Water Resource Control Engineer; (3) John O'Hagan, Enforcement Section Manager; and (4) James Kassel, Assistant Deputy Director for Water Rights.

It is uncertain whether a pre-1914 right has been perfected at all. The hearing record suggests that the diversion and use that occurred on the property subject to the Waldteufel claim of right was authorized under riparian right to the West Fork of the Russian River, which would indicate that no pre-1914 right has been perfected. But a ruling on this issue appears to be outside of the issues fairly raised by the Hearing Notice and Proposed Cease and Desist Order (CDO) issued by the Division of Water Rights. The notice and proposed CDO raise issues concerning the nature and extent of the Waldteufel claim of right, including whether a pre-1914 right had been perfected and not forfeited for non-use in an amount greater than 15 acre-feet per year. They did not put the parties on notice that it could be decided that no pre-1914 right was ever perfected -- even for an amount of 15 acre-feet per year or less. Because the parties were not on notice that these proceedings might include this issue, the parties have not had an opportunity to present evidence as to whether the diversion and use would have been authorized under riparian right, and we do not know what evidence they might have presented. Accordingly, this order is based on the extent to which a pre-1914 right could have been perfected, and has not been forfeited for non-use, assuming that a pre-1914 right could have been perfected by the diversion and use established in the hearing record.

Historically, water was used under the Waldteufel claim of right for purposes of irrigating crops on a 34-acre parcel of land located adjacent to the West Fork of the Russian River. Since acquiring an interest in the Waldteufel claim of right in 2002, Millview has expanded the place of use from the 34-acre parcel to Millview's entire service area, which is 8 to 10 square miles, and has relocated the point of diversion downstream to a point below the confluence of the West and East Forks of the Russian River. Millview has taken the position that it may divert approximately 1,450 afa under the right. Millview has supplied water to its customers under the Waldteufel claim of right and other rights, year-round, to meet residential, commercial, industrial and irrigation water demands within its service area.

The purpose of use, place of use, and point of diversion of an appropriative right may be changed, provided that the changes do not amount to the initiation of a new right, or result in injury to other legal users. In this case, Millview has exceeded the scope of the Waldteufel claim of right by diverting more water than authorized under the right, diverting water outside the authorized season of diversion, and diverting water when it was not available from the West Fork of the Russian River. Millview's diversion and use outside the scope of the right is

unauthorized and constitutes a trespass against the State. In addition, Millview's increased diversion and use under the right is likely to have resulted in injury to other legal users.

In the absence of enforcement action, Millview is likely to continue its unauthorized diversion and use under the Waldteufel claim of right. Accordingly, issuance of this cease and desist order is warranted. Because Millview was not on notice that the validity of the Waldteufel claim of right in its entirety was at issue, this order does not require Millview to cease its diversion under the right altogether. Instead, this order requires Millview to cease its diversion and use of water in a manner inconsistent with the parameters of the right, assuming a valid right exists. In order to ensure compliance with this order, we also will require Millview to maintain a record of its diversions under the Waldteufel claim of right, as well its diversions under the other water rights and the water supply contract that Millview holds.

2.0 PROCEDURAL AND FACTUAL BACKGROUND

2.1 Complaint Investigation

By letter dated February 27, 2006, Lee O. Howard filed an administrative complaint with the State Water Board, Division of Water Rights. (Millview Ex. 11.) The complaint alleged that Millview was supplying water to a subdivision with 350 homes pursuant to the Waldteufel claim of right. In his complaint, Mr. Howard alleged that the right no longer existed because it had not been used continuously since 1914. Mr. Howard also stated that there had been a change in the purpose of use, from irrigation to domestic supply, and a change in the point of diversion, from a point on the West Fork of the Russian River to a point 400 feet downstream on the East Fork of the Russian River.

In response to the complaint, staff from the Complaint Unit within the Division of Water Rights conducted an investigation. Staff prepared a report, dated June 1, 2007, which documented their investigation and summarized their findings and recommendations. (Prosecution Team (PT) Ex. 10.) As described in the staff report, the subdivision identified in Mr. Howard's complaint was developed after two individuals, Thomas P. Hill and Steven L. Gomes (Messrs. Hill and Gomes), acquired a parcel of land comprised of approximately 32 acres from the Robert Wood Living Trust in 1998. (*Id.* at p. 1; PT Ex. 7.) The parcel is located adjacent to the West Fork of the Russian River, immediately south of Lake Mendocino Drive, and upstream of the confluence of the West and East Forks of the Russian River. (PT Exhibit 10, pp. 1, 4.)

In 2001, Messrs. Hill and Gomes sold most of the parcel of land to Creekbridge Homes L.P., which constructed 125 homes on the property. (*Id.* at p. 1.)

When Messrs. Hill and Gomes acquired the parcel from the Robert Wood Living Trust, they also acquired all water rights associated with the parcel, including the Waldteufel claim of right. (PT Ex. 10, p. 1; PT Ex. 7.) This right, which is discussed in greater detail in section 4.0, below, is referred to as the Waldteufel right because it was initiated by J.A. Waldteufel, who recorded a notice of appropriation on March 24, 1914. (PT Ex. 10, p. 1, Millview Ex. 2.) The notice claimed the right to divert 100 miner's inches under a 4-inch pressure, or 2 cubic feet per second (cfs), from the West Fork of the Russian River for domestic and culinary purposes and for irrigation. (Millview Ex. 2.)

In 2002, Messrs. Hill and Gomes entered into an agreement with Millview, whereby the Waldteufel claim of right was transferred to Millview for four years, except for 125,000 gallons of water per day, which was reserved by Messrs. Hill and Gomes, and Millview acquired an option to purchase the right. (PT Ex. 9.) Subsequently, Millview exercised its option to purchase all of the right from Messrs. Hill and Gomes. (Millview Ex. 14, pp. 3-4.)² Millview supplies water to the Creekbridge Homes subdivision pursuant to the claim of right. (PT Ex. 10, pp. 3-5.)³ Millview's point of diversion is located on the mainstem of the Russian River, below the confluence of the West and East Forks of the Russian River. (*Id.* at p. 4.) In 2006, the Creekbridge Homes Subdivision was annexed into Millview's service area. (R.T. at pp. 192:15-25, 193:1-10.)

The June 1, 2007 staff report evaluated the validity of the Waldteufel claim of right. After examining the information available concerning the history of the claim of right, including the history of water use on the 33.88-acre parcel acquired by Messrs. Hill and Gomes, staff concluded that the claim of right had a valid basis, but that the extent of the right was substantially less than the full face value of the claim set forth in the 1914 notice of appropriation. (PT Ex. 10, p. 16.) Specifically, staff concluded that the right had been forfeited

² It is unclear whether Messrs. Hill and Gomes transferred all or a portion of the 125,000 gallon per day reservation to Creekbridge Homes L.P., or to individual homeowners within the subdivision, or whether Messrs. Hill and Gomes sold the reservation to Millview. (See PT Ex. 3; R.T. at pp. 169-171.) Millview has taken the position, however, that Millview acquired the entire claim of right. (See PT Ex. 10, p. 5; R.T. at p. 171.)

³ Although Messrs. Hill and Gomes retained a portion of the right, at least initially, Millview has diverted all of the water used under the right since it was acquired by Messrs. Hill and Gomes. Accordingly, and for ease of reference, we refer in this order only to Millview's diversion and use under the Waldteufel claim of right.

in part due to non-use, “to the point where the maximum authorized diversion is 15 acre-feet per annum at a maximum instantaneous rate not to exceed 500 gpm or 1.1 cfs” (*Ibid.*) Staff did not recommend enforcement action against Millview, however, because Millview also diverts water from the Russian River pursuant to a water right permit, a water right license, and a water supply contract, and Millview’s diversions had not exceeded the total amount of water Millview is authorized to divert under its combined rights. (PT Ex. 10, p. 17; PT Ex. 1, p. 13.)

2.2 Litigation

Millview and Messrs. Hill and Gomes submitted comments to the Complaint Unit seeking changes to the June 1, 2007 staff report. (Messrs. Hill & Gomes Ex. N; Messrs. Hill & Gomes Ex. O.) When the report remained unchanged, they filed a petition, seeking reconsideration of the report by the State Water Board pursuant to Water Code section 1122. (Messrs. Hill & Gomes Ex. R.) In their comments and petition, Millview and Messrs. Hill and Gomes asserted that the report had engendered uncertainty concerning the validity of the Waldteufel right, which precluded them from completing the sale of the right from Messrs. Hill and Gomes to Millview, and placed Millview at risk if Millview were to exercise the full face value of the right.

By letter dated April 17, 2008, the Chief of the Division of Water Rights explained that the staff report was not an order or decision subject to reconsideration pursuant to section 1122. For this reason, among others, the Division Chief stated that no further action could or would be taken on the petition for reconsideration. (Messrs. Hill & Gomes Ex. S.)

Subsequently, Millview and Messrs. Hill and Gomes filed a lawsuit against the State Water Board in Mendocino County Superior Court, seeking to have the staff report set aside, or to require the State Water Board to hold a hearing and take final action on the issues raised in Mr. Howard’s complaint and addressed in the report. In an order dated January 14, 2009, the court denied the relief requested because the State Water Board had not made a final determination subject to judicial review. (Messrs. Hill & Gomes Ex. V.) The court also stated, however, that the State Water Board’s inaction had effectively clouded the validity of the Waldteufel right, frustrated the ability of Millview and Messrs. Hill and Gomes to complete a business transaction, and left them with little recourse other than to defy the State Water Board and risk the consequences. The court stated that the State Water Board should either disavow the conclusions contained in the staff report, or “pursue a due process course to reviewable finality.” (*Id.* at p. 2.)

2.3 Notice of Proposed CDO

On April 10, 2009, the Assistant Deputy Director for Water Rights issued a notice of proposed cease and desist order to Millview and Messrs. Hill and Gomes. (Messrs. Hill & Gomes Ex. W.) The notice included a draft CDO, which if adopted would require Millview and Messrs. Hill and Gomes to restrict diversions from the Russian River or its tributaries under the Waldteufel claim of right to (1) an instantaneous rate of 1.1 cfs; (2) an annual amount of 15 acre-feet; and (3) a rate no greater than the rate of flow available from the West Fork Russian River as measured at U.S. Geological Survey (USGS) gage number 11461000. The draft CDO also would require Millview and Messrs. Hill and Gomes to maintain daily records of diversions under the Waldteufel right, Millview's water right license (License 492, Application A003601), Millview's water right permit (Permit 13936, Application A017587) and Millview's water supply contract with the Mendocino County Russian River Flood Control and Water Conservation Improvement District (Mendocino District).

The notice of proposed CDO advised Millview and Messrs. Hill and Gomes that if they disagreed with the facts or corrective actions set forth in the draft CDO, they could request a hearing within 20 days from the date of receipt of the notice.

2.4 Evidentiary Hearing

Both Millview and Messrs. Hill and Gomes submitted timely requests for a hearing on the proposed CDO. On September 3, 2009, the State Water Board issued a notice of public hearing. The State Water Board held the hearing on January 26, 2010. The key hearing issues were as follows: Should the State Water Board adopt the draft CDO issued on April 10, 2009? If the draft CDO should be adopted, should any modifications be made to the measures in the draft order, and what is the basis for such modifications?

Adjudicative proceedings before the State Water Board are governed by California Code of Regulations, title 23, sections 648.8, 649.6, and 760, and the statutes specified in the regulations, including applicable provisions of chapter 4.5 of the Administrative Procedure Act (commencing with Government Code section 11400) (APA). As required by the APA, the State Water Board has separated its adjudicative function from its investigative and prosecutorial functions in this proceeding. During the hearing, a staff prosecution team presented the case for adopting the draft CDO. The hearing notice identified the members of the prosecution team and specified that the prosecution team would be treated like any other party to the hearing. A

staff hearing team was assigned to assist the hearing officer in conducting the hearing, provide advice to the State Water Board Members, and prepare a draft order. None of the staff who were involved in the investigation of Mr. Howard's complaint or the preparation of the draft CDO were assigned to the hearing team. Like other interested persons, the prosecution team was prohibited from having ex parte communications with the members of the State Water Board and members of the hearing team regarding substantive and controversial procedural issues pertaining to the hearing. The separation of functions described above also applied to the supervisors of each team.

The following entities or individuals participated in the evidentiary portion of the hearing: the prosecution team, Millview, Messrs. Hill and Gomes, and Sonoma County Water Agency (SCWA). The Mendocino District and the California Department of Fish and Game presented non-evidentiary policy statements.⁴

3.0 LEGAL BACKGROUND

3.1 Riparian Water Rights

This proceeding involves the two principal types of surface water rights recognized under California law: riparian rights and appropriative rights. Generally, riparian rights authorize the diversion and use of water from a stream on land that is contiguous to the stream and located within the watershed of the stream. (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 774-775.) Riparian rights are limited to the natural flow of the stream, and do not authorize the diversion of "foreign water" that would not be present in the stream under natural conditions. (*Bloss v. Rahilly* (1940) 16 Cal.2d 70, 75-76.) In addition, water may not be seasonally stored under a riparian right. (*City of Lodi v. East Bay Mun. Utility Dist.* (1937) 7 Cal.2d 316, 335.)

A riparian right attaches only to the smallest parcel held under one title in the chain of title leading to the present owner. (*Pleasant Valley Canal Co. v. Borror, supra*, 61 Cal.App.4th at

⁴ In addition to prior evidentiary rulings, the Board makes the following rulings: Millview submitted a request on January 4, 2010 for official notice of a broad category of materials from numerous files. Many of the documents in those files were never presented during the proceeding or identified with specificity. To the extent specific documents within the request were presented during the hearing and relied upon by Millview or other parties, the Board takes official notice of those specific documents. In addition, Millview requested official notice of the hearing officer's rulings of December 31, 2009. This request is denied as moot. The rulings are part of the administrative record for the adjudicative proceeding and need not be subject to a request for official notice. Finally, Millview objects to the hearsay testimony in an April 5, 2010 objection. The objections are overruled. The Board does not rely on the hearsay evidence as the exclusive basis to support any findings in this order, and admission is consistent with section 11513 of the Government Code.

pp. 774-775.) When a riparian parcel is subdivided, such that a parcel is no longer contiguous to the stream, the riparian right formerly attached to the noncontiguous parcel is lost, absent proof of intent to retain the riparian right. (*Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 331.) Once it has been lost, the riparian right cannot be regained by reuniting the noncontiguous and contiguous parcels under common ownership. (*Ibid.*)

Relative to other riparian rights, riparian rights are correlative. When the natural flow of a stream is insufficient to satisfy all the riparian rights to use the waters of the stream, the riparian right holders must reduce their diversions proportionately. (*Prather v. Hoberg* (1994) 24 Cal.2d 549, 560.) Relative to an appropriative right, a riparian right has a priority date based on when the riparian parcel was patented. (*Pleasant Valley Canal Co. v. Borror*, *supra*, 61 Cal.App.4th at p. 774.)

3.2 Appropriative Water Rights

Appropriative rights are acquired by diverting water from a stream and applying it to beneficial use. Appropriative rights are not dependent on land ownership, and may authorize the use of water outside the watershed. (*Crandell v. Woods* (1857) 8 Cal. 136, 142; *Miller v. Bay Cities Water Co.* (1910) 157 Cal. 256, 280-281.) Unlike riparian rights, appropriative rights are not necessarily limited to the natural flow of the stream, and water may be seasonally stored under an appropriative right. (*Bloss v. Rahilly*, *supra*, 16 Cal.2d at pp. 75-76; *City of Lodi v. East Bay Mun. Utility Dist.*, *supra*, 7 Cal.2d at p. 335.) The point of diversion, place of use, or purpose of use of an appropriative right may be changed, provided that the change does not amount to the initiation of a new water right, or result in injury to any other legal user of water. (Wat. Code, §§ 1701, 1702, 1706 [changes permissible subject to no injury rule]; *Senior v. Anderson* (1896) 115 Cal. 496, 501-504 [change in place of use permissible but appropriative right limited in quantity to amount of water used to irrigate original place of use].)

The maxim “first in time, first in right,” governs the relative priority of appropriative rights. The priority of an appropriative right is based on the date when the development of the right was initiated. When the flow of a stream is insufficient to satisfy all the appropriative rights to use the waters of the stream, senior appropriators are entitled to satisfy their rights in full before junior appropriators may satisfy their rights. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926.)

Before December 19, 1914, the effective date of the Water Commission Act, an appropriative right could be obtained in two different ways: non-statutory and statutory. The non-statutory method entailed simply diverting water and applying it to beneficial use, after having made some sort of objective manifestation of the intent to appropriate the water. (See *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 311-312.) The statutory method of obtaining a pre-1914 appropriative right entailed following the requirements of Civil Code sections 1410 through 1422, which were enacted in 1872. Civil Code section 1415 required the posting and recording of a notice that contained specified information about a proposed appropriation. Civil Code section 1416 required construction of the diversion works to be commenced within 60 days of posting the notice, and required the work to be conducted and completed with diligence.

Since December 19, 1914, obtaining a water right permit from the State Water Board (or its predecessor agency) pursuant to division 2 (commencing with section 1000) of the Water Code has been the exclusive means to acquire an appropriative water right. (Wat. Code, § 1225; *People v. Shirokow* (1980) 26 Cal.3d 301, 308-309.) Division 2 of the Water Code sets forth a comprehensive regulatory scheme designed to ensure that water rights are exercised in an orderly fashion, and that the water resources of the State are put to beneficial use to the fullest extent possible. Part 2 of division 2 (commencing with section 1200) provides for the appropriation of water. Among other things, part 2 defines water subject to appropriation (sections 1200-1203), establishes a registration program for small domestic and livestock stockpond uses (sections 1228-1229.1), authorizes the Board to act on applications for permits to appropriate water (sections 1250-1491), and authorizes the Board to issue water right licenses confirming the right to appropriate the amount of water beneficially used by permittees in accordance with their permits (sections 1600-1675.2).

Both pre-1914 and post-1914 appropriative rights are perfected by applying water to reasonable, beneficial use. The measure of the right is the amount of water actually applied to reasonable, beneficial use, not the amount of water listed in a notice of appropriation, the capacity of an appropriator's diversion works, the amount of water actually diverted, or the amount of water authorized to be diverted in a water right permit. (*Haight v. Costanich* (1920) 184 Cal. 426, 431; *Trimble v. Heller* (1913) 23 Cal.App. 436, 443-444; *Akin v. Spencer* (1937) 21 Cal.App.2d 325, 328; Wat. Code, §§ 1240, 1390, 1610.)

Appropriative rights must be developed with due diligence. (*Maeris v. Bicknell* (1857) 7 Cal. 261, 263; Wat. Code, §§ 1395, 1396, 1397; Cal. Code Regs., tit. 23, § 840.) Under the doctrine of progressive use and development, the development of an appropriative right that was initiated before December 14, 1914, may be completed after that date without obtaining a water right permit, provided that any increase in the diversion and use of water after December 14, 1914, is within the scope of the original plan of development, and the plan is carried out with due diligence. (*Haight v. Costanich*, *supra*, 184 Cal. at pp. 431-433.)

3.3 The Reasonable Use Doctrine

All water rights are subject to the reasonable use doctrine set forth in Article X, section 2 of the California Constitution and Water Code sections 100-101. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 366-367.) Both article X, section 2 of the Constitution and Water Code section 100 establish the state policy that the water resources of the state should be put to beneficial use to the fullest extent possible. In addition, article X, section 2 and section 100 establish the following general rules:

1. Water rights are limited to the amount of water reasonably required for the beneficial use to be served.
2. Water rights do not extend to the waste of water.
3. Water rights do not extend to the unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.

(See *Peabody v. Vallejo*, *supra*, 2 Cal.2d. at p. 367.)

3.4 Relationship Between Riparian and Appropriative Rights

As a general rule, a riparian water right holder cannot establish a right to divert and use additional water by claiming a duplicative appropriative right that authorizes the diversion and use of the same amount of water as the riparian right and that is subject to the same limitations. (See *Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247, 252 [only water in excess of that required to satisfy riparian rights is subject to appropriation]; Wat. Code, § 1201 [defining unappropriated water to exclude water reasonably needed for useful and beneficial purposes on riparian lands]; see also *Crane v. Stevinson* (1936) 5 Cal.2d 387, 398 [plaintiff in quiet title

action failed to prove appropriative claim of right by showing, among other things, that water was diverted as an appropriator and not in the exercise of plaintiff's rights as riparian owner].)

This conclusion is further supported by the provision of Article X, section 2 of the California Constitution that limits water rights to the amount of water reasonably required for the beneficial use to be served. If a beneficial use is or may be served through the exercise of a riparian right, then no additional amount of water is reasonably required to serve that use, and therefore an appropriative right to serve the same use cannot be obtained consistent with article X, section 2. (See also Hutchins, *The California Law of Water Rights* (1956) p. 209 ["[T]he privilege of claiming dual water rights cannot be made a vehicle for acquiring the right to more water than can be put to reasonable beneficial use . . ."].)

A riparian right holder may obtain an appropriative right, however, to the extent that the appropriative right would authorize a use that the riparian right does not authorize. (See, e.g., *City of Lodi v. East Bay Mun. Utility Dist.*, *supra*, 7 Cal.2d at p. 335 [riparian landholder needed appropriative right in order to store water]; *Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th at pp. 774-775 [appropriative right used on non-riparian lands].) Similarly, it may be possible to hold both an appropriative and a riparian right if the appropriative right confers a higher priority of right. (*Pleasant Valley Canal Co. v. Borrer*, *supra*, at p. 774.)

3.5 Forfeiture of Water Rights

Case law has established that pre-1914 appropriative rights are subject to forfeiture in whole or in part if water is not used under the right for a five-year period. (*Smith v. Hawkins* (1898) 110 Cal. 122, 1127-128; *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 582.) Similarly, the Water Code authorizes the State Water Board to revoke water right permits and licenses for nonuse. (Wat. Code, §§ 1390, 1410, 1675.) In addition, Water Code section 1240 provides that an appropriative right ceases when the right ceases to be used, and Water Code section 1241 provides that appropriative rights are subject to forfeiture for failure "to use beneficially all or any part of the water claimed . . . for which a right of use has vested . . . for a period of five years"

Section 1241 provides further that unused water shall revert to the public and be regarded as unappropriated water “upon a finding by the Board following notice to the permittee, licensee, or [holder of a small domestic use or stockpond right] and a public hearing if requested by the permittee, licensee, [or holder of the small domestic use or stockpond right].”⁵

The purpose of both the forfeiture doctrine and the due diligence requirement, discussed in section 3.2, above, is to ensure that appropriators do not hold water rights in “cold storage,” thereby preventing water resources from being put to beneficial use. (See *Smith v. Hawkin*, *supra*, 110 Cal. at p. 127 [“Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose.”]; see also State Water Board Order WR 2008-0045, p. 3 [discussing the purpose of the due diligence requirement].) Accordingly, the forfeiture doctrine and the due diligence requirement are in furtherance of the fundamental public policy embodied in article X, section 2 of the California Constitution and Water Code section 100, which require the water resources of the State to be put to beneficial use to the fullest extent of which they are capable, and limit all water rights to the amount of water reasonably required for the beneficial use to be served. (See *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 577, 600 [stating that allowing a diverter to freeze an entitlement to appropriated water, regardless of nonuse, would contravene the important public policy embodied in article X, section 2 of the California Constitution].)

Unlike appropriative rights, riparian rights are not lost through non-use. (*In re Waters of Long Valley Creek Stream System* (1979) 23 Cal.3d 339, 347, 358.) When the Board conducts an adjudication of all the rights to a stream system, however, as authorized by Water Code sections 2500-2868, the Board may subordinate the priority of unexercised riparian rights relative to otherwise junior water rights to the extent reasonably necessary to promote the

⁵ It is unclear whether the section of the Water Commission Act later codified as section 1241 of the Water Code was originally intended to apply to both pre-1914 and post-1914 appropriative rights, or just to post-1914 appropriative rights. (See Code Com. Notes, 68 West Ann. Wat. Code (2009 ed.) foll. § 1241, p. 107; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 933-934; *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 566, fn. 5.) It is clear, however, that in its current form the Water Code is intended to create a uniform five-year forfeiture period for both pre-1914 and post-1914 appropriative rights. (See Governor’s Commission to Review California Water Rights Law, Final Report (1978) pp. 60, 71; Stats. 1980, ch. 1100, Stats. 1980, ch. 933, § 5, p. 2955; see generally Sawyer, *Improving Efficiency Incrementally: The Governor’s Commission Attacks Waste and Unreasonable Use* (2005) 36 McGeorge L. Rev. 1, 222-225.)

State's interest in fostering the most reasonable and beneficial use of scarce water resources. (*Id.* at pp. 358-359.)

3.6 Cease and Desist Authority for Water Right Violations

The State Water Board may issue a CDO in response to a violation or threatened violation of (1) the prohibition against the unauthorized diversion or use of water, (2) a term or condition of a water right permit, license, certification, or registration, or (3) a State Water Board order or decision issued pursuant to specified provisions of the Water Code. (Wat. Code, § 1831, subds. (a) & (d)(1-3).) The State Water Board may require compliance immediately or the State Water Board may set a time schedule for compliance. (*Id.*, § 1831, subd. (b).)

Before issuing a CDO, the Board must provide notice and an opportunity for hearing to the person allegedly engaged in the violation. (Wat. Code, §§ 1831, subd. (c), 1834, subd. (a).) The notice must contain “a statement of facts and information that would tend to show” the alleged violation. (*Id.*, § 1834, subd. (a).)

Water Code section 1845, subdivision (b) provides that any person who does not comply with a CDO may be liable for an amount not to exceed one thousand dollars for each day in which the violation occurred. In addition to imposing administrative civil liability pursuant to this provision, the State Water Board may request the Attorney General to petition the superior court for injunctive relief. (*Id.*, § 1845, subd. (a).)

4.0 HISTORY OF THE WALDTEUFEL PRE-1914 APPROPRIATIVE CLAIM OF RIGHT

As described briefly in section 2.1, above, J.A. Waldteufel recorded a notice of appropriation on March 24, 1914, pursuant to Civil Code section 1415. (Millview Ex. 2.) The notice claimed the right to divert 100 miner's inches under a 4-inch pressure from the West Fork of the Russian River “for domestic and culinary purposes upon the lands owned by me, hereinafter described, contiguous to said River and for the irrigation of said lands” (*Ibid.*) The notice provided that “the place of intended use is on Lot #103 of Healeys survey and Map of Yokayo Rancho” (*Ibid.*) The notice also provided that J.A. Waldteufel intended to divert the water using an electric motor and six-inch centrifugal pump. (*Ibid.*)

According to the expert witness for the prosecution team, 100 miner's inches is equivalent to 2 cfs. (R.T. at p. 120.) Millview and Messrs. Hill and Gomes have taken the position that

approximately 1,450 afa may be diverted and used under the Waldteufel claim of right. (PT Ex. 9; R.T. at p. 172.)

According to a map submitted by Millview, Lot 103 of the Yokayo Rancho was a 165-acre parcel located on the west side of the West Fork of the Russian River to the north and south of what is now Lake Mendocino Drive. (PT Ex. 1, p. 4; PT Ex. 3 [Millview submittal with map of Lot 103 attached]; R.T. at pp. 120-121.) The administrative record also includes a copy of a deed dated April 4, 1913, that conveyed a 33.88-acre portion of Lot 103 of the Yokayo Rancho from C. J. Chandon and Mollie Chandon to J. A. Waldteufel. (Millview Ex. 1.) This is the same parcel that was acquired by Messrs. Hill and Gomes in 1998. (Compare Millview Ex. 1 [1913 deed] to PT Ex. 7 [1998 deed].) The record does not contain any evidence that J.A. Waldteufel ever owned more than the 33.88-acre portion of Lot 103 that he acquired from the Chandons in 1913. Accordingly, the record supports the conclusion that the 33.88-acre parcel was the intended place of use for the Waldteufel claim of right.

Both the prosecution team and Millview appear to have assumed that J.A. Waldteufel owned all of Lot 103, and therefore the entire 165-acre lot was the intended place of use for the Waldteufel claim of right. The prosecution team and Millview may have based this assumption on the notice of appropriation, but the language of the notice is ambiguous. The notice claimed the right to use water “upon the lands owned by me,” and provided that the intended place of use was “on Lot #103.” This language can be interpreted to mean that the intended place of use was on all of Lot #103, as the prosecution team and Millview assumed, or just on that portion of Lot #103 that was owned by J.A. Waldteufel. On cross-examination, the witness for the prosecution team admitted that he had no information to support his assumption that J.A. Waldteufel owned all of Lot 103. (R.T. at p. 121.) Given this lack of evidence, the better interpretation of the notice is that the intended place of use was the 33.88-acre parcel that J.A. Waldteufel owned.

The 33.88-acre parcel changed hands many times between 1913, when J.A. Waldteufel acquired it, and 1998, when it was acquired by Messrs. Hill and Gomes. (PT Ex. 4.) Presumably, the Waldteufel claim of right was conveyed along with the land. The administrative record contains evidence that water was diverted from the West Fork of the Russian River for purposes of irrigation on the parcel during this period, but the record contains very little

evidence quantifying how much water was used, as discussed in greater detail in section 5.2.2, below.

Lester Wood and Bertha Wood acquired the Waldteufel parcel in 1945. (PT Ex. 4.) In 1965, a new law was enacted which required most diverters to file a statement of water diversion and use with the State Water Board. (See Wat. Code, §§ 5100-5107.) Pursuant to this new requirement, Lester Wood filed statement of water diversion and use number S000272 in 1967. (PT Ex. 6.) Lester Wood also filed supplemental statements for the following periods: 1970-1972, 1979-1981, and 1985-1987. (*Ibid.*) As discussed in section 5.2.3, below, these statements are evidence that water use under the Waldteufel claim of right did not exceed 15 afa during the irrigation season during the period between 1967 and 1987.

Robert Wood acquired the Waldteufel parcel from Lester and Bertha Wood in 1988, and sold it to Messrs. Hill and Gomes in 1998. Robert Wood did not file any supplemental statements of diversion and use, and the record does not contain any reliable evidence concerning whether or to what extent Robert Wood diverted or used water under the Waldteufel claim of right between 1988 and 1998.⁶

Water use under the right changed after Messrs. Hill and Gomes sold most of the Waldteufel parcel to Creekbridge Homes in 2001 and leased most of the water right to Millview in 2002. As stated earlier, the point of diversion was moved approximately 400 feet downstream to Millview's existing point of diversion below the confluence of the West Fork and the East Fork of the Russian River. The purpose of use changed from irrigation to domestic and municipal use. The place of use also changed. Between 2001 and 2004, the parties claim to have used water under the right solely to supply the Creekbridge Homes subdivision, which is located on the former Waldteufel parcel. Subsequently, however, Millview claims to have used water under the right elsewhere in its service area. (R.T. at pp. 173-180, 194.) Millview provides water diverted from the Russian River to approximately 1,500 water service connections within its service area, which consists of an 8 to 10 square mile unincorporated area north of Ukiah in Mendocino County, to meet residential, commercial, industrial and irrigation water demands. (Millview

⁶ The administrative record contains the written declaration of Floyd Lawrence, who grew up near the Waldteufel parcel. In his declaration, Mr. Lawrence stated that the parcel was in agricultural production until construction began on the new housing development. (PT Ex. 5, p. 35.) But Mr. Lawrence's declaration was admitted into the record subject to a hearsay objection, as explained below.

Ex. 14, p. 1; SCWA Ex. 5; R.T. at p. 168.) Millview also supplies water to the Calpella County Water District. (Millview Ex. 14.)

As discussed in greater detail in section 5.3, below, water use under the Waldteufel claim of right increased significantly after 2001, but it is unclear exactly how much water has been used under the right since that time. Creekbridge Homes filed a single statement of water diversion and use, projecting that it would use 21.85 acre-feet in 2001 for purposes of irrigation, construction dust control, and domestic use. Messrs. Hill and Gomes filed a supplemental statement for the 2002-2004 period, claiming to have used 15.11 acre-feet in 2002, 31.73 acre-feet in 2003, and 43.84 acre-feet in 2004 for domestic use. (PT Ex. 6; PT Ex. 10, p. 12.) Millview also claims to have used water under the right since 2001. Millview did not file any supplemental statements, but according to its accounting sheets, the amount used by Millview ranged from 3.76 acre-feet in 2001 to 1,174.75 acre-feet in 2005. (PT Ex. 1, p. 11; PT Ex. 11.)

5.0 DISCUSSION

5.1 The State Water Board Has Authority to Determine the Validity and Extent of the Waldteufel Claim of Right to the Extent Necessary to Decide Whether a Threat of Unauthorized Diversion Exists

Millview and Messrs. Hill and Gomes contend that the State Water Board does not have jurisdiction to determine the validity of a pre-1914 appropriative right, including whether a pre-1914 right has been forfeited for non-use. In support of their contention, they argue that Water Code sections 1240 and 1241 do not apply to pre-1914 rights. In addition, they argue that, by their terms, Water Code sections 1052 and 1831 do not authorize the Board to issue a cease and desist order against a diverter who claims to hold a pre-1914 right because pre-1914 rights are not subject to regulation pursuant to division 2 of the Water Code. Millview and Messrs. Hill and Gomes also cite to *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, *supra*, 147 Cal.App.4th 555 in support of the argument that any challenge to a pre-1914 claim of right on the grounds of forfeiture must be brought in court through a quiet title or declaratory relief action by a water right holder with a competing claim of right. Similarly, Millview cites to *Smith v. Hawkins*, *supra*, 110 Cal. 122 in support of the argument that pre-1914 rights are subject to dispossession only through the doctrines of prescription, adverse possession, or abandonment, all of which are within the exclusive jurisdiction of the courts.

The contention that the State Water Board does not have authority to evaluate the validity of a pre-1914 claim of right is inconsistent with the Board's statutory authority to investigate and take enforcement action against the unauthorized diversion or use of water. Water Code section 1051 authorizes the Board to investigate, take testimony, and ascertain whether water attempted to be appropriated is appropriated in accordance with state law. (See also Wat. Code, § 183 [authorizing the Board to hold hearings and conduct investigations to the extent necessary to carry out the powers vested in it].) If the Board finds that a person has diverted or used water without authorization, the Board may impose administrative civil liability in an amount not to exceed five hundred dollars for each day during which the unauthorized diversion or use occurred. (Wat. Code, § 1052, subds. (a) & (b).) As discussed in section 3.6, above, the Board also has authority to issue a cease and desist order in response to a violation or threatened violation of the prohibition against the unauthorized diversion or use of water. (Wat. Code, § 1831, subd. (d)(1).) The Legislature has directed the Board to take vigorous action to prevent the unlawful diversion of water. (*Id.* § 1825.)

The State Water Board's authority to evaluate the validity of a pre-1914 appropriative claim of right, including whether the right has been forfeited in whole or in part, is inherent to the Board's statutory authority to investigate and take enforcement action in response to the actual or threatened unauthorized diversion or use of water. In cases where a diversion is not authorized by a water right permit or license, but the diverter claims to hold a pre-1914 appropriative right, ascertaining whether the water is being diverted in accordance with State law, as expressly authorized by Water Code section 1051, necessarily will entail evaluating and deciding whether the pre-1914 appropriative claim of right is valid. Similarly, taking enforcement action as authorized by Water Code section 1052 or 1831 necessarily will entail evaluating any pre-1914 appropriative claim of right advanced by a diverter. Otherwise, the mere assertion of a pre-1914 appropriative claim of right, without providing information to support such an assertion, would effectively thwart the Board's ability to exercise its enforcement authority, and to fulfill its statutory mandate to prevent illegal diversions. (See Wat. Code, § 1825 [directing State Water Board to take vigorous action to prevent the unlawful diversion of water].) In this case, the State Water Board must evaluate whether and to what extent the Waldteufel claim of right is valid in order to determine whether Millview's diversions under the claim of right are unauthorized, and therefore subject to enforcement action.

The argument that, by their terms, Water Code sections 1052 and 1831 do not authorize the State Water Board to issue a cease and desist order against a diverter who claims to hold a pre-1914 appropriative right lacks merit as well. Section 1831, subdivision (d)(1) authorizes the Board to issue a cease and desist order in response to a violation or threatened violation of the prohibition set forth in section 1052 against the unauthorized diversion or use of water “subject to [division 2 of the Water Code (commencing with section 1000)].” Section 1831, subdivision (e) provides that the Board’s authority to issue a cease and desist order does not authorize the Board to regulate the diversion or use of water “not otherwise subject to regulation of the board under [part 2 of the Water Code (commencing with section 1200)].” Millview and Messrs. Hill and Gomes argue that pre-1914 appropriative rights are not subject to regulation under division 2 of the Water Code (which includes part 2), and therefore Water Code sections 1052 and 1831 do not authorize the State Water Board to issue a cease and desist order against a diverter who claims to hold a pre-1914 appropriative right.

This argument is flawed because it begs the question, namely whether a given diversion claimed to be authorized by a pre-1914 appropriative right is in fact authorized by a valid pre-1914 appropriative right. If it is not, the diversion is unauthorized, and therefore subject to enforcement action. Millview and Messrs. Hill and Gomes are correct that the diversion of water consistent with a valid pre-1914 appropriative right would not constitute an unauthorized diversion of water subject to division 2 of the Water Code. (See Wat. Code, §§ 1201, 1202.) Accordingly, the diversion of water as authorized under a valid pre-1914 appropriative right would not be subject to enforcement pursuant to Water Code sections 1052 and 1831, subd. (d)(1). But if the claimed pre-1914 appropriative right in question is not valid, then the diversion of water under the claimed right would constitute an unauthorized diversion of water subject to division 2 of the Water Code, and the diversion would be subject to enforcement pursuant to Water Code sections 1052 and 1831, subdivision (d)(1). Similarly, a diversion would be unauthorized and subject to enforcement action to the extent that it exceeds the amount of water that may be diverted under a valid right, or is otherwise inconsistent with the parameters of the right.⁷

⁷ Another problem with Millview and Messrs. Hill and Gomes’s interpretation of Water Code section 1831 is that their assertion that pre-1914 appropriative rights are not subject to regulation under division 2 is overbroad and incorrect. Although water diverted and used under valid pre-1914 appropriative rights is not subject to appropriation pursuant to part 2 of the Water Code (see Wat. Code, §§ 1201, 1202), pre-1914 appropriative rights are not completely unregulated under division 2. (See, e.g., Wat. Code, §§ 1707 [authorizing the Board to approve a petition to change any type of right for purposes of protecting instream, beneficial uses], 2500-2900 [authorizing the Board to determine all the rights to a stream system], 5101 [requiring all diverters to file statements of water diversion and use, unless certain exceptions apply].)

Essentially, Millview and Messrs. Hill and Gomes claim that Millview's diversions are authorized by the Waldeufel claim of right, and argue on this basis that the State Water Board lacks the authority to decide whether Millview's diversions under the right are authorized or not. The U.S. Supreme Court rejected a similar argument that an entity can avoid an agency's jurisdiction by claiming to be exempt from the agency's jurisdiction in *Weinberger v. Hynson, Westcott and Dunning, Inc.* (1973) 412 U.S. 609. In that case, the Court rejected the contention that the Food and Drug Administration (FDA) lacked jurisdiction to determine the validity of a manufacturer's claim that a certain drug was not a "new drug," within the meaning of the Federal Food, Drug, and Cosmetic Act, and therefore the manufacturer was exempt from the Act's requirement to submit substantial evidence of the drug's effectiveness to the FDA, and obtain FDA approval of a new drug application (NDA). (*Id.* at pp. 623-627.) The Court held:

It is clear to us that FDA has power to determine whether particular drugs require an approved NDA in order to be sold to the public. FDA is indeed the administrative agency selected by Congress to administer the Act, and it cannot administer the Act intelligently and rationally unless it has authority to determine what drugs are 'new drugs' . . . and whether they are exempt from the efficacy requirements

(*Id.* at p. 624.) Likewise, the State Water Board cannot administer the water right permit system effectively, or carry out its statutory mandate to prevent the unlawful diversion of water, unless the Board has authority to decide the validity of a diverter's claim to be exempt from the permitting system. In many cases, such as this one, this will entail evaluating the validity of a diverter's pre-1914 appropriative claim of right.

The Court of Appeal's holding in *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89 lends further support to the conclusion that the State Water Board has authority to evaluate the validity of a pre-1914 appropriative claim of right to the extent necessary to decide whether to take enforcement action against the claimant. The *Phelps* case involved administrative enforcement proceedings similar to this proceeding. In that case, the State Water Board concluded that certain individuals had diverted and used water illegally, and issued an order imposing administrative civil liability against them. (State Water Board Order WRO 2004-0004.) In reaching the conclusion that the individuals had diverted water illegally, the Board addressed the individuals' riparian and pre-1914 appropriative claims of right, and

concluded that the individuals' diversion and use of water was not authorized by valid riparian or pre-1914 appropriative rights. (*Id.* at pp. 23-29, 34.)

On appeal, the Court upheld the State Water Board's conclusions regarding the individuals' riparian and pre-1914 appropriative claims. (*Phelps v. State Water Resources Control Board*, *supra*, 157 Cal.App.4th at pp. 116-119.) Although the Board's authority to decide the validity of the individuals' claims was not challenged in *Phelps*, so the Court did not expressly address that issue, the conclusion that the State Water Board did not exceed its authority by addressing the individuals' claims is implicit in the Court's holding. (See also *North Gualala Water Co. v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, 1589 [holding that the State Water Board's interpretation of the statutory definition of a subterranean stream was entitled to judicial deference because the Board's permitting authority over groundwater is limited to water flowing in subterranean streams and the Board has the power to determine whether groundwater is subject to the Board's permitting authority].)

5.1.1 The *North Kern* Case Does Not Support Millview and Messrs. Hill and Gomes's Contention Regarding the State Water Board's Jurisdiction

As stated above, Millview and Messrs. Hill and Gomes cite to *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, *supra*, 147 Cal.App.4th 555 in support of their argument that any challenge to a pre-1914 claim of right on the grounds of forfeiture must be brought in court through a quiet title or declaratory relief action by a water right holder with a competing claim of right. In the *North Kern* case, the holder of junior pre-1914 appropriative rights filed an action against the holder of senior pre-1914 appropriative rights, seeking to establish that a portion of the senior appropriator's rights had been forfeited for nonuse. In its opinion, the Court of Appeal stated that "[f]orfeiture of the right to appropriate water from a natural watercourse *can* be established through a quiet title or declaratory judgment action brought by one with a conflicting claim to the unused water, such as the owner of a junior right to use water from the same watercourse." (*Id.* at p. 560, emphasis added.)

Contrary to Millview and Messrs. Hill and Gomes's argument, the Court did not hold that forfeiture of a pre-1914 appropriative right *must* be established through a judicial challenge because the courts have exclusive jurisdiction to determine whether a pre-1914 appropriative right has been forfeited. The Court did not address the State Water Board's authority to

evaluate whether a pre-1914 right has been forfeited in an administrative enforcement proceeding because that was not an issue in the case.

Millview's reliance on *Smith v. Hawkins* (1898) 110 Cal. 122 is misplaced for the same reason. In that case, plaintiffs brought an action against a junior water right holder to quiet title to their pre-1914 appropriative claim of right. The California Supreme Court held, however, that plaintiffs had not used water under their right for five years or more before they commenced their action, and therefore they had forfeited their right. (*Id.* at pp. 127-128.) As with the *North Kern* case, *Smith v. Hawkins* stands for the proposition that forfeiture of a pre-1914 appropriative right may be established through a judicial challenge brought by one water right holder against another, but the Court did not hold that a judicial challenge is the exclusive means to determine whether a pre-1914 appropriative right has been forfeited, and the case has no bearing on the issue of whether the State Water Board may evaluate the validity of a pre-1914 appropriative claim of right to the extent necessary to carry out the Board's statutory duties. Indeed, the case was decided well before the Water Commission Act was enacted, and long before the State Water Board even existed.

5.1.2 The Board's Determination Concerning Its Jurisdiction Does Not Amount to Adoption of an Illegal New Policy

Messrs. Hill and Gomes argue that the State Water Board has consistently taken the position that it does not have jurisdiction over pre-1914 appropriative rights, except to the extent necessary to determine waste or unreasonable use. In support of this argument, they cite to statements contained in two informational documents that were posted on the Board's website: a 1990 document entitled "Information Pertaining to Water Rights in California," (Messrs. Hill and Gomes Ex. AA), and a 2005 document entitled "Information Pertaining to Investigating Water Right Complaints in California" (Messrs. Hill and Gomes Ex. BB). They also cite to a statement contained in a brief filed by the State Water Board in litigation filed by the California Farm Bureau Federation against the Board, and to a statement contained in State Water Board [Order WR 2001-22](#). Messrs. Hill and Gomes argue further that if the Board were to change its position regarding its jurisdiction over pre-1914 appropriative rights in this proceeding, such a change would amount to the adoption of a new policy in violation of due process requirements and the Administrative Procedure Act.

These arguments lack merit for a number of reasons, as explained below. First, the State Water Board has not adopted a policy or rule of general applicability concerning the Board's jurisdiction over pre-1914 appropriative rights. To the extent that Messrs. Hill and Gomes rely on the informational documents and the brief filed in the *California Farm Bureau* case as an expression of the State Water Board's recent position or policy, their reliance is misplaced because those documents are not regulations that have been adopted by the Board, and therefore they cannot be used as guidance in this or any other proceeding. (See Gov. Code, §§ 11340.5, subd. (a), 11342.600 [prohibiting an agency from using a guideline, manual, or other standard of general application that has not been adopted as a regulation for purposes of implementing or interpreting the law administered by the agency].)⁸

In addition, Messrs. Hill and Gomes overlook the fact that, in a number of recent, precedential decisions, the State Water Board has exercised its authority to evaluate the validity of claimed riparian and pre-1914 appropriative rights to the extent necessary to prevent the unauthorized diversion or use of water. (See, e.g., State Water Board Order WR 2001-22 at pp. 25-26 [requiring a report substantiating a claimed pre-1914 appropriative right]; [Order WRO 2004-0004](#) at pp. 23-29, 34-35 [imposing administrative civil liability after concluding that diverters did not hold valid riparian or pre-1914 appropriative rights]; [Order WR 2006-0001](#) at pp. 12-16, 20-21 [imposing administrative civil liability and issuing a cease and desist order after determining the validity and extent of a claimed pre-1914 right and concluding that the diverter had diverted more water than authorized under the right]; [Order WR 2009-0060](#) at pp. 5-6, 57 [issuing a cease and desist order for diversions in excess of total amount authorized to be diverted under both permitted and licensed rights and riparian and pre-1914 appropriative rights previously quantified by the Board].)⁹ Thus, the assertion of the Board's authority to evaluate the validity of the Waldteufel claim of right in this proceeding does not represent an impermissible change in policy, but the application of the law to the facts of this proceeding, consistent with prior Board precedent. (See Gov. Code, § 11425.60 [authorizing an agency to designate a decision reached in an adjudicative proceeding as precedent; State Water Board Order WR 96-1 at p. 17, n. 11 [designating as precedent all State Water Board orders and

⁸ In addition, their reliance on the brief is unavailing because it is not part of the record in this proceeding, nor is it the subject of a request for official notice.

⁹ Messrs. Hill and Gomes's reliance on Order WR 2001-22 in support of their argument is puzzling. In that decision, the State Water Board required El Dorado Irrigation District (EID) to submit a report substantiating a claimed pre-1914 appropriative right. The Board asserted that it had the authority to require the report to the extent necessary to ascertain whether the claimed right was valid, or whether EID's diversion and use under the right was unauthorized. (Order WR 2001-22 at pp. 25-26.) The Board also rejected the argument that its authority to inquire into the validity of a claimed pre-1914 right ends once a prima facie showing of the validity of the right is made. (*Ibid.*)

decisions adopted by the Board at a public meeting, unless an order or decision indicates otherwise].)

Finally, assuming for the sake of argument that the informational documents cited by Messrs. Hill and Gomes should be afforded any weight in this proceeding, it merits note that the documents themselves are ambiguous, and do not clearly stand for the proposition that the State Water Board has taken the position that it does not have the authority to determine the validity of pre-1914 appropriative rights in the context of an enforcement proceeding. For example, Messrs. Hill and Gomes quote selectively from a paragraph in the 2005 document, which indicates that the Board may not process a complaint involving claimed riparian or pre-1914 water rights if the Board decides that the issues more appropriately fall under the jurisdiction of the courts. (Messrs. Hill and Gomes Ex. BB, p. 3.) But the 2005 document also provides that the Division of Water Rights will investigate a complaint against an alleged unauthorized diversion to determine if the diverter has a permit, license, riparian, pre-1914, or other type of right, and take appropriate action if Division staff determine that the diverter does not have a valid water right. (*Id.* at p. 2.)

Messrs. Hill and Gomes also point to a statement in the 1990 informational document to the effect that the State Water Board does not have the authority to determine the validity of riparian and pre-1914 appropriative rights, but may assist the courts in such determinations. (Messrs. Hill and Gomes, Ex. AA, pp 7-8.) This statement is correct to the extent that it was intended to mean that the Board's adjudication of riparian and pre-1914 appropriative rights in a statutory stream adjudication or court reference must be confirmed by the appropriate court. (See Wat. §§ 2016-2019, 2075-2076, 2750-2774.) If on the other hand this statement was intended to mean that the Board does not have the authority to evaluate the validity of claimed riparian and pre-1914 appropriative rights to the extent necessary to decide whether there has been an unauthorized diversion or use of water, then this statement is inconsistent with the Board's statutory enforcement authority, as discussed above.¹⁰

¹⁰It also merits note that in 1990, the date of this document, the State Water Board did not have authority to issue a cease and desist order in response to the unauthorized diversion or use of water, and the Board did not have authority to administratively impose penalties for violation of Water Code section 1052 except for violations occurring during critically dry years. (See Stats. 2002, ch. 652, § 6; Wat. Code, § 1052, subd. (b), as amended by Stats. 1987, ch. 756.) Although the document may be incorrect if it is interpreted as a statement about the Board's enforcement authority under existing law, as applied to the Board's enforcement authority in 1990 it amounts to nothing more than a generalization made without expressly recognizing an exception to that generalization.

5.2 The Validity and Extent of the Waldteufel Claim of Right

This proceeding presents the following issues concerning the validity and extent of the Waldteufel claim of right: (1) whether an appropriative right could have been developed in light of the fact that the Waldteufel parcel appears to have been riparian to the West Fork of the Russian River; (2) assuming that an appropriative right could have been developed, whether and to what extent the right was perfected; and (3) assuming the right was perfected, the extent to which it was forfeited in part for non-use. These issues are addressed in turn, below.

5.2.1 Because Water Was Used Consistent with a Riparian Right this Order should not be Interpreted to Validate an Appropriative Right in any Amount

Consistent with the authority discussed in section 3.4, above, it does not appear an appropriative right to use water over and above the right to use water under riparian right could have been developed based on the Waldteufel claim. The 33.88-acre parcel that J.A. Waldteufel acquired from the Chandons appears to have been riparian to the West Fork. (Millview Ex. 1 [1913 deed describing parcel boundary as extending along a portion of the center of the channel of the “west branch” of the Russian River]; PT Ex. 3 [map of Lot 103 of the Yokayo Rancho submitted by Millview indicating Lot 103 was contiguous to the West Fork.])¹¹ In addition, the record does not contain any evidence that an appropriative right was necessary to satisfy the demand for domestic and irrigation water use on the Waldteufel parcel. The West Fork contains only natural flow, and does not include any “foreign water” that a riparian right holder would not be entitled to divert. (See SCWA Ex. 1, p. 5.) And J.A. Waldteufel did not seek to seasonally store water, for which an appropriative right would have been required. Finally, it does not appear that an appropriative right would have conferred any advantage on J.A. Waldteufel, such as a higher priority of right. The patent for the 33.88-acre parcel predated 1913, so the riparian right attached to the parcel would have been senior to any appropriative right developed after that date.

¹¹ The record does not include a complete chain of title dating back to the patent, and it is possible that the parcel was severed from the West Fork and reunited under common ownership prior to 1913. That possibility seems unlikely, however, in light of the slow rate of development in the area, and the prosecution team and Messrs. Hill and Gomes appear to be in agreement that the Waldteufel parcel was riparian. (See PT Ex. 10, p. 8; Messrs. Hill and Gomes Ex. N, p. 2.)

In light of the above, the diversion and use of water by J.A. Waldteufel and his successors-in-interest that might otherwise have resulted in the perfection of an appropriative right could be considered to have been an exercise of the riparian right attached to the parcel.¹²

Notwithstanding the foregoing, staff from the Complaint Unit concluded in the 2007 staff report that it was possible for an overlapping appropriative right to be developed through the diversion and use of water on the Waldteufel parcel. (PT Ex. 10, pp. 8-9.)¹³ Accordingly, staff concluded that a pre-1914 appropriative right had been developed, but forfeited in part due to nonuse. Similarly, the draft CDO would require Millview to restrict its diversions under the Waldteufel claim of right, but would not require Millview to cease its diversions under the claim of right altogether. This order does not require Millview to cease its diversions under the Waldteufel claim of right altogether, based upon the Notice in this proceeding. Millview should be on notice, however, that the validity of the Waldteufel claim of right in its entirety is questionable.

5.2.2 Perfection of the Waldteufel Claim of Right

Assuming for the sake of argument that an overlapping appropriative right could have been developed through the diversion and use of water on the Waldteufel parcel, the record does not support the conclusion that an appropriative right to the full “face value” of the 1914 notice of appropriation – approximately 1,450 afa – ever was perfected. As discussed in section 3.2, above, appropriative rights are perfected by applying water to reasonable, beneficial use. The measure of the right is the amount of water actually applied to reasonable, beneficial use, not the amount of water listed in a notice of appropriation, or the capacity of the appropriator’s diversion works. An appropriative right initiated before December 14, 1914, may be perfected after that date, provided that the original plan of development is carried out with due diligence.

¹² When Creekbridge Homes acquired most of the parcel from Messrs. Hill and Gomes, all but a narrow strip of land retained by Messrs. Hill and Gomes appears to have been severed from the West Fork. (PT Ex. 10, pp. 1-2.) It is unclear whether riparian rights have been retained on the parcels within the Creekbridge Homes subdivision that are no longer contiguous to the West Fork. In a statement of water diversion and use filed by Creekbridge Homes in 2001, Creekbridge Homes claimed to have acquired a portion of the Waldteufel claim of right, but did not claim to have a riparian right. (PT Ex. 8.)

¹³ The prosecution team based this conclusion in part on the advice of legal counsel. (PT Ex. 10, p. 8; Millview Ex. U, document 32.) Upon closer examination of applicable law and the facts of this case, this advice appears to have been incorrect. Moreover, legal counsel advised that any increase in water use under both rights due to a transfer of the appropriative right and simultaneous use of water under the previously dormant riparian right would be subject to the no injury rule codified in Water Code section 1706. As explained in section 5.3, below, the changes in purpose of use, place of use, and point of diversion instituted by Millview have led to an increase in use that likely has resulted in injury to other legal users. Accordingly, the no injury rule likely precludes the exercise of both the Waldteufel claim of right and any riparian rights remaining on the parcels that used to be part of the 33.88-acre Waldteufel parcel.

The administrative record in this proceeding contains evidence that, several years after filing the notice of appropriation, J.A. Waldteufel or his successors-in-interest diverted water from the West Fork of the Russian River for purposes of irrigation on the 33.88-acre parcel, but the record contains very little evidence quantifying how much water was used. The 1913 deed conveying the parcel from the Chandons to J.A. Waldteufel reserved to the Chandons the fruit and first cutting of alfalfa produced on the parcel in 1913. (Millview Ex. 1.) The reservation indicates that the parcel was in agricultural production as early as 1913, but it does not necessarily mean that water was diverted from the West Fork for purposes of irrigation, nor does the reservation provide any information concerning how much water, if any, may have been used for purposes of irrigation.

The record also contains the written declaration of Floyd Lawrence, who was born in 1914 and raised on property on the east side of the West Fork of the Russian River near the Waldteufel parcel. (PT Ex. 5, pp. 3, 6.) Mr. Lawrence stated in his declaration that, since approximately 1917, J.A. Waldteufel and later his successors-in-interest diverted water from an eight-foot hole in the West Fork using a gasoline pump and 6-inch suction line. (*Id.* at pp. 19-22.) He stated that the gasoline pump was replaced at some point, but a pump continued to be used at the same location for at least 50 years. (*Id.* at p. 22.) Mr. Lawrence recalled that Mr. Dowling, who acquired the parcel in 1918, grew three or four crops of alfalfa in the area to the west of his house, which he flood irrigated, and he grew oat hay and had a three- or four-acre pear orchard in a narrow strip between the house and the West Fork. (*Id.* at pp. 21, 26, 29-30.) Mr. Lawrence also recalled that the area where alfalfa had been grown was later converted to vineyard. (*Id.* at pp. 31, 32.)

Mr. Lawrence's declaration was admitted into the record subject to a hearsay objection. (R.T. at pp. 129-130.) Accordingly, the declaration can be used to supplement or explain other evidence, but may not be relied upon as the sole basis for a finding unless it would be admissible over objection in civil actions. (Cal. Code Regs., tit. 23, § 648.5.1; Gov. Code, § 11513, subd. (d).)¹⁴ Mr. Lawrence's statement that water was diverted using a 6-inch suction line does supplement other evidence that such a pipe was used. Specifically, an expert witness for Millview testified that he visited the Waldteufel diversion site in 2009 and observed a

¹⁴ In its closing brief, Millview asserts that Mr. Lawrence's declaration would be admissible over an objection in a civil action because it was against his interest to provide sworn testimony supporting competing water usage. The record does not contain any evidence, however, that Mr. Lawrence diverted and used water from the West Fork of the Russian River, or that the diversion and use of water under the Waldteufel claim of right was against his interest.

remnant 6-inch steel pipe. (Millview Ex. 9; R.T. at p. 153.) In addition, Mr. Lawrence's statements concerning diversions from the West Fork and the crops grown on the parcel serve to explain the existence of the pipe, and supplement other evidence of agricultural activity on the parcel contained in the administrative record. (See Millview Ex. 1 [1913 deed conveying the parcel from the Chandons to J.A. Waldteufel]; PT Ex. 6 [statements of water diversion and use filed by Lester Wood].) Taken together, Mr. Lawrence's statements and other evidence in the record support the finding that some irrigation took place on the Waldteufel parcel within a reasonable period of time after J.A. Waldteufel filed a notice of appropriation. Mr. Lawrence's hearsay statements do not, however, support the finding that J.A. Waldteufel and his successors-in-interest diverted water from the West Fork for purposes of irrigation on a continuous basis since 1917, nor do Mr. Lawrence's statements establish how many acres were irrigated, or how much water was diverted and used.

In order to quantify the amount of water that might have been used to flood irrigate alfalfa on the Waldteufel parcel, Millview introduced the expert testimony of Dan Putnam, Ph.D. Dr. Putnam did not have any personal knowledge as to the amount of water that might have been used on the Waldteufel parcel. Instead, he estimated water use based on his knowledge of historic irrigation practices, and the soil and weather conditions in the vicinity of the parcel. (Millview Exhibit 10.) Dr. Putnam assumed that irrigation would have occurred during the months of April, May, June, July, August, September, and early October, and that alfalfa would have been harvested four to six times during the year. (*Id.* at p. 1.) He also assumed 50 to 60 percent irrigation efficiency, which means that a significant percent of the water diverted could have returned to the stream system after having been applied to the crop. (*Id.* at p. 1; R.T. at pp. 146-148.) Dr. Putnam estimated that the amount of water required to flood irrigate 162 acres of alfalfa would have been 932 acre-feet on the low end, and 1,310 acre-feet on the high end. (Millview Ex. 10, p. 3.)

A significant problem with Dr. Putnam's estimate of water use on the parcel is that the record does not support his assumption that water was used under the Waldteufel claim of right to flood irrigate 162 acres of alfalfa. In fact, the record does not indicate how many acres of alfalfa may have been flood irrigated, but given the size of the parcel in question, it would be more reasonable to assume that no more than 30 acres of alfalfa were flood irrigated under the Waldteufel claim of right. Based on Dr. Putnam's estimate, and assuming that all of his other assumptions are correct, the amount of water required to flood irrigate 30 acres of alfalfa would

have been approximately 173 acre-feet on the low end (932 acre-feet of water ÷ 162 acres × 30 acres = 173 acre-feet of water), and approximately 243 acre-feet on the high end (1,310 acre-feet of water ÷ 162 acres × 30 acres = 243 acre-feet of water).

Thus, interpreting the evidence in the light most favorable to Millview and Messrs. Hill and Gomes, and assuming that 30 acres of alfalfa were flood irrigated on a continuous basis for a period of time beginning around 1917, we find that a right to divert more than approximately 243 afa, plus whatever amount of water may have been required to irrigate several acres of orchard, never was perfected. The right to divert that amount of water would have been limited to the irrigation season, which according to Dr. Putnam was April through September, with some irrigation occurring in early October.

5.2.3 Partial Forfeiture of the Waldteufel Claim of Right

Assuming for the sake of argument that an appropriative right to divert approximately 243 afa was perfected, the next issue is the extent to which the right may have been forfeited in part for nonuse. As explained below, we find that partial forfeiture occurred when the owner of the parcel switched from growing alfalfa to less water-intensive crops. This occurred during the period when Lester and Bertha Wood owned the parcel, between 1945 and 1988, if not earlier. Although the administrative record does not include records of the amount of water used before 1967, statements of water diversion and use filed by Lester Wood are evidence that Mr. Wood did not use more than 15 acre-feet, or divert at a rate greater than 1.1 cfs, during the irrigation season in any given year during the period between 1967 and 1987.

As stated in section 4.0, above, Lester Wood filed statement of water diversion and use number S000272 in 1967. According to the statement, which was dated February 14, 1967, Mr. Wood diverted water from the West Branch of the Russian River from mid-May through mid-July for purposes of irrigating 15 acres of grapes and 15 acres of walnuts. (PT Ex. 6.) He listed a maximum annual water use in recent years of 15 afa and a minimum annual use of 7.5 afa. (*Ibid.*) He indicated that the year of first use as nearly as known was 1914, and included a reference to the notice of appropriation recorded by J.A. Waldteufel. (*Ibid.*)

Lester Wood filed supplemental statements for the following periods: 1970-1972, 1979-1981, and 1985-1987. (PT Ex. 6.) The supplemental statements do not cover the entire 20-year period from 1967-1987, and they do not list the quantity of water diverted and used in acre-feet.

The information contained in the supplemental statements, however, is consistent with the original statement, and the supplemental statements are evidence that Lester Wood's irrigation practices did not change for at least 20 years.

The supplemental statement for 1970-1972 indicates that sprinklers would be run at a rate of 500 gallons per minute (gpm) for 25 hours in May for purposes of frost protection, and for 100 hours in July and 24 hours in September for purposes of irrigation. (PT Ex. 6.) (The supplemental statement was dated February 12, 1970, so presumably these amounts were an estimate of future water use.) According to the expert witness for the prosecution team, 500 gpm equals 1.1 cfs, and if water was diverted at a rate of 500 gpm for 149 hours, a total of 13.7 acre-feet would be diverted. (PT Ex. 10, pp. 5, 12; R.T. at pp. 54, 112-113.)

The supplemental statements for 1979-1981 and 1985-1987 did not quantify the amount of water used. Consistent with earlier statements, however, the supplemental statement for 1979-1981 indicates that water was used from April through September for purposes of irrigating grapes and walnuts. (PT Ex. 6.) Similarly, the supplemental statement for 1985-1987 indicates that water was used from April through September for purposes of irrigating 30 acres. (*Ibid.*) Taking into consideration the consistency of the information reported in all of the statements of water diversion and use, the fact that grape vines and walnut trees are perennial crops, and the fact that the parcel owned by Lester Wood was not much larger than 30 acres, it is unlikely that Lester Wood's diversion and use of water varied significantly between approximately 1967 and 1987, or that he diverted and used more than 15 acre-feet, or that he diverted water at a rate greater than 1.1 cfs, during the irrigation season (April through September) in any given year during that period.¹⁵

¹⁵ In a brief submitted prior to the hearing, Messrs. Hill and Gomes argued that the statements of water diversion and use could not be relied upon because Water Code section 5108 provided that such statements were "for informational purposes only." Water Code section 5108 has been repealed. In addition, even if former section 5108 were applicable to the statements at issue in this proceeding, that section would not preclude reliance on the statements as evidence of Lester Wood's water use under the Waldteufel claim of right. Section 5108 provided in full as follows: "Statements filed pursuant to this part shall be for informational purposes only, and neither the failure to file a statement nor any error in the information filed shall have any legal consequences whatsoever other than those specified in this part." (Stats. 1965, ch. 1430, § 1, p. 3359) Water Code section 5107 provided (and continues to provide) that the making of a willful misstatement is a misdemeanor, and a person who makes a material misstatement is subject to administrative civil liability. Thus, section 5108 excused the failure to file a statement, or the filing of a statement with an immaterial error, but did not prohibit reliance on the information contained in a statement. Moreover, the fact that willful and material misstatements are subject to enforcement action indicates that statements can be relied upon as an accurate source of information concerning the diversion and use of water by the person who filed the statement.

In determining whether a water right is forfeited for non-use, years during which there was insufficient flow available for the appropriator to exercise its right should be excluded in calculating the five-year forfeiture period. (See *Bloss v. Rahilly*, *supra* 16 Cal.2d at p. 78.)

5.2.3.1 The *North Kern* Case Does Not Preclude a Finding of Forfeiture

Millview and Messrs. Hill and Gomes cite to *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, *supra*, 147 Cal.App.4th 555, in support of the argument that, in order to establish forfeiture, non-use must be proven for a five-year period immediately preceding a “clash of rights” with a competing water right holder. They argue that forfeiture of the Waldteufel claim of right cannot be established based on non-use in 1967 because that single year was not a five-year period immediately preceding 2006, when Mr. Howard filed his complaint against Millview. They also argue that this proceeding does not involve a clash of rights because Mr. Howard is not a competing water claimant, and no other person or entity has asserted a competing claim to the water at issue.

These arguments lack merit for several reasons. Preliminarily, the basis for our determination of forfeiture in this proceeding is non-use during the 20-year period from 1967-1987, not during the single year of 1967. In addition, this proceeding is distinguishable from the *North Kern* case, as explained below. Finally, the holding in *North Kern* does not preclude a determination that the Waldteufel claim of right was forfeited in part because this proceeding does in fact involve a clash of rights between competing claimants.

In the *North Kern* case, a junior appropriator, North Kern Water Storage District (North Kern), filed a legal action against a senior appropriator, Kern Delta Water District (Kern Delta), seeking to establish that Kern Delta’s pre-1914 appropriative water rights had been forfeited in part due to non-use. The parties’ rights to the Kern River had been quantified and the priority of their rights had been established pursuant to a decree issued in 1901. (*North Kern*, *supra*, 147 Cal.App.4th at pp. 561-562.) The dispute between the parties arose shortly before 1976, when Kern Delta acquired its rights from a third party, having announced its intention to increase water usage under the rights, over North Kern’s objection.

The Court of Appeal issued two opinions in the case, the first of which was unpublished. In the first opinion, the Court stated that, in order to establish forfeiture, North Kern was required to prove that Kern Delta or its predecessors-in-interest had failed to use some portion of Kern

Delta's entitlement under the decree continuously during a five-year period no later than the five years immediately preceding North Kern's assertion of its conflicting right to the water, resulting in a "clash of rights." (*North Kern Water Storage Dist. v. Kern Delta Water Dist.*, 2003 WL 215821 (Jan. 31, 2003, F033370) at p. 18.) The Court rejected the argument that the forfeiture period was the five-year period immediately preceding the lawsuit, and left the trial court some discretion to determine the appropriate forfeiture period, but stated that the period must bear a direct temporal relationship to the time when North Kern's competing claim was made. (*Ibid.*) In reaching this conclusion, the Court of Appeal reasoned that the doctrines of forfeiture, adverse possession, abandonment, and prescription are all related, and are all evaluated in the context of competing water right claims. In support of this reasoning, the Court cited to a number of cases in which a water right holder advanced a claim of forfeiture or prescription against a competing water right holder. (*Ibid.*) In its second, published, opinion, the Court of Appeal upheld the trial court's determination that the appropriate forfeiture period was the five-year period immediately preceding 1976, when Kern Delta acquired the rights that were the subject of its dispute with North Kern. (*North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 566-567.)

In reaching the conclusion that the forfeiture period must bear a temporal relationship to a "clash of rights," the Court of Appeal conflated the doctrines of forfeiture and prescription, and departed from prior precedent. (See, e.g., *id.* at p. 566.) Unlike forfeiture, which is based on non-use for a five-year period, prescription or adverse possession is based on adverse use for a five-year period. (See *City of Pasadena v. City of Alhambra*, *supra*, 33 Cal.2d at pp. 926-927 [a wrongful appropriation may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for a period of five years, and under claim of right].) Although all of the cases cited by the Court in support of its conclusion involved competing claimants, none of the cases held that the period used to establish forfeiture, as opposed to the period used to establish a prescriptive claim of right, must bear a temporal relationship to a clash of rights between the parties. (See also *Crane v. Stevinson*, *supra*, 5 Cal.2d at p. 398 [stating that the failure to maintain beneficial use under a pre-1914 appropriative right for a five-year period would result in forfeiture of the right, without specifying that the five-year period must bear any relationship to a clash of rights].)

Unpublished opinions of California courts are not precedential. (See Cal. Rules of Court, rule 8.1115.) And the second, published opinion in the *North Kern* litigation reviewed whether the

trial court acted in accordance with the first, unpublished opinion, not whether the first opinion was correctly decided. (See *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th at p. 566 & fn. 5.) As a result, it is unclear to what extent the legal conclusions reached in the *North Kern* are applicable outside of the context of the specific litigation involved in that case.

Irrespective of issues concerning the precedential value of the Court of Appeal's conclusions in the *North Kern* case and whether the case was properly decided as applied to the particular situation involved, the case is distinguishable from the instant proceeding because it involved an action among competing water right holders, and did not involve the State Water Board's authority. Because the Court of Appeal's "clash of rights" theory is based on principles governing prescription, the theory should not apply to the State Water Board for the same reasons that prescription does not apply to the State Water Board, including the potential for the doctrine to undermine the State Water Board's oversight of water diversion and use. (See generally *People v. Shirokow* (1980) 26 Cal.3d 301, 303.)

A number of situations may arise where it may be necessary for the Board to evaluate whether a right has been forfeited in the absence of a "clash of rights." For example, in an administrative enforcement proceeding such as this one, it may be necessary for the Board to evaluate whether a pre-1914 right has been forfeited in order to determine whether a diversion is unauthorized. The Board's authority to take enforcement action in response to an unauthorized diversion is not limited to situations where there is a competing claim to the water diverted. Accordingly, the issue of forfeiture could arise in an enforcement proceeding that does not involve a "clash of rights."

Similarly, it may be necessary for the Board to evaluate whether a pre-1914 right has been forfeited in determining whether surplus water is available for appropriation by a water right applicant, irrespective of whether a competing claimant has asserted a right to water unused under the pre-1914 right in question. (See *United States of America v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102-104 [The Board must examine riparian and prior appropriative rights in order to determine whether surplus water is available for appropriation].) Finally, it may be necessary for the Board to determine whether a pre-1914 right has been forfeited in a statutory adjudication to determine all of the rights to water of a stream system.

(See Wat. Code, §§ 2500-2900.) Again, the issue of forfeiture could arise in a statutory adjudication in the absence of a “clash of rights” with a competing claimant.

The Board’s ability to effectively administer water rights as authorized by statute would be thwarted if the Board were precluded from addressing whether a pre-1914 right has been forfeited when the issue arises in an administrative proceeding, unless a competing water right claimant has elected to challenge the right holder in some fashion. Moreover, to extend the holding in *North Kern* to administrative proceedings before the Board would be contrary to the constitutional maxim that the State’s water resources should be put to beneficial use to the fullest extent possible. In effect, it would allow pre-1914 appropriative right holders to place their rights in “cold storage,” and retain unexercised rights unless and until a competing claim is advanced, thereby preventing other prospective appropriators from obtaining permits to appropriate the water unused under the rights. (See *People v. Shirokow* (1980) 26 Cal.3d 301, 309 [“waters of the state be available for allocation in accordance with the code to the fullest extent consistent with its terms.”].)

Assuming for the sake of argument that the holding in *North Kern* extends to this proceeding, the Court’s holding does not preclude a forfeiture determination because this proceeding involves a clash of rights, not between Millview and Mr. Howard, but between Millview and the Mendocino District and SCWA. In its policy statement, the Mendocino District asserted that Millview’s diversions under the Waldteufel claim of right conflict with the District’s and SCWA’s rights to store water in Lake Mendocino, which is located on the East Fork of the Russian River upstream of the confluence of the West and East Forks. Similarly, an expert witness for SCWA testified that unauthorized diversions under the Waldteufel claim of right, or increased diversions under the right, during periods when SCWA is releasing water from Lake Mendocino in order to meet instream flow requirements would adversely affect SCWA’s ability to store water in Lake Mendocino under SCWA’s permitted rights. (SCWA Ex. 1, pp. 3-6.)

Under *North Kern*, the forfeiture period is no later than the five years immediately preceding a clash of rights between competing claimants, and must bear a temporal relationship to the clash of rights. In this case, the clash of rights occurred sometime after 1998, when Messrs. Hill and Gomes acquired the Waldteufel claim of right and proposed to increase water usage under the right. Thus, consistent with the holding in *North Kern*, the appropriate forfeiture period would be no later than 1998, and must bear a temporal relationship to that date. In the *North Kern* case,

the trial court was able to evaluate the extent to which Kern Delta's rights had been forfeited based on the five-year period immediately preceding the clash of rights between North Kern and Kern Delta because the parties had maintained complete records of their water use. (See *North Kern*, *supra*, 147 Cal.App.4th at pp. 572, 574.) In this case, by contrast, records of the amount of water used under the Waldteufel claim of right do not exist except for the original and supplemental statements of water diversion and use filed by Lester Wood between 1967 and 1987. Although this period does not immediately precede 1998, it is indicative of the use that occurred in the period immediately preceding 1998 because the record indicates that the Waldteufel parcel remained in agricultural production until 1998, and the record does not contain any evidence that water use under the Waldteufel claim of right increased between 1987 and 1998.

5.2.3.2 Non-use During the Forfeiture Period Was Not Due to a Lack of Water Availability

Messrs. Hill and Gomes contend that a determination of forfeiture would violate the holdings in *North Kern*, *supra*, 147 Cal.App.4th at pp. 580-582 and *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1372 because the prosecution team failed to show that sufficient water was available in the West Fork of the Russian River during the forfeiture period to fully satisfy the Waldteufel claim of right. Messrs. Hill and Gomes are correct that non-use due to a lack of water availability cannot be the basis of forfeiture. In this proceeding, however, there is no evidence that flows in the West Fork were insufficient to satisfy Lester Wood's annual demand for irrigation water from April through September during the 1967-1987 period.

USGS has maintained an instream surface flow gage immediately upstream of the point of diversion for the Waldteufel claim of right since 1952. (PT Ex. 1, p. 7; SCWA Ex. 1, p. 5; SCWA Ex. 6; R.T. at pp. 257-259; Millview Ex. U, tab. 30.) The gage data indicate that monthly-mean surface water flows in the West Fork at the location of the gage dropped below 2 cfs during August and September of most years during the forfeiture period, and during July of some years. (Millview Ex. U, tab. 30; see also SCWA Ex. 1, p. 5 [flows in the West Fork typically drop below 2 cfs between mid-July and mid-September].) But the data also show that recorded surface flows were adequate to allow for the annual diversion of up to 243 afa (the maximum extent to which the right may have been perfected) during the course of each irrigation season during the forfeiture period. (Millview Ex. U, tab. 30.)

The declaration of Floyd Lawrence supports this finding. As stated earlier, Mr. Lawrence recalled that J.A. Waldteufel and later his successors-in-interest diverted water from an eight-foot hole in the West Fork. Mr. Lawrence also recalled a time in the 1930's when surface water flows disappeared in some locations, but even then water continued to flow from hole to hole in the gravel. (PT Ex. 5, pp. 24-25.) Mr. Lawrence did not recall the West Fork ever having run dry. (*Id.* at p. 24.) In addition to Mr. Lawrence's declaration, the record contains evidence that, in more recent years, water may have been diverted under the Waldteufel claim of right from a shallow well, which could have allowed water from the West Fork to be diverted even when surface water flows were low. (See Messrs. Hill and Gomes Ex. Z; R.T. at pp. 217-218.) Based on the foregoing evidence, we find that non-use during the 1967-1987 forfeiture period was not attributable to a lack of water availability. Instead, the amount of water used during that period likely was attributable to the irrigation demand of the less water-intensive crops being grown on the Waldteufel parcel at the time.

5.2.3.3 The Prosecution Team Met Its Burden of Proof

Millview and Messrs. Hill and Gomes contend that the Division improperly shifted the burden of proof by requiring them to prove that forfeiture of the Waldteufel right did not occur. Contrary to this contention, the prosecution team has met its burden of proving that the Waldteufel claim of right has been forfeited for non-use, and therefore a threat of unauthorized diversion under the Waldteufel claim of right exists.

Generally, in an enforcement action, the prosecution bears the burden of establishing a prima facie case of a violation or a threatened violation. (Evid. Code, § 550; Cal. Law Revision Com. Com, 29B, pt. 1B West's Ann. Evid. Code (2011 ed.) foll. § 550, pp. 407-408.) At that point, the burden shifts to the alleged wrongdoer to answer such evidence, including establishing affirmative defenses. (*Ibid.*; See e.g. *Phelps v. State Water Resources Control Board*, *supra*, 157 Cal.App.4th at pp. 119-120 [upholding trial court findings that diverters against whom the Board had imposed administrative civil liability for the unauthorized diversion of water had not presented sufficient credible evidence in support of their claimed pre-1914 appropriative and riparian rights].)

Here, the prosecution team has established a prima facie case of threatened unauthorized diversion under the Waldteufel claim of right by presenting evidence that the right has been forfeited in part through non-use and Millview has diverted more water than authorized under

the right. Specifically, the prosecution team presented evidence that water use under the right between 1967 and 1987 did not exceed 15 afa (PT Ex. 1, p. 5; PT Ex. 6), and that Millview's more recent use under the right has exceeded that amount (PT Ex. 1, pp. 11, 13; PT Ex. 11). Thus, the prosecution team effectively shifted the burden to Millview to produce evidence that a threat of unauthorized diversion does not exist. For the reasons discussed above, the evidence and arguments presented by Millview and Messrs. Hill and Gomes is insufficient to effectively rebut the evidence submitted by the prosecution team, and establish that the Waldteufel claim of right was not forfeited in part for non-use.

5.2.3.4 Policy Considerations Favor a Determination that the Waldteufel Claim of Right Has Been Forfeited

Messrs. Hill and Gomes contend that a determination that the Waldteufel claim of right has been forfeited would violate the constitutional requirement that water be applied to beneficial use to the maximum extent possible because it would prevent Millview from applying water to beneficial use. They also contend that a determination of forfeiture would violate Water Code section 106, which provides that the use of water for domestic purposes is the highest use of water, because Millview intends to supply water for domestic purposes.

Contrary to Messrs. Hill and Gomes's contention, however, and as discussed above, the constitutional mandate to maximize the beneficial use of water would be violated by a determination that the Waldteufel claim of right has *not* been forfeited. Such a determination would establish the precedent that unexercised rights can be resurrected after decades of non-use, thereby engendering uncertainty concerning the availability of unappropriated water, and precluding other prospective appropriators from obtaining permits to apply any unused water to reasonable, beneficial use. Because the statutory procedures for appropriation of water rights are in furtherance of the constitutional mandate to maximize the beneficial use of water, exceptions to those statutory procedures should not be made except to the extent expressly provided by the Water Code. (See *People v. Shirokow*, *supra*, 26 Cal.3d at pp. 309-310.) Where a claimed pre-1914 right is otherwise subject to forfeiture for non-use, the forfeiture should not be ignored or overridden simply because, absent forfeiture, the claimed pre-1914 right would provide a vehicle to put water to beneficial use without having to comply with the statutory appropriation procedures.

In addition, in a fully appropriated stream system such as the Russian River, the issue is not whether water will be used, but by whom. As discussed in greater detail in section 5.3, below, the West and East Forks of the Russian River and a portion of the mainstem are fully appropriated from July 1 through October 31. This means that any water unused under the Waldteufel claim of right during that period is likely to be used to satisfy downstream water right holders, or to meet instream flow requirements imposed on SCWA pursuant to State Water Board Decision 1610. (See [Order WR 2008-0045](#) at p. 19 [explaining that revocation of unexercised water right permits for the Auburn Dam Project would not reduce water supplies, but rather would serve to redistribute available supplies to junior appropriators and water right applicants].) Some of the water right holders who stand to benefit from a determination that the Waldteufel claim of right has been forfeited, including SCWA, also supply water for domestic purposes. (See SCWA Ex. 1, p. 1.) But even if that were not the case, the legal and policy considerations that favor a forfeiture determination in this proceeding outweigh the policy preference for domestic use.

5.3 Unauthorized Diversion and Use Under the Waldteufel Claim of Right

Assuming that the Waldteufel claim of right authorizes the diversion and use of 15 afa, the next issue is whether Millview's diversion and use under the right has exceeded or threatens to exceed the scope of the right. As explained in section 3.2, above, the holder of a pre-1914 appropriative right may change the point of diversion, purpose of use, or place of use of the right, provided that the changes do not amount to the initiation of a new right, or result in injury to any other legal user of water. (Wat. Code, § 1707; *Senior v. Anderson*, *supra*, 115 Cal. at pp. 501-504.)

In this case, the changes in point of diversion, purpose of use, and place of use instituted by Millview have lead to an impermissible expansion of the right. Specifically, the change in place of use, from the 33.88-acre Waldteufel parcel to Millview's 8 to 10 square mile service area, and the change in purpose of use, from irrigation to domestic, commercial, industrial and irrigation use, have resulted in a significant increase in the total amount of water diverted and used under the right. (See SCWA Ex. 1, pp. 5-6; SCWA Ex. 5.) The change in purpose of use also has resulted in the diversion and use of water outside the irrigation season. And the change in point of diversion has allowed Millview to divert and use water from the Russian River below the confluence of the East Fork of the Russian River and West Fork of the Russian River when it was not available from the West Fork of the Russian River. (See SCWA Ex. 1, p. 5.) The

diversion and use of water outside the scope of the right amounts to the initiation of a new right without authorization, and constitutes a trespass against the State. (See Wat. Code, § 1052, subd. (a).) In addition, to the extent that the changes to the right have lead to an increase in diversion and use of water under the right, the changes are likely to have resulted in injury to other legal users in violation of Water Code section 1706.

The extent to which Millview's diversion and use under the Waldteufel claim of right has exceeded the scope of the right is discussed in section 5.3.1, below. Injury to other legal users as a result of increased diversion and use under the right is discussed in section 5.3.2.

5.3.1 Millview's Diversion and Use Has Exceeded the Scope of the Right

The total amount of water diverted and used by Millview under the Waldteufel claim of right has exceeded 15 afa since Millview entered into a lease agreement with Messrs. Hill and Gomes in 2002, and may have exceeded that amount in 2001 as well. Creekbridge Homes filed statement of water diversion and use number S015625 in 2001. (PT Ex. 8.) According to the statement, Creekbridge Homes projected that it would use 21.85 acre-feet in 2001 for purposes of irrigating 10.5 acres of fruit trees, construction dust control, and domestic use for 51 homes. (PT Ex. 8; PT Ex. 10, p. 12.) Creekbridge Homes did not file any supplemental statements.

For the 2002-2004 period, Messrs. Hill and Gomes filed a supplement to statement number S000272, which indicates that water was used under the Waldteufel claim of right for domestic use by 350 people. (PT Ex. 6; PT Ex. 10, p. 12.) The amounts claimed to have been used were 15.11 acre-feet in 2002, 31.73 acre-feet in 2003, and 43.84 acre-feet in 2004.

Millview did not file any statements of water diversion and use, but the prosecution team obtained accounting sheets from Millview for 2001-2008 pursuant to a Public Records Act request. The accounting sheets include the amount of water Millview claims to have used under the Waldteufel claim of right. (PT Ex. 1, pp. 10-11; PT Ex. 11.) Millview claims to have used a total of 3.76 acre-feet in 2001, 19.14 acre-feet in 2002, 40.12 acre-feet in 2003, 58.86 acre-feet in 2004, 1,174.75 acre-feet in 2005, 55.167 acre-feet in 2006, 623.12 acre-feet in 2007, and 808.23 acre-feet in 2008. (PT Ex. 1, p. 11; PT Ex. 11.) Millview's General Manager testified at the hearing that Millview used the water for construction and domestic supply at the Creekbridge Homes subdivision in 2001-2004, but in later years, when Millview used larger

quantities of water under the right, Millview used some of the water elsewhere within Millview's service area. (R.T. at pp. 173-180, 194.)

It is unclear whether the amounts of water that Millview claims to have used at Creekbridge Homes in 2001-2004 were in addition to the amounts that Creekbridge Homes and Messrs. Hill and Gomes claim to have used, or whether the amounts claimed by Millview included the amounts claimed by Creekbridge Homes and Messrs. Hill and Gomes. In either case, diversion and use under the Waldteufel claim of right has exceeded 15 afa every year from 2002 through 2008, and may have exceeded that amount in 2001.

Millview also diverted and used water outside the irrigation season. Between 1967 and 1987, Lester Wood reported that he used water for purposes of frost control or irrigation from April through September. (PT Ex. 6.) To the extent that the right to divert and use water outside that season may have been perfected, the right was forfeited for non-use. Inconsistent with this authorized season of diversion, Messrs. Hill and Gomes reported that water was used under the Waldteufel claim of right from May through November during the 2002-2004 period. (PT Ex. 6.) In addition, Millview's accounting sheets indicate that Millview used water under the claim of right year-round except in 2001, when Millview used water under the claim of right from May through December, and in 2008, when Millview used water under the claim of right from January through August. (PT Ex. 1, p. 11; PT Ex. 11.) The use of water outside the authorized season of diversion constitutes the initiation of a new right, and is unauthorized.

Another way in which Millview exceeded the scope of the Waldteufel claim of right was by diverting water from the mainstem of the Russian River below the confluence of the West Fork and the East Fork during periods when the water was not available at the original point of diversion on the West Fork. Unlike flows in the West Fork, which are entirely natural, flows in the mainstem below the confluence are augmented by water imported from the Eel River and releases from storage in Lake Mendocino. (PT Ex. 1, p. 13; SCWA Ex. 1, pp. 2, 5.) As discussed in section 5.2.3.2, above, surface water flows in the West Fork typically drop below 2 cfs in the summer months. Flows in the mainstem, by contrast, are maintained at much higher levels. (SCWA Ex. 1, pp. 2-3, 5; SCWA Ex. 3; R.T. at pp. 242-243.) Thus, by moving the point of diversion downstream, Millview could divert water at a higher rate than would have been possible at the original point of diversion. The expert witness for the prosecution team estimated that Millview's rate of diversion under the Waldteufel claim of right exceeded the flows

at the original point of diversion on the West Fork over 22 percent of the time during the low flow period (June through November) between 2001 and 2008. (PT Ex. 1, p. 13.)

5.3.2 Increased Diversion and Use Is Likely to Have Resulted in Injury

Water Code section 1706 provides that a pre-1914 appropriative right holder “may change the point of diversion, place of use, or purpose of use if others are not injured by such change” In this case, to the extent that the changes to the Waldteufel claim of right instituted by Millview have lead to an increase in diversion and use under the right, the changes are likely to have resulted in injury to other legal users in violation of section 1706.

The State Water Board has determined that the West and East Forks of the Russian River and a portion of the mainstem within Mendocino County are fully appropriated from July 1 to Oct. 31. (State Water Board [Order WR 98-08](#), Appen. A, p. 26.) Coincidentally, this determination was based in part on State Water Board [Decision 1110](#). In that decision, which was adopted in 1963, the Board denied Millview’s application to appropriate 3 cfs from the West Fork of the Russian River during the months of July through October. The Board found that no water was available for appropriation from July through October because all of the water in the West Fork during those months was needed in most years to satisfy senior water rights and to maintain instream flows needed to protect fishery resources and recreation. (Decision 1110 at pp. 4-5.)

Consistent with the State Water Board’s finding in Decision 1110, any increase in diversion and use under the Waldteufel claim of right is likely to injure other legal users by reducing flows in the mainstem of the Russian River that are needed to satisfy other water right holders or to protect fishery resources and recreation.¹⁶ In particular, any increase in diversion and use under the right is likely to result in injury to SCWA and the Mendocino District, as explained below.

In addition to Decision 1110, the State Water Board’s fully appropriated stream determination was based on State Water Board [Decision 1610](#). Decision 1610 involved several water right permits held by SCWA, including permit number 12947A, which authorizes SCWA to store water in Lake Mendocino, and to directly divert and redivert previously stored water from points of diversion on the mainstem of the Russian River in Sonoma County. The Mendocino District

¹⁶ It is uncertain whether public trust resources, including fish and wildlife and recreation, are “legal users” within the meaning of the no injury rule codified in Water Code section 1706. (See State Water Board Order WR 95-9 at p. 29, fn. 10.) For purposes of this proceeding, however, we need not resolve this issue.

also holds a permitted right to store water in Lake Mendocino. In Decision 1610, the Board included terms in SCWA's permits requiring SCWA to maintain specified instream flows in the Russian River for purposes of protecting fishery resources and recreational uses. (Decision 1610, pp. 19-21, 51-53.)

As explained by an expert witness for SCWA, under certain hydrologic conditions SCWA must augment natural flows with water released from storage in order to meet the instream flow requirements. (SCWA Ex. 1, pp. 2-3; R.T. at pp. 238-239.) Accordingly, if Millview increases its diversions under the Waldteufel claim of right during periods when SCWA is releasing water from storage in order to meet instream flow requirements, SCWA must release more water from storage in order to maintain the requisite flows, thereby reducing storage levels in Lake Mendocino and adversely affecting SCWA's and the Mendocino District's water supply. (SCWA Ex. 1, pp. 2-3; R.T. at p. 240.) Reduced storage levels also could adversely affect Chinook salmon, which depend on releases from storage to support upstream migration for spawning in the fall. (SCWA Ex. 1, p. 3; R.T. at p. 241.)

5.4 The Board Has Afforded Millview and Messrs Hill and Gomes Due Process of Law

Millview and Messrs. Hill and Gomes contend that the Division did not provide adequate notice before conducting the field investigation and issuing the staff report.

Millview and Messrs. Hill and Gomes were not deprived of a property interest by the staff report, which took no action. Before taking enforcement action by issuing this CDO, the Board provided Millview and Messrs. Hill and Gomes notice and an opportunity to be heard. The board held an evidentiary hearing, and afforded Millview and Messrs. Hill and Gomes the opportunity to present evidence and legal argument, cross-examine the prosecution team's witness, and present rebuttal evidence.

Millview and Messrs. Hill and Gomes contend that the staff report and draft CDO were based on the theory that the Waldteufel right was forfeited, but at the hearing the prosecution team switched to a new theory that the right was never vested. Millview and Messrs. Hill and Gomes argue that this change of legal theory deprived them of the ability to prepare for the hearing.

Pursuant to Water Code section 1834, subdivision (a), a draft CDO must contain a statement of facts and information that would tend to show the proscribed action. Consistent with this

requirement, the draft CDO put Millview and Messrs. Hill and Gomes on notice that the proscribed action was the diversion of more than 15 afa under the Waldteufel right. The hearing notice also described the key hearing issue broadly as whether the draft CDO should be adopted, with or without modifications. The Board's hearing procedures are designed to prevent surprise testimony. The prosecution team's evidence was submitted in advance. The written testimony of the expert witness for the prosecution team put Millview and Hill and Gomes on notice before the hearing that the prosecution team questioned whether the Waldteufel right had ever vested (i.e. that the right had never been perfected). (PT Ex. 1, pp. 8-9.) There is no evidence that Millview and Messrs. Hill and Gomes needed to conduct discovery in order to prepare to cross-examine the prosecution's witness or present rebuttal concerning the prosecution's "new theory."

Finally, Millview and Messrs. Hill and Gomes contend that the Board did not adequately separate functions. Based on the testimony of the prosecution team's witness, Chuck Rich, concerning the Board's position with respect to its authority over pre-1914 rights, they infer that Chuck Rich has been a "confidant and policy maker" for the Board for many years, and that the Board would not want to disappoint or embarrass him by ruling against him in this proceeding.

The Board is required to separate the prosecutorial and advisory functions on a case-by-case basis. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 738.) There is no prohibition against an employee acting in a prosecutorial capacity in a particular proceeding, simply because that employee advises the Board on other matters. (*Ibid.*) The requirements for separation of functions were satisfied in this proceeding. The inference that Mr. Rich has a special status with the Board as "confidant or policy maker" is wholly unsubstantiated, as is the claim the Board is biased in his favor. Where, as here, the proceedings have been conducted consistent with the requirements for internal separation functions, "the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." (*Id.* at p. 741.) The speculative and unsupported claims made by Millview and Messrs. Hill and Gomes that the Board could not impartially evaluate Mr. Rich's testimony fall far short of that standard.

6.0 CONCLUSION

Assuming that an appropriative right could have been developed based on water diverted for use on the Waldteufel parcel, the right to divert more than approximately 243 afa during the irrigation season could not have been perfected. Additionally, the right to divert any more than 15 afa has been forfeited due to non-use.

As set forth in section 5.3, above, Millview's diversion and use under the Waldteufel claim of right has exceeded the parameters of the right, and likely has resulted in injury to other legal users. During the hearing, Millview's general manager testified that Millview may relocate the point of diversion to the West Fork, but otherwise Millview has given no indication that it intends to cease its unauthorized diversion and use under the Waldteufel claim of right. (R.T. at pp. 188-191.) Accordingly, a threat of unauthorized diversion and use under the right exists, and issuance of this CDO to Millview is warranted.¹⁷

If Millview's diversions continue to expand and Millview continues to divert water in excess of the Waldteufel claim of right, the threat of unauthorized diversion exists. Therefore, to ensure compliance with this order, Millview should be required to record and report its diversions as set forth in the draft CDO. Specifically, we will require Millview to maintain a daily record of its diversions under the Waldteufel claim of right, Millview's water right license and permit, and Millview's water supply contract with the Mendocino District. In addition, we will require Millview to maintain a record of any water that Millview diverts on behalf of other entities. We will require Millview to submit the records of its diversions to the Division of Water Rights on an annual basis, and provide a copy of the records to the Division upon request.

As set forth in section 5.2 above, it appears that an overlapping appropriative right could not have been developed based on diversion and use on the Waldteufel parcel because the parcel was riparian. This order does not prohibit diversion and use consistent with the appropriative right that would have been established, and not forfeited for non-use, assuming that an

¹⁷ The Draft Cease and Desist Order included Messrs. Hill and Gomes. Messrs. Hill and Gomes entered into a written "License and Assignment of Water Rights Agreement" with Millview. (PT-9) The agreement provides for Millview's lease and option to purchase the Waldteufel claim of pre-1914 appropriative right held by Messrs. Hill and Gomes. The effective period of the agreement is listed as being from October 15, 2002, until October 14, 2006. The record is not clear, however, whether the agreement was extended. Regardless of the term of that agreement, to the extent that Messrs. Hill and Gomes maintain any interest in the Waldteufel claim of right, our analysis finding that the Waldteufel right is limited applies equally to their claim under the Waldteufel right, and would apply to any diversions thereunder.

appropriative right could have been developed, because the hearing notice did not adequately raise the issue, for purposes of this proceeding, of whether a pre-1914 right could have been established at all. This order should not be interpreted to confirm or validate that any pre-1914 right exists based on the Waldteufel claim of right, or that any particular parcel retained a riparian right upon severance, should these issues be raised in any later proceeding.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT, Millview County Water District shall take the following actions to prevent the threatened unauthorized diversion and use of water of which Millview County Water District was on notice in these proceedings, as set forth in section 1052 of the California Water Code.

1. Millview County Water District shall restrict all diversions from the Russian River, its tributaries or underflow, or a subterranean stream associated with the Russian River valley pursuant to the Waldteufel pre-1914 appropriative claim of right, to the diversion season of April through September, and to:
 - a. an instantaneous rate of 1.1 cfs;
 - b. an annual amount of 15 acre-feet; and
 - c. a rate no greater than the rate of flow available from the West Fork Russian River as measured at the USGS gage #11461000 (Russian River Near Ukiah, CA).
2. Millview County Water District shall maintain a record of all diversions of water on a daily basis. This record shall identify the amount of water diverted each day at Millview County Water District's points of diversion and the basis of right utilized to justify the diversion of water including, but not limited to:
 - a. the Waldteufel pre-1914 appropriative claim of right (as reported under Statements S000272 and S015625 or any other reporting document);
 - b. License 492 (Application A003601);
 - c. Permit 13936 (Application A017587); and
 - d. the contract with the MCRRFC&WCID pursuant to Permit 012947B (Application A012919B).

The record shall also identify any water wheeled for other entities (e.g., Calpella County Water District, the City of Ukiah, etc.) pursuant to a valid basis of right. This record shall be updated at least weekly and made available for inspection on the next business day after receipt of a written request from any interested party. A copy of the annual record for each calendar year shall be submitted to the following address no later than February 1st of each year:

Division of Water Rights
Attention Program Manager, Enforcement Section
P.O. Box 2000
Sacramento, CA 95812-2000

An electronic copy shall be submitted to a specified e-mail address if so directed in writing by the Deputy Director for Water Rights.

CERTIFICATION

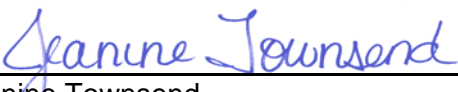
The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 18, 2011.

AYE: Chairman Charles R. Hoppin
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – Response to Draft Report

- 2014.06.16L from BAB to Harling
- doc00556920140625114633
- NMFS comments Marble Mountain Ranch Water Rights 7-17-14
- Stanshaw - Response to report 6.15.14

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June 16, 2014

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Will Harling, Executive Director
Mid Klamath Watershed Council
Orleans/Somes Bar Fire Safe Council
P.O. Box 409
Orleans, California 95556

Re: Comments on Draft Marble Mountain Ranch Stanshaw Creek Water Rights Report

Dear Mr. Harling:

The Marble Mountain Ranch ("MMR") has an appropriative right to water from Stanshaw Creek in Siskiyou County that was passed down from a claim for six hundred (600) miner's inches or fifteen (15) cubic feet per second ("CFS") made in 1867. Though the uses of the land and, consequently, water use have evolved over the years, use of the MMR water right ("MMR Right") has been continuous and beneficial since its inception. The Draft Marble Mountain Ranch Stanshaw Creek Water Rights Report, dated April 17, 2014 (the "Report") analyzes the MMR Right and provides an opinion on whether any portion of the MMR Right has been forfeited for nonuse over the lifespan of the right.

This comment letter seeks to address some concerns with the factual assumptions and legal conclusions drawn in the Report.

(1) Factual Clarifications.

The analysis of the Report relies upon several facts regarding the history of MMR and the surrounding area. There are some factual clarifications and distinctions, which are important to understanding the MMR Right. In evaluating the historical use of the MMR Right, the Report discusses the progression of the place and the purpose of water use. On page 11 of the Report, MMR is characterized as being approximately forty (40) acres. Currently, all of the adjoining parcels that comprise MMR total approximately sixty-five (65) acres. Additionally, it is our understanding that the Irving Creek parcel downriver and adjoining MMR was originally part of MMR. Further, the current size of MMR is not reflective of the historical size of the property that was served by the MMR Right, taking into account historic divisions and subdivisions of the property from its original and larger size.

Page 12 of the Report states, “[t]here is also an assertion that the mining occurred on the Fisher property.” It would be incorrect to rely on the assertion that mining occurred on the Fisher property rather than the MMR in evaluating historical water use by MMR. A hydraulic mining pit can still be found on the MMR property that was used as a dump site for decades since the termination of mining operations. The mining pit has been cleaned out and is used as a horseback riding trail. The pit is also designated as a dump site by the State Highway Department for soil spoils from landslides in the area. Remnants of the original ditch lines leading into this pit are still present. Though unused, these canal arteries show a connection to MMR’s current active canal system. These inactive canal lines show a concurrent use of diverted water both for mining, and for domestic and agricultural uses associated with the operation of a homestead ranch that served as a base location for the miners.

Additionally, there was at least one other hydraulic mining pit located in front of MMR, which was filled during the construction of Highway 96 when a portion of the MMR property was taken through eminent domain for the construction of Highway 96. There are erosion canyons along the higher elevations of MMR, as well as abandoned water canals from the mining operations. We are in the process of obtaining pictures of these features, as they currently exist on the land and will submit them subsequent to this letter.

With regards to the changes in application of water, even at the time that the MMR Right was used for mining, it is important to note that the MMR Right was also providing domestic water for the community of laborers performing the mining operations. Given the time period and the remote locations, the MMR Right provided water for stock operations, orchards, gardens, and any other purposes needed to support life. Remnants of the web of canal systems delivering water for these various purposes is still evident on the MMR property. This web of canals was also used to deliver water for other historical uses on the MMR, including but not limited to: (1) a California State Highway construction yard; (2) a stock yard and dairy; (3) United States Forest Service lodging; (4) lodging for teachers for the Irving Creek School; (5) the Hayes family ranch; (6) and various other uses over years for which MMR has provided documentation to the Water Board and Mid Klamath Watershed Council.

On page 12, the Report references mine tailings located on at the mouth of Stanshaw Creek, on property currently owned by Konrad Fisher ("Fisher Property"). The Report suggests that these mine tailings are evidence that the place of use for the MMR Right changed. These mine tailings are located downstream, along the Klamath River, just outside the floodplain, at an elevation that is approximately seven hundred feet (700') lower than the MMR Right canal system. They are located approximately one (1) horizontal mile from the MMR canal system and diversion point. There is no evidence of any remnant canals or ditch lines which connect the MMR Right diversion point to the mine tailings on the Fisher Property. It is much more likely that these mine tailings were served by a different water right and a lower diversion point.

The only perfected pre-1914 appropriative water right on the Stanshaw Creek is the MMR Right. MMR does not comment on any potential riparian rights held by Fisher Property. It is worth noting that there is no evidence that any portion of the MMR Right was diverted to the Fisher Property. There is no evidence of a connecting canal system from the MMR diversion point. Additionally, the owners of the Fisher Property have attempted to negotiate with MMR owners in the past to establish a diversion from Stanshaw Creek that is downstream from the MMR diversion point. These negotiations would not be necessary if the Fisher Property had an existing claim to the MMR Right.

There is substantial evidence that the entire right to divert fifteen (15) CFS was perfected for the MMR Right around the time it was first acquired for mining purposes. However, while MMR does own the entirety of the original MMR Right, MMR only claims the current ditch capacity of the only remaining active artery for the MMR Right. MMR acknowledges that the original MMR Right has truncated from fifteen (15) CFS to approximately three (3) CFS as the beneficial uses of the water have progressed from mining activities to other, more efficient, commercial and domestic purposes.

Page 14 of the Report mentions that there is debate regarding the timeline for the establishment of MMR's hydroelectric power generation system. In addition to the facts and documentation already provided, MMR wishes to note that Jerry Hayes, the son of former MMR owner Lue Hayes, has stated that, at the time the Hayes family purchased the property in the 1950s, there was an existing water wheel running on a two inch (2") line that, at the very least, was used to power the main ranch house. MMR has contacted Jerry Hayes again to obtain his written statement in this regard and will provide same. The Report notes that a letter from 2001 represented that a former MMR employee, Violet Anderson, did not mention the source of water for hydroelectric generation for the McMurty dairy in her written statement. However, it is logical that the source of water for energy generation for the property during the McMurty ownership would be the same as it was during the subsequent Hayes ownership. Further, there is no other feasible source of water for hydroelectric energy generation on the MMR property, other than the existing canal.

Overall, the Report declined to give weight to continuous and large residential populations that were supported by the MMR Right beginning in the 1920s and lasting until the 1950s as highway construction and ranching operations developed on the MMR property. Large diversions were made during that time period for flood irrigation and the residential needs of road construction crews and Forest Service employees. Essentially, all of Stanshaw Creek was diverted at regular intervals for beneficial uses and was carried over leaky flumes, down ditches with high ditch loss, to be ultimately used for broadcast flooding on irrigable land and pastures with any overflow being returned to the Klamath River. Several members of the Hayes family have confirmed that it was necessary to divert all of Stanshaw Creek's water at regular intervals for domestic, energy, and agricultural uses through the best available technology at the time, which had lower efficiency rates than the current uses.

(2) The Report incorrectly identifies the burden of proof for determining pre-1914 appropriative rights.

A. The appropriator claiming a pre-1914 appropriative right must perfect such right.

Crucial to evaluating pre-1914 appropriative rights is the understanding of who bears the burden of proving or disproving the right and to what degree the right must be proven. In the event that the State Water Resources Control Board (“SWRCB” or “Board”) attempts to augment the MMR Right through a cease and desist order or other mechanism, the Board, as the enforcement entity, shall have the burden of establishing that that water use is a violation. (*In the Matter of Draft Cease and Desist Order Against Unauthorized Diversions by Woods Irrigation Company*, (2/01/2011) Order WR 2011-0005, at 28).

Arguably, as a preliminary matter, the appropriator has the burden of initially establishing that some type of right was perfected. In order to establish that an appropriative right was established, three elements must be shown: “(1) An intent to apply it to some existing or contemplated beneficial use; (2) an actual diversion from the natural channel by some mode sufficient for the purpose; and (3) an application of the water within a reasonable time to some beneficial use.” (*Simons v. Inyo Cerro Gordo Mining & Power Co.*, (1920) 48 Cal. App. 524, 537). This must be shown by preponderance of the evidence. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 547-548; Cal. Evid. Code Sec. 115). A preponderance of the evidence standard means that it is more likely than not that these elements have been met. (*People ex rel. Brown v. Tri-Union Seafoods, LLC*, (2009) 171 Cal. App. 4th 1549; *Katie V. v. Superior Court*, (2005) 130 Cal. App. 4th 586). As mentioned in the Report, the evidence provided to establish the water right must be viewed in the light most favorable to the appropriator. (Report at 6).

The MMR has provided the recorded notice stating that E. Stanshaw would divert six hundred (600) miner’s inches or fifteen (15) CFS of water for mining and irrigation purposes, which is dated March 25, 1867. The MMR has also provided deeds showing the chain of transfer of this original diversion to the current owners of the MMR, Douglas, Heidi Ann, Norman, and Carolyn Cole (the “Coles”). This recorded notice shows that the original appropriator, E. Stanshaw, had an intent to apply the diverted water to the beneficial uses of irrigation and mining.

The actual diversion is evidenced in the existing ditch, which services the MMR. The MMR provided pictures of this ditch. Additionally, the MMR has submitted testimony and other evidence showing the numerous uses of the diverted water over time. This satisfies the second element for establishing the appropriative right.

Through correspondence MMR has submitted to both the Mid Klamath Watershed Council and the Water Board numerous documents, which are incorporated herein by this reference. These documents and correspondence provide substantial evidence that the MMR Right has been used continuously and beneficially since 1867. Such evidence includes statements from previous owners that the full capacity of the ditch was used for irrigation and domestic uses, including the testimony of Lue and Agnes Hayes who stated that during their ownership of the MMR Right from 1955 to 1970 they used every drop of water carried by the ditch to service the families living on the ranch and irrigate gardens and agricultural lands through flood irrigation (Testimony of Lue and Agnes Hayes (July 7, 1998), ¶ 5). MMR has also provided documentation of the school that operated on the property as well as the progression of domestic development over the years. All of this documentation shows that the MMR Right was being actively consumed to service various needs. These documents provide a historical record and indicate that it is more likely than not that at least three (3) CFS of the MMR Right has been continuously used beneficially over the lifespan of the right.

Not only does this evidence satisfy the third element of some beneficial use, MMR has gone beyond these requirements and has shown that the use of water has been ongoing and continuous since it was first perfected.

B. Once a pre-1914 appropriative right is perfected, the entity challenging the right has the responsibility of proving that the right has been forfeited.

Once it is established a water right does exist, the party challenging the right has the burden of showing that the right is now invalid. (*Barnes v. Hussa*, (2006) 136 Cal. App. 4th 1358; *Ward v. City of Monrovia*, (1940) 16 Cal. 2d 815, 820-21; *Lema v. Ferrari*, (1938) 27 Cal. App. 2d 65, 73, 80 P.2d 157). Specifically for establishing forfeiture of a pre-1914 appropriative right, the party challenging the right must prove that the appropriator failed to continuously use a portion of the water right over a span of five (5) years. (*N. Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007), 147 Cal. App. 4th 555, 560). A recent appellate decision suggests that only the five (5) year period immediately preceding the formal challenge to the water right is relevant for determining whether there has been forfeiture. (*Id.*).

The Report cites the SWRCB decision, *In the Matter of Draft Cease and Desist Order Against Unauthorized Diversions by Woods Irrigation Company*, (2/01/2011) Order WR 2011-0005 (the “Water Order”) to conclude that MMR carries the burden of proof for establishing the pre-1914 right. (Report at 7). However, the excerpt quoted is taken out of context and, upon a closer examination of the Water Order, it is clear that the initial burden for a challenge to a pre-1914 right rests with the challenger. Immediately preceding the quoted text, the Water Order notes that the entity claiming a violation or an unauthorized water use, “bears the burden of establishing a prima facie case of a violation...”. (Water Order at 28.). The Water Order notes that a pre-1914 right to divert seventy-seven (77) CFS was presumed valid since prosecution failed to establish a prima facie case otherwise. (*Id.*) The excerpt quoted in the Report refers to an additional water right in excess of seventy-seven (77) CFS that purportedly existed. The Water Order states that the prosecutor had established a prima facie case that the appropriator did not have a water right beyond the original seventy-seven (77) CFS. (*Id.*). Because the prosecutor established a prima facie case that the water right did not exist, the burden shifted to the appropriator to prove that the right did in fact exist. (*Id.* at 29). It was in this context that the Water Order made the statements that, “it is reasonable to draw the inference from Woods’s [*sic*] lack of submittal of evidence for a valid water right that such right does not exist.” (*Id.*)

Conversely, the Report has not presented a prima facie case that the MMR Right has been forfeited. A “prima facie case” means that a party has produced sufficient evidence to “allow the fact-trier to infer the fact at issue and rule in the party’s favor.” (*Black’s Law Dict.* (3rd Pocket ed. 2006) p. 561, col. 1.).

The Report identifies at least six (6) water uses under MMR’s appropriative right: mining, irrigation, stockwatering, hydroelectric, domestic, and reasonable losses. The Report attempts to trace the fluctuations of each of these uses over time and notes possible trends and shifts in uses.

However, the Report fails to look at these uses congruently for a given time period. At each phase in the lifespan of the appropriative right, there are holes and questions as to how much water was being used. For example, the Report does not convincingly pinpoint the amount of water that was lost during carriage of water for irrigation purposes. The Report mentions one half (0.05) CFS or one (1) CFS as potential amounts of loss. However, the Report does not discuss the historical use of the MMR Right to divert water for flood irrigation, which, though a standard practice at the time, was an inefficient method. The table attached to this letter shows the different water usage amounts identified in the Report over time. It is clear from the Report that the MMR Right was using at least three (3) CFS for hydroelectric energy alone from 1965 until the Coles installed a more efficient Pelton Wheel. Further, the Report does not contest that at least three (3) CFS were being used by the MMR right for mining purposes up until the 1920s or 1930s.

The period in question appears to be after the mining practices stopped and before the one hundred kilowatt (100 KW) Pelton Wheel was installed in 1965. The Report fails to recognize information regarding use of water for this period. It is acknowledged that the MMR Right was serving at least one hundred (100) head of cattle in the 1950s and being used to irrigate at least thirty (30) acres of hay, alfalfa and gardens. However, the Report disregards the evidence of hydroelectric uses of water on the property as well as the use of water to service an onsite school. Additionally, the Report fails to determine specific amounts that were being used during this time for irrigation, stockwatering, domestic, and reasonable losses. During this period, it is likely that the methods used for diversion and irrigation resulted in carriage losses as well.

Another factual matter worth addressing is the statement in the report that the mining operations occurred on another property owned by the Fishers, rather than the MMR property. As mentioned previously, one hydraulic mining pit is still present on the MMR property and there was at least one other mining pit on the property that has since been filled in.

MMR has established, by a preponderance of the evidence, its continued use of at least three (3) CFS, and likely more, during this period. The Report's reliance on vague references and unknown variables fails to adequately challenge the preponderance of the evidence established by MMR.

(3) Concerns about impacts on Coho Salmon populations are irrelevant to the determination of whether MMR holds a pre-1914 appropriative right.

Another item of concern in the Report is the discussion of the impact of the diversion on populations of Coho salmon. This discussion is problematic because: (1) it assumes that the MMR diversion is hurting salmon populations without presenting any evidence to support the assertion; and (2) it wrongfully imposes the burden of protecting the Coho salmon on MMR, rather than on junior water rights holders. Most importantly, such discussion goes beyond the scope of the assigned analysis and should be stricken.

The Report notes that MMR's diversion from Stanshaw Creek may be an unlawful taking under the Endangered Species Act of 1973 (the "ESA"). Under the ESA, it is unlawful to "take" an endangered or threatened species. (*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, (1995) 515 U.S. 687, at 687). For the purposes of the ESA, "take" is defined as "to harass, harm, pursue," "wound" or "kill". (*Id.*). Further, the word "harm" has been defined to include "significant habitat modification or degradation where it actually kills or injures wildlife". (*Id.* at 708.). The Report offers no evidence that the diversion is killing, injuring or harming fish. Other than referencing claims made by third parties, the Report presents no evidence that the MMR diversion is adversely impacting Coho salmon populations at all. MMR is unaware of any reports of fish dying in Stanshaw Creek or any reported injury to the fishery. If anything, the one hundred and fifty (150) year old ditch line creates additional habitat for fish. While MMR is willing to do anything in its power to improve the habitat for fish and reduce its footprint, it is our understanding that the Stanshaw Creek habitat is functioning well under the existing conditions. As such, there is no basis for denying the MMR Right at this point on the basis of ESA and such assertions should be stricken from the Report.

Further, even if there is a basis for reducing water diversion on the Stanshaw Creek, the SWRCB does not have authority to regulate MMR's pre-1914 right. While the SWRCB may have the authority to determine whether a pre-1914 water right exists, it does not have jurisdiction to regulate it.¹ (*In the Matter of Application 15843 of Melvin K., Carrie R., and Gary W. Malsh* (by

¹ "To the extent that a right to use water on the property in question exists by virtue of a riparian right or by continuous beneficial use beginning prior to December 19, 1914, the effective date of the Water Commission Act (now Water Code), such rights are not affected by this decision as it is a matter not properly within the jurisdiction of the Board and is not dependent upon issuance of a permit to the applicants." *In the Matter of Application 15843 of Melvin K., Carrie R., and Gary W. Malsh* (by assignment) (1969) Decision No. D934, at 7.

"However, the Board's actions are confined to the framework of the Trustee District's own applications, and to the Board's duty to protect vested rights." *In the Matter of Applications 360, 5640, 11023 and 16469 Held by Fresno Irrigation District* (1968, Decision No. D1290, at 3.

assignment) (1969) Decision No. D934, at 7; *In the Matter of Applications 360, 5640, 11023 and 16469 Held by Fresno Irrigation District* (1968, Decision No. D1290, at 3; *In the matter of application 22782 of Cuesta La Honda Guild* (1969), Decision No. D1324) at 3.). Once the SWRCB determines that the water right exists, its role is complete. Therefore, it is not appropriate for the SWRCB to determine whether an existing pre-1914 water right should be regulated or reduced due to environmental concerns.

Aside from the claim of environmental harm being unsupported and irrelevant to determining whether MMR has an appropriative right, this discussion also wrongly imposes the duty of protecting fish species on MMR. Under common law, appropriative rights have an order of priority based on the date each was established. (*N. Kern Water Storage Dist. v. Kern Delta Water Dist.*, (2007) 147 Cal. App. 4th 555, 561.). This means that the oldest appropriative right must be fully satisfied before the newer appropriative right is entitled to any water. (*City of Pasadena v. City of Alhambra*, (1949) 33 Cal. 2d 908, 926.). In other words, when there is insufficient water supply in a system, the water allocated for a newer appropriative right will be curtailed before the older appropriative right is reduced. Here, if it is determined that more water must be left in Stanshaw Creek to protect the Coho salmon under the ESA, such amounts should be acquired by reducing the water allocation of appropriative rights that are junior to MMR, before any of the MMR Right is reduced. The Report makes no mention of other appropriative rights on the system. Without this information, it is unfair to place the entire burden of protecting Coho salmon on MMR, especially when there has no formal finding that harm is actually occurring.

(4) MMR is willing to consider physical solutions that are not cost prohibitive and do not impair its pre-1914 appropriative right.

The Report concludes that, “the MMR Stanshaw Creek context represents a good opportunity for application of the physical solution doctrine.” (Report at 21). The physical solution doctrine allows a court with jurisdiction to adjudicate a water rights dispute to, “within limits” impose an equitable physical solution to “achieve a practical allocation of water to competing interests.” (*State Water Res. Control Bd. Cases*, (2006) 136 Cal. App. 4th 674, at 745.). A physical solution cannot be imposed unless it preserves water right priorities. (*City of Barstow v. Mojave Water Agency*, (2000), 23 Cal. 4th 1224, at 1243.). MMR is eager to work with the involved parties towards a dynamic solution that minimizes harm to all interests. MMR has indicated a

“The Board has no jurisdiction to validate riparian rights, pre-1914 appropriative rights, or rights obtained through grant of prescription...” *In the matter of application 22782 of Cuesta La Honda Guild* (1969), Decision No. D1324) at 3.


Will Harling
June 16, 2014
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willingness to perform certain measures, such as returning hydroelectric tailwater flows back into Stanshaw Creek. However, it is not clear from the Report what physical solution is being proposed. MMR is concerned about costs of physical solutions and is not willing to agree to a physical solution that could impair its pre-1914 appropriative right to divert three (3) CFS of water. MMR cannot agree to a physical solution without more details and adequate assurance that its water rights are being protected.

Thank you for your consideration of these comments. It is our expectation the Report will be revised accordingly. I am happy to discuss these issues further with you and look forward to working with you to reach a beneficial result for all parties involved.

Best Regards,

CHURCHWELL WHITE LLP


Barbara A. Brenner
Partner

Attachment

Timeline of Marble Mountain Ranch Water Usage Data From Report																
	Pre-1914	1920s or 1930s	1950s	1955	After 1955	1965	1955-1970s	1970s-1994	1993	1994	1998	2009	2010	2012	2013	2014
Mining	Unidentified	NONE	NONE	NONE	NONE	NONE	NONE	NONE	NONE	NONE	NONE	NONE	NONE	NONE	NONE	NONE
Irrigation	Unidentified	Estimated 0.3 to 0.35 CFS	30 acres of hay, alfalfa, and gardens	Unidentified	Unidentified	Unidentified	Unidentified	.09 CFS for alfalfa irrigation	Unidentified	Unidentified	Unidentified	25 acres of pasture, 60 fruit trees, and a 2 acre garden	Unidentified	Unidentified	Unidentified	Unidentified
Stockwatering	Unidentified	Unidentified	100 head cattle	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	20-30 head of stock	Unidentified	Unidentified	Unidentified
Hydroelectric	Unidentified (evidence of Pelton Wheel acknowledged .029 CFS)	Unidentified	Unidentified	4 KW Pelton Wheel (0.29 CFS)	9 KW Pelton Wheel (0.66 CFS)	100 KW Pelton Wheel (7.68 CFS)	100 KW Pelton Wheel (7.68 CFS)	100 KW Pelton Wheel (7.68 CFS)	100 KW Pelton Wheel (7.68 CFS)	100 KW Pelton Wheel (7.68 CFS)	100 KW Pelton Wheel (7.68 CFS)	100 KW Pelton Wheel (7.68 CFS)	100 KW Pelton Wheel (7.68 CFS)	100 KW Pelton Wheel (7.68 CFS)	100 KW Pelton Wheel (7.68 CFS)	38 KW (2.8 CFS)
Domestic	Unidentified	Unidentified	Unidentified	15 homes	Unidentified	Unidentified	RV sites and 10 additional cabins added	Unidentified	.02 CFS	55 licensed RV hookups each running 30 amp circuits, outbuilding, home and cottage useage.	Unidentified	Unidentified	Resort serving 50 people	Guest Ranch with no RVs for 30 people	Unidentified	Unidentified
Reasonable Losses	Unidentified (at least .5 CFS conceded)	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	.5 CFS	Unidentified	.5 CFS	Unidentified	Unidentified	Unidentified	1 CFS	Unidentified
Total	15 CFS	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified	Unidentified

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June 18, 2014

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VIA US MAIL & E-MAIL (will@mkwc.org)

Will Harling, Executive Director
Mid Klamath Watershed Council
Orleans/Somes Bar Fire Safe Council
P.O. Box 409
Orleans, California 95556

Re: Formal Protest to Any Decreased Diversions

Dear Mr. Harling:

As you know, I represent Marble Mountain Ranch ("MMR") in matters pertaining to its appropriative water right on Stanshaw Creek. I am writing on behalf of MMR to submit a formal protest to any decrease in MMR's diversion from Stanshaw Creek. MMR holds a pre-1914 appropriative right for at least three (3) cubic feet per second, which dates back to 1867.

Under common law, appropriative rights have an order of priority based on the date each right was established. (*N. Kern Water Storage Dist. v. Kern Delta Water Dist.*, (2007) 147 Cal. App. 4th 555, 561.). This means that the oldest appropriative right must be fully satisfied before any newer appropriative right may begin diverting water. (*City of Pasadena v. City of Alhambra*, (1949) 33 Cal. 2d 908, 926.). In other words, when there is insufficient water supply in a system, the water allocated for a newer appropriative right will be curtailed before the older appropriative right is reduced.

Before MMR is required to decrease its diversion rate in any way, all junior appropriative rights holders in the system should be restricted from diverting water. As mentioned, MMR's appropriative right dates back to 1867 and should have priority over any appropriative rights on the system that were established after 1867.

As my client has communicated to you, MMR is willing to work with interested parties to achieve a practical solution during this unprecedented drought season. However, any and all voluntary decreases in water use by MMR are not a waiver of any of MMR's water rights. Such measures may be done in an effort to respond to an emergency situation created by the drought, but are not an abandonment of the water right or an acknowledgement that MMR is only entitled to a certain amount of the water. MMR reserves the right to seek judicial, equitable, or any other

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relief permitted by law from other diverters or involved parties with respect to the request to curtail diversions. Other water right holders on the Stanshaw system should curtail their diversions accordingly.

Pursuant to Water Code Section 1011, any conservation efforts or cessation of water use by MMR during this drought season should be deemed a "reasonable beneficial use of water" by MMR and are not a forfeiture of any water right held by MMR.

Additionally, while MMR is willing to grant the Mid Klamath Watershed Council access to its property during appointed times for the purpose of collecting flow data, this permission to enter the property is in no way an endorsement of the data or results collected and produced. MMR has great respect for the Mid Klamath Watershed Council and its staff, but it will not and does not approve the Mid Klamath Watershed Council findings prior to evaluating the data and analysis itself.

To better understand MMR's appropriative right and to find a meaningful solution to these issues, it would be helpful to be informed of other water rights and diversions on the system. As such, I am also requesting information that includes (1) all diverters on the system; (2) the basis for each diverter's water right; (3) how much water each diverter is permitted to use; and (4) how much water each diverter has curtailed in response to the drought.

MMR is committed to working with other interested parties to find a cooperative and practical response to any water shortages in the system caused by the drought. At the same time MMR is mindful that junior appropriators may use the drought as an opportunity to create controversy and uncertainty about established rights in an effort to move up in priority. As such, we feel it is important to formally reassert our position at this time that MMR's rights should not be curtailed.

Thank you again for your assistance with this matter. Please feel free to contact me if you have any questions or would like to discuss these issues further.

Best Regards,

CHURCHWELL WHITE LLP

Barbara A. Brenner
Partner

NMFS Comments on the 4/17/14 Draft Marble Mountain Ranch Stanshaw Creek Water Rights Report

July 17, 2014

The Marble Mountain Ranch water right issue has been going on for a long time with no resolution. NMFS has submitted a water right protest to the application to appropriate water. The protest included terms that were less protective of Coho than those being used currently, i.e. no diversion during low flow or only small percentage of unimpaired flow allowed to be diverted during low flow periods. The 2002 NMFS protest terms recommended a minimum bypass flow of 1.5 cfs and a maximum diversion rate of 3 cfs. Using these recommendations, the diversion would be limited to 3 cfs for flows over 4.5 cfs, and limited to the flow rate minus 1.5 cfs for flows lower than 4.5 cfs. CDFW has recommended a minimum bypass flow of 2.5 cfs at the highway 96 culverts. To meet these two bypass flow recommendations, the tailwater of the hydroelectric plant should be returned to the stream above the highway 96 culverts.

Over the 13 years since the original water rights application the diversion structure remains inadequate. It is unscreened and there is major stream disturbance several times per year for diversion maintenance. The diversion is built in attempt to divert the majority of the low flow. The diversion is causing take of listed critical coho salmon habitat, at the very least, by a substantial decrease in cold water refugia at the mouth. This type of disturbance requires a 1603 Streambed Alteration Agreement with CDFW. CDFW must include bypass flow recommendations to protect downstream habitat, regardless of whether there is a Pre-1914 water right.

The diversion occurs on National Forest Land and requires a special use permit. According to the meeting notes from the National Forest (Heitler, March 22, 2001) the Special Use permit may be free but the issuance of the permit still requires the Forest Service to complete an ESA Section 7 consultation with NMFS regarding the diversion. The ESA Section 7 consultation should consider the effect of removing cold water refugia in Coho Critical habitat.

From the Cascade Report, the pre-1914 water right seems to remain questionable, however, even if a pre-1914 right were proven, the diversion is still limited by State and Federal regulation as explained above. As pointed out by the Water Rights Report, “the injury to instream fisheries could operate as a separate and independent basis for reduction of the diversions from Stanshaw Creek”. In other words, it really doesn’t matter whether there is a pre-1914 water right or not, through several other laws, a bypass flow must be provided to adequately protect critical stream habitat.

Currently the diversion is limited by the actual low flow and is usually much less than 3 cfs during the summer months simply because the flow is not available. Several years ago, I made a

rough low flow estimate for Stanshaw Creek based on correlation with the USGS Ti Creek data, estimating a summer base flow of three cubic feet per second. On September 20, 2012, I measured the Stanshaw Creek streamflow and the Marble Mountain Ranch diversion. At that time, there was 2.5 cfs in Stanshaw Creek with seventy percent of the streamflow being diverted down the ditch and a bypass flow of .049 cfs (+/- .15%). Diverting this high percentage of flow has an adverse effect on critical habitat and threatened coho.

Fortunately, Stanshaw Creek has a relatively high summer base flow and NMFS is in support of finding a “physical solution” to address the needs of Marble Mountain Ranch while meeting the recommended NMFS and CDFW bypass recommendations. Through conservation, storage, conveyance upgrades, and reuse, the water and power requirements can likely be met for the Marble Mountain Ranch. NMFS is in support of a solution to the Marble Mountain Ranch diversion that would include reductions in low flow diversion and return of hydropower flow back to Stanshaw Creek. The reduction of low flow diversion should include a structure that will avoid annual stream disturbance and have an outlet structure to help meter the flow to ensure required bypass flow. Storage should be added to the system to augment flows in periods of low flow or drought. Ditches should be lined or pipes added to prevent losses to seep and evaporation and to prevent fine sediments from entering Stanshaw Creek. Water needs for domestic and agriculture should utilize the outfall of the power plant. Photovoltaic system should be considered to compensate for deficiency in summer time power supply. Costs of photovoltaic system can be minimized by utilizing the inverter, batteries, and transmission lines of the existing hydroelectric system.

Realistic power requirements to operate the Ranch are needed. The 38 kilowatt power calculation in the Draft report is simply the power in water flowing through 500 feet of 14 inch pipe. Up to 80 percent of this power could be lost to voltage conversion, through power line transmission and through storage (i.e batteries). Where battery storage capacity is limited, the hydro turbine cannot store energy and any diversion to the hydro turbine would be wasted. To fully describe the system, we need to know the power requirements in kilowatt-hours, when the power is needed throughout the day, how the power is stored, what the storage capacity is, how it is transmitted to the place of use, and how it is converted to a usable voltage etc. With the added information, we can begin to develop a “physical solution” designed to meet the needs of the Marble Mountain Ranch while providing the necessary by pass flows in Stanshaw Creek.

June 12, 2014

Martha Lennihan
Lennihan Law
1661 Garden Highway, Suite 102
Sacramento, CA 95833

Joey Howard
Cascade Stream Solutions, LLC
295 E. Main, Suite 11
Ashland, OR 97520

Re: Draft Marble Mountain Ranch Stanshaw Creek Water Rights Report

Dear Ms. Lennihan and Mr. Howard:

Thank you for your thorough research about Marble Mountain Ranch's claimed pre-1914 right to water from Stanshaw Creek. I appreciate the opportunity to submit comments before you finalize the draft Marble Mountain Ranch Stanshaw Creek Water Rights Report (Draft Report). In preparing the final report, I urge you to consider the following:

Marble Mountain Ranch is Not Successor-in-interest to Stanshaw's 1867 Mining Water Right

The Coles' claimed pre-1914 water right is founded on the assumption that they are successors in interest to the water right established by the 1867 "Water Notice" by E. Stanshaw. This claim is debunked by the fact that Stanshaw's water right was used for mining that took place primarily, if not exclusively, on land that I now own. The place of use of Stanshaw's water right can be documented by historic land title searches, evidence of very extensive hydraulic mining on my property, and water diversion pipes and ditches that lead to my property and are located on U.S. Forest Service land.

This fact is also substantiated by the Cascade Stream Solutions' (CSS) Water Use Technical Memorandum ("Technical Memo") which reads: "[T]here are mine tailings at the mouth of Stanshaw Creek, and none on the MMR." (P. 12)

This fact is further substantiated by the fact that the Coles' predecessors (the Youngs) submitted an application for a water right for hydropower production in 1989. Had the Youngs' believed they held a valid pre-1914 water right, they would likely not have applied for a new water right. Until very recently, the Coles continued to seek approval of this water right application.

CSS should further investigate on-the-ground evidence of water use on my land and consult with me personally, just as they have investigated water use on the Coles' land and consulted with Doug Cole personally. Additionally, Lennihan Law and/or CSS should investigate historic land title documents to determine exactly how much of Stanshaw's original land claim is now owned by myself versus the Coles.

Stanshaw's Original Water Right Has Been Forfeited Due to Non-use

Even if Stanshaw's original mining water right had been exercised on land now owned by the Coles, this right would have been forfeited due to non-use with the possible exception of a water right adequate to meet domestic and irrigation needs. The State Water Resources Control Board's (SWRCB) staff arrived at a similar conclusion based on the assumption that Coles are successors in interest to the Stanshaw water right. 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." Both of these letters are in your files under "unsorted documents."

This period of non-use began when hydraulic mining ended or became illegal and lasted until hydroelectric power generation was initiated. According to the Draft Report, hydraulic mining at the site ended in the 1920s or 1930s. Moreover, hydraulic mining became illegal in 1884 based upon the court's ruling in *Woodruff v. North Bloomfield Gravel Mining*, 18 F. 753 (D. Cal. 1884). Illegal water diversions cannot be used to substantiate a pre-1914 water right. Therefore, for the purposes of establishing a pre-1914 water right, hydraulic mining ended in 1884.

The Draft Water Rights Report cites ample evidence, including documents written by the Coles and a previous owner of MMR, indicating that "hydroelectric generation was initiated in the 1940's or later." (Draft Water Rights Report at p. 14.) The report also asserts that these documents may be considered binding.

Given the ample evidence to the contrary, and limited evidence in the affirmative, the final report should revisit the conclusion that "power generation was initiated before 1914." Nothing in the record demonstrates or establishes that mining or power generation took place during this time period. The Draft Water Rights Report makes the assumption that it did, and then determines the maximum amount of water that could have been diverted during that time period based upon equipment from the 1950s.

The period of time with no evidence of water use for mining or power production is too long to satisfy the burden of proof applied to pre-1914 water right claimants.

Domestic & Irrigation Use of 0.35 CFS Would Be Wasteful & Unreasonable

According to the Technical Memorandum, the SWRCB estimated the Cole's domestic and irrigation use at 0.103 cfs. (Technical Memo at p. C9.) The draft report notes that Cole's predecessors (the Youngs) conceded that their domestic and irrigation water needs were 0.11 cfs. 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 at p. C9.) The Draft Water Rights Report's conclusion relies upon Doug Cole's higher estimate rather than the more substantiated estimates of SWRCB and the Youngs.

The final report, should determine the actual domestic and irrigation water needs based on: (1) actual irrigated acres; (2) actual numbers of dwellings; and (3) Department of Water Resources' standard water use volumes for domestic and irrigation values.

Conveyance Loss of 0.5 CFS is Wasteful & Unreasonable

The Draft Report assumes conveyance losses are excluded from the aforementioned estimates for domestic and irrigation water use. Regardless of whether this is true, in this instance a conveyance loss of 0.5 CFS would be considered wasteful and unreasonable. Simply piping water from Stanshaw Creek to its place of use would eliminate the vast majority of conveyance loss. The existing unlined conveyance ditch is not only wasteful, but it washes out many winters creating mudslides that cause plumes of muddy water to enter the Klamath River from the mouth of Stanshaw Creek.

MMR's Diversion Violates Laws that Supersede Valid pre-1914 Water Rights

The Draft Report correctly cites several laws that MMR's diversion may violate. These include the Public Trust Doctrine, the Reasonable Use Doctrine, the state and federal Endangered Species Acts, and Fish and Game Code section 1600. MMR's diversion also violates Fish and Game Code section 5937.

California Department of Fish and Wildlife (DFW) and the National Marine Fisheries Service (NMFS) both issued minimum bypass flow recommendations necessary to protect endangered coho salmon. MMR's diversion does not comply with these recommendations.

Diversion Method and Location of Return Flow May be Unlawful

As stated above, MMR's diversion ditch washes out many winters causing mudslides that fill Stanshaw Creek and enter the Klamath River. Moreover, the portion of MMR's diversion that is not consumptively used is returned to Irving Creek, not Stanshaw Creek. I urge you to evaluate the whether the diversion ditch itself and location of return flow comply with existing laws.

Report Should Estimate Minimum & Maximum Volume of Claimed Water Right

As detailed above, the Draft Report makes numerous assumptions to arrive at the maximum possible estimate of MMR's water right. Specifically, the Draft Report concludes that the MMR water right is "up to 0.35 cfs for domestic and irrigation, 0.31 cfs for power generation, plus reasonable losses in the range of 0.5 cfs."

I respectfully request that the final report include minimum (i.e. "as little as") estimates in addition to maximum ("up to") estimates. Doing so would best serve the purpose of the report, which is to bring interested parties to a negotiated, mutually agreeable solution.

Physical Solutions

Fortunately, physical solutions exist that would protect the Coles' business interests, eliminate the threat of regulatory action against the Coles by government agencies, end the take of endangered species, and preserve my ability to exercise my riparian water right for hydropower production in the future. I encourage all interested parties to explore such physical solutions with me as well as MMR.

Until a long-term physical solution can be implemented, the Coles should install a pipe into Stanshaw Creek that is adequate to meet their domestic and irrigation water needs. This interim solution would allow Coles to bypass water that is not needed and/or cannot be legally diverted.

Again, thank you for your thorough research. Please feel free to contact me if you have any questions or need additional information.

Sincerely,



Konrad Fisher

STANSHAW FILE INDEX

MID KLAMATH WATERSHED COUNCIL

DOCUMENTS

- 20.1 Title Documents
 - 1. 12-15-94.Cole's Grant Deed
 - 2. 1867 claim –original
 - 3. 1867 claim –typed
 - 4. No date – Assessor's Parcel map
- 20.2 SWRCB Documents
 - 20.2.1 Klamath Forest Alliance Complaint, SWRCN File 262.0
 - 1. 8-22-02. SWRCB.ltr to Mooney. Complaint
 - 2. 5-23-02(a). SWRCB.ltr to Cole's and KFA.Complaint
 - 3. 5-23-02(b). SWRCB. Memo to file.Compliant
 - 4. 9-20-01.SWRCB.filed investigation.Complaint
 - 5. 7-02-01.SWRCB.ltr to Cole.(includes ltr from Mooney)
 - 20.2.2 Application to Appropriate, 029449
 - 1. 1-17-13.SWRCB.to Cole Attny. App 29449.Cancellation
 - 2. 11-02-12.SWRCB. to Cole Attny.App 29449.req for info
 - 3. 3-30-12.SWRCB.to Cole.60 day notice of cancellation
 - 4. 12-06-06. SWRCB.to DFG and Cole's. NMFS Protest
 - 5. 11-9-05.SWRCB.to Cole. CEQA info req
 - 6. 06-22-01.SWRCB.to KF. App 29449.
 - 7. 9-15-98.SWRCB.to Cole's. unauth. Diversion
 - 8. 3-27-89.SWRCB.notice.App 29449
 - 20.2.3 Small Domestic R480
 - 1. 9-3-09.SWRCB.to DFG.R480
 - 2. 4-8-05.SWRCB.to Cole.R480.pond rpt of reg
 - 20.2.4 Young's Ranch
 - 1. 02-04-93.SWRCB.SWRCB.to Young's.App 29450
 - 2. 03-17-90.Consultant.Hydrology Report.Young's Ranch.

THIRD PARTY Sources

- 30.1 USFS
 - 1. 8-11-10.USFS.to Cole.new power plant
 - 2. 10-19-01.USFS.to file.case report – chronology
 - 3. 10-18-01.USFS.to file.water right complaint meeting
 - 4. 5-08-01.USFS.to Pace
 - 5. 3-22-01.USFS.to file.site visit and meeting summary
 - 6. 3-09-00.USFS.to SWRCB. App 29449
 - 7. 8-17-64.USFS.to Reg.Forester.ditch ROW

30.2 DFG/DFW

1. 10-15-09.DFG.to SWRCB. Re7-08-g req small domestic R480
2. 2-07-07.DFG.to SWRCB. Cole App 29449.protest dismissal terms
3. 7-05-05.DFG.ltr to Cole.mitigation
4. 11-20-01.DFG.to SWRCB.Cole App 29449.Complaint Investigation
5. 4-30-99.DFG.Cole 1600 Agreement
6. 1-04-79. DFG survey results on Stanshaw

30.3 Klamath Forest Alliance

1. 6-24-02.KFA's Attny.Complaint
2. 11-30-01.KFA's Attny.unlawful diversion
3. 06-14-01.KFA's Attny.Complaint
4. 3-09-01.KFA's Attny.intent to sue for ESA violation
5. 3-15-00.Fisher.Protest

30.4 Cole and Cole's Attorney

30.4.1 All Documents provided by Barbara Brenner

1. 11-29-12.BB. Letter re Supplemental Info for Statement of Water Diversion Use
2. 2.10-01-12.BB.Letter re Diversion Rights Stanshaw.App 029449
3. 04-17-12.BB.Email re Marble Mtn Ranch.Aerial Photos
4. 08-05-09.BB.Complaint.Chronology
5. 04-19-06.BB.Irving Creek School History and Photos
6. 04-2001.BB.Handwritten letter to Cole re History of Site
7. 12-04-98.BB.Letter from Bagheban to Cole
8. 11-25-98.BB.Letter from Bagheban to SWRCB
9. 11-05-98.BB.Letter from Squires to SWRCB
- 10.07-13-98.BB.Article on Irving Creek School
- 11.07-07-98.BB.Testimony of Hayes on Historical Use of Water
- 12.06-03-95.BB.Inspection Photos
- 13.5-21-97.BB.Dec of Harless on Ditch Use Witnesses by Coles
- 14.04-28-97.BB.Forest Service Quitclaim Deed.97005031
- 15.06-03-95.BB.grant deed from mcmurtry to hayes.9418
- 16.01-04-95.BB.Cole Correctory Grant Deed.95000070
- 17.12-30-94.BB.grant deed 94018121
- 18.10-14-94.BB.Parcel Ownership Papers
- 19.09-26-94.BB.Buyers Escrow Instructions from Siskiyou Land Title
- 20.09-09-94.BB.CA All-purpose Acknowledgment
- 21.11-29-77.BB.Grant Deed Joint Tenancy.4094
- 22.11-05-77.BB.Certificateof Waiver.Hayes Assign Lease to Young
- 23.03-29-73.BB.Dec of Abandonment of Homestead.13097
- 24.03-07-72.BB.Voucher for Payment Under Federal Tort Claims Act

- 25. 02-03-72.BB.Letter to Hayes from English.USFS.6570 Claim
- 26. 02-04-70.BB.Letter to Hayes from Grainger.USFS.claim
- 27. 10-22-69.BB.Letter to Hayes from Stokes.USFS
- 28. 06-30-69.BB.Letter to McMannis from Worthington.USFS
- 29. 06-23-69.BB.Letter to McMinnis from Bizz
Johnson.congressman
- 30. 06-09-69.BB.Letter to Hayes from Kleaver.complaint
- 31. 05-23-69.BB.Directors Deed
- 32. 32.12-22-64.BB.Flood s Reported by Agnes Hayes
- 33. 11-07-57.BB.Letter to Hayes re Map and Description Surveyor
- 34. 10-26-48.BB.Order Settling Final Acct of Administrator and
Decree of Distribution
- 35. 11-07-57.BB.ASdditional Homestead to Cover Land Intended to
be Patented
- 36. 12-12-45.BB.Identure 3667
- 37. 05-27-32.BB.Indenture3890
- 38. 08-31-31.BB.Indenture
- 39. 04-10-22.BB.Indenture
- 40. 06-21-18.BB.Certificate of the Register of the land Office.Books
of Patents 13 pg 449
- 41. 06-09-1880.BB.Water Notice of Stanshaw.typed
- 42. 06-09-1880.BB.Water Notice.handwritten
- 43. 10-24-1870.BB.Klamath Misc Stanshaw.copy
- 44. 10-24-1870.BB.Klamath Misc Stanshaw
- 45. 03-25-1867.BB.ExhibitA.handwritten
- 46. 03-25-1867.BB.Ntc of Mining and irrigation Stanshaw Recorded
- 47. 03-25-1867.BB.Ntc of Mining and Irrigation
- 48. No Date.BB.Letter from Kaye to Hayes.USFS.claim
- 49. No Date.BB.Letter from Hayes to Kaye.USFS.claim
- 50. No Date.BB.Dec of Harless re Continued Use of
Ditch.handwritten
- 51. No Date.BB.Dec of Harless with notes
- 52. No Date.BB.Handwritten letter to Kaye
- 53. No Date.BB.Questionable Measurements by Goss
- 54. No Date.BB.Summary of Stanshaw Diversion Rights by Marble
Mountain Ranch
- 55. No Date.BB.Timeline

30.4.2 All Documents provided by Doug Cole

- 1.11-09-12.Cole's Attny.e-mail re:statement of water diversion and
use
- 2.10-04-12.Cole's Attny. E-mail to SWRCB
- 3.10-01-12.Cole's Attny.to SWRCB.App 29449.summary of water
use
- 4.8-20-01.Cole's Attny.Complaint rebuttal

30.5 NMFS

- 1.07-08-02.NMFS.to SWRCB.complaint
2. 11-15-01.NMFS.dismissal terms
3. 3-08-00.NMFS.protest

40.1 Project description

- 1.Stanshaw Creek(1).history
- 2.Stanshaw Creek Water Conservation Project (issues and concerns by stakeholders)

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 20.1 Title Documents

1. 12-15-94.Cole's Grant Deed
2. 1867claim_copy_of_original
3. 1867claim_typed
4. No date. Assessors Parcel Map

Recording requested by:

SISKIYOU COUNTY TITLE CO.
AND WHEN RECORDED MAIL THIS DEED AND
UNLESS OTHERWISE SHOWN BELOW, MAIL
TAX STATEMENT TO:

Name: Mr. and Mrs. Doug Cole

Mailing Address: 92520 Hwy. 96

City/State/Zip: Somes Bar, CA
95568

Order No. 60696-dn

CURRENT GRANT
DEED TO COLES
COMPLETE WITH
WATER RIGHTS

RECORDED AT REQUEST OF
SISKIYOU COUNTY TITLE CO. 193

OFFICIAL RECORDS
SISKIYOU COUNTY, CALIF.

DEC 30 . 3 00 PM '94

94018121

David H. Higgs

\$14.00

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Grant Deed

THE UNDERSIGNED GRANTOR(S) DECLARE(S)

DOCUMENTARY TRANSFER TAX IS \$ 88.00

☒ computed on full value of property conveyed, or

☐ computed on full value less value of liens or encumbrances remaining at
time of sale.

☐ unincorporated area

☐ city of

, AND

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

ROBERT E. YOUNG and MARY J. YOUNG, husband and wife

hereby GRANT(S) to DOUGLAS T. COLE and HEIDI ANN COLE, husband and wife as
Joint Tenants

the following described real property in the
County of Siskiyou, State of California:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.
TOGETHER WITH ALL WATER RIGHTS APPURTENANT THERETO.

Dated December 15, 1994

STATE OF CALIFORNIA
COUNTY OF SISKIYOU

On 12/29/94 before me, the undersigned, a
Notary Public in and for said State, personally appeared

Robert E. Young and Mary J. Young

personally, known to me (or proved to me on the basis of
satisfactory evidence) to be the person(s) whose name(s)
is/are subscribed to the within instrument and acknowledged
to me that he/she/they executed the same in his/her/their
authorized capacity(ies), and that by his/her/their signature(s)
on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

Signature *Denise D. Nixon*
NOTARY PUBLIC IN AND FOR SAID STATE

MAIL TAX STATEMENTS AS DIRECTED ABOVE.

Robert E. Young
Robert E. Young
Mary J. Young
Mary J. Young

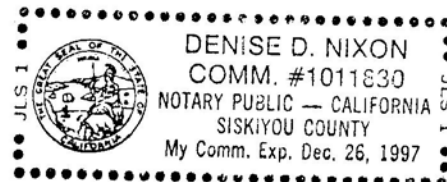


EXHIBIT "A"

ALL THAT REAL PROPERTY SITUATE IN THE COUNTY OF SISKIYOU, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL I:

The Southeast 1/4 of the Northwest 1/4 of the Southwest 1/4, the Southwest 1/4 of the Northeast 1/4 of the Southwest 1/4, the North 1/2 of the Northwest 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southwest 1/4 of the Southwest 1/4, the Northwest 1/4 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, the South 1/2 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, and the Southwest 1/4 of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Base and Meridian.

EXCEPTING THEREFROM: All that portion of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian described as:

Beginning at the South 1/4 corner of said section; thence East 330 feet to the True Point of Beginning; thence East 330 feet along the South line of said Section to the East boundary of the LUE HAYES property; thence North 330 feet along the East line of said Hayes property; thence West 330 feet; thence South 330 feet to the True Point of Beginning.

FURTHER EXCEPTING those portions of the land in the West 1/2 of the Southwest 1/4 of the Southeast 1/4, and in the Southwest 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian, as conveyed to LUE HAYES et ux, by deed recorded July 1, 1955, in Book 352 at page 253, Official Records of Siskiyou County, lying Southerly of the line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, Humboldt Meridian, and Sections 33 and 34, Township 13 North, Range 6 East, Humboldt Meridian, bears South 88° 51' 44" East, 1769.19 feet, said point also being Engineer's Station "A" 479177.35 P.O.C., as established from the Department of Public Works 1964 Survey between Sogues Bar and Ti Creek Road 01-Sis-96; thence from a tangent which bears North 47° 20' 27" West, along a curve to the left, having a radius of 1000.00 feet, through an angle of 07° 37' 11", a distance of 132.99 feet to Engineer's Station "A" 481110.34 E.C., as established from said survey; thence North 35° 02' 22" East, 100.00 feet to a point hereinbelow referred to as Point "B", thence North, 54° 57' 38" West 180 feet more or less to the East line of the West 1/2 of the Southwest 1/4 of the Southeast 1/4 of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence, continuing North 54° 57' 38" West, 610 feet to a point for a total distance of 790.42 feet from said Point "B"; thence South 35° 02' 22" West, 34.00 feet; thence, from a tangent which bears North 54° 57' 38" West, along a curve to the left, having a radius of 1266.00 feet, through an angle of 14° 29' 35", a distance of 320.24 feet to a point hereinbelow referred to as Point "C"; thence North 69° 27' 13" West 520 feet, more or less, to the West line of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33; thence continuing North 69° 27' 13" West, 290 feet, more or less to the South line of the North

(Continued)

1/2 of the North 1/2 of the Southeast 1/4 of the Southwest 1/4 of Section 33; thence continuing North $69^{\circ} 27' 13''$ West, 47 feet to a point, hereinbelow referred to as Point "D" for a total distance of 857.37 feet from said Point "C"; thence from a tangent which bears North $69^{\circ} 27' 13''$ West along a curve to the left, having a radius of 5066.00 feet a distance of 355 feet, more or less to the West line of the Southeast 1/4 of the Southwest 1/4 of said Section 33; thence continuing along last said curve, a distance of 335 feet to a point, hereinbelow referred to as Point "E", through a total angle of $07^{\circ} 48' 15''$, and a total distance of 690.03 feet from said Point "D"; thence North $41^{\circ} 41' 14''$ West, 178 feet, more or less, to the South line of the Northwest 1/4 of the Southwest 1/4 of said Section 33; thence continuing North $41^{\circ} 41' 14''$ West 138 feet to a point for a total distance of 316.31 feet from said Point "E"; thence North $76^{\circ} 12' 04''$ West, 128 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the Northwest 1/4 of the Southwest 1/4 of said Section 33.

EXCEPTING THEREFROM that portion thereof lying Southerly of the line described as follows:

Commencing at said Engineer's Station "A" 481+10.34 E.C., hereinabove described; thence North $54^{\circ} 57' 38''$ West, 159.66 feet; thence South $35^{\circ} 02' 22''$ West, 225.00 feet to a point hereinbelow referred to as Point "F"; thence North $11^{\circ} 17' 26''$ East, 17 feet, more or less, to the South line of said Section 33, being the 'TRUE POINT OF BEGINNING' of this line; thence continuing North $11^{\circ} 17' 26''$ East, 120 feet to a point for a total distance of 136.57 feet from said Point "F"; thence North $54^{\circ} 57' 38''$ West, 575.76 feet; thence from a tangent which bears North $54^{\circ} 57' 38''$ West, along a curve to the left, having a radius of 1100.00 feet, through an angle of $14^{\circ} 29' 35''$, a distance of 278.25 feet; thence North $69^{\circ} 27' 13''$ West, 115 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33.

ALSO EXCEPTING THEREFROM that portion thereof conveyed to EDWIN T. McMANIS, et ux, by Deed recorded January 19, 1965 in Book 512 at page 457, Official Records of Siskiyou County.

The bearings used in the above description are on the California Co-ordinate System Zone 1, and the distances are surface.

PARCEL II:

That portion of the lands in the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, H.M., conveyed to the State of California by deed recorded December 15, 1965 in Book 524, Official Records, page 98, Siskiyou County Records, lying Northeasterly of a line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, H.M., and Sections 33 and 34, Township 13 North, Range 6 East, H.M., bears South $88^{\circ} 51' 44''$ East, 1769.19 feet, said point also being Engineer's Station "A" 479+77.35 P.O.C., as established from the Department of Public Works 1964 Survey between Soyes Bar and Ti Creek, Road 01-Sis-96; thence from a tangent that bears North $47^{\circ} 20' 27''$ West, along a curve to the left with a radius of 1000.00 feet, through an angle of $07^{\circ} 37' 11''$, for a distance of 132.99 feet; thence North $35^{\circ} 02' 22''$ East, 100.00 feet; thence North $54^{\circ} 57' 38''$ West, 182 feet, more or less to the Point of Intersection with the East line of said land, last said

(Continued)

point being the TRUE POINT OF BEGINNING of this parcel thence continuing North 54° 57' 38" West, 117 feet, more or less to the Point of Termination of this line on the North line of said lands.

The bearings used in the above description are on the California Co-ordin

ORIGINAL WATER FILING BY SAM. STANSHAW 1867

399

Notice: Is hereby given, that I have taken up and
 located for mining and irrigating purposes, six
 hundred acres of the water issuing in Shoshone
 creek, so called, the water so taken, being assessed
 first by ditch and flume, to and past my
 dwelling house, assessed by ditch and flume
 running up the Shoshone River to my upper
 field, second creek being in Dillon Township, State
 of California, County of Blumont
 March 25-1867
 E. Stanstow

Recorded March 25th 1867 at request of E. Stanstow
 B. W. Smith - Recorder

Notice: Is hereby given to all to whom it may concern
 that I have taken up and located for mining purposes
 one hundred acres of the water issuing in the
 Creek, that empties in to the Blumont River on
 the west side, and directly opposite the house of
 "Jay Ben", and known as the "Bumstowing" Creek
 said creek being in Dillon Township, State of
 California, County of Blumont
 March 25th A. D. 1867
 E. Stanstow

Recorded at request of E. Stanstow March 25th A. D. 1867

Notice: Is hereby given that I have taken up and hold for mining and for purpose of irrigation six hundred inches of the water running in Stanshaw Creek. So called the water so taken, being carried first by ditch and flume, to and past my dwelling home; second by ditch and flume running up the Klamath River to my upper field, said creek being in Dillon Township, State of California, County of Klamath.

March 25th. A.D. 1867 E. Stanshaw

Recorded March 25th. 1867 at request of E. Stanshaw

B. W. Janks Recorder

Notice: Is hereby given to all to whom it may concern that I have taken up and hold for mining purposes one hundred inches of the water running in the creek, that emptys into the Klamath River on the west side and directly opposite the head of "Lay Bar", and known as the "Frenchman's" Creek said creek being in Dillon Township, State of California, County of Klamath

March 25th. A.D. 1867 E. Stanshaw

Recorded at request of E. Stanshaw March 25th. A.D. 1867

Notes: I have given that I have better up and
 noted for mining and raising property, and
 connected mine of the border mining in California
 creek, so called, the water is better, being covered
 first by water and then, to make good and
 something more, across by water and then
 running up the stream and then to my upper
 field. Good creek being in Delta San Joaquin, State
 of California, County of Merced,
 March 25-1867

Recorded March 25th 1867 at request of E. Stanshaw
 O. W. Smith - Recorder

Notes: I have given to all to inform it was common
 that I have better up and noted for mining property
 one hundred miles of the water running in the
 creek, that perhaps in the State of Merced
 the water, and especially opposite the house of
 "Long Ben", and then on the "Stanshaw's" creek
 and creek being in Delta San Joaquin, State of
 California, County of Merced,
 March 25th A. D. 1867
 E. Stanshaw
 at request of E. Stanshaw March 25th A. D. 1867

Notice: Is hereby given that I have taken up and hold for mining and for purpose of irrigation six hundred inches of the water running in Stanshaw Creek. So called the water so taken, being carried first by ditch and flume, to and past my dwelling home; second by ditch and flume running up the Klamath River to my upper field, said creek being in Dillon Township, State of California, County of Klamath.

March 25th. A.D. 1867 E. Stanshaw

Recorded March 25th. 1867 at request of E. Stanshaw

B. W. Janks Recorder

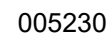
Notice: Is hereby given to all to whom it may concern that I have taken up and hold for mining purposes one hundred inches of the water running in the creek, that emptys into the Klamath River on the west side and directly opposite the head of "Lay Bar", and known as the "Frenchman's" Creek said creek being in Dillon Township, State of California, County of Klamath

March 25th. A.D. 1867 E. Stanshaw

Recorded at request of E. Stanshaw March 25th. A.D. 1867

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1. 100% of the total area of the site is to be covered by vegetation.

2. 100% of the total area of the site is to be covered by vegetation.

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 20.2 SWRCB documents

20.2.2 Application 029449

20.2.3 Small Domestic R480

20.2 SWRCB documents\20.2.4 Young's Ranch

20.2.1 KFA Complaint, SWRCB File 262.0

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 20.2.1 KFA Complaint, SWRCB File 262.0

1. 8-22-02. SWRCB.ltr to KFA.Complaint
2. 5-23-02(a).SWRCB.ltr to Coles and KFA.Complaint
3. 5-23-02(b).SWRCB. memo to file.Complaint
4. 9-20-01.SWRCB.field investigation.Complaint
5. 7-2-01 SWRCB.ltr to Cole.Complaint

State Water Resources Control Board

WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5377
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>

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2002 AUG 23 PM 2 02

AUG 22 2002

In Reply Refer to:

363:MC:262.0(47-40-01); A029449DFG - REDDING

Klamath Forest Alliance
c/o Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Dear Mr. Mooney:

WATER RIGHTS COMPLAINT OF THE KLAMATH FOREST ALLIANCE AGAINST THE COLES REGARDING DIVERSIONS FROM STANSHAW CREEK IN SISKIYOU COUNTY

Staff of the Division of Water Rights (Division) has completed their review of your letter of June 24, 2002 regarding the subject complaint. You indicate in this letter that you and your client disagree with the conclusions reached by Complaint Unit staff, as expressed in their letter and Staff Report of Investigation dated May 23, 2002. After review of both the Staff Report of Investigation and your letter, I have concluded that further action with respect to your client's complaint is not warranted, and I have directed the Complaint Unit to close this complaint. The supporting rationale for this action is described below.

Unauthorized Diversion of Water – You contend that the Division previously determined that any pre-1914 appropriative right held by the Coles is limited to approximately 0.11 cubic feet per second (cfs). Regardless of past letters sent by the Division containing estimates of what could be diverted pursuant to a pre-1914 appropriative right claim, the Division has no adjudicatory authority to quantify such a claim. Only the courts can make this determination. The most recent evidence submitted by the Coles and their legal counsel indicates that diversion of water from Stanshaw Creek into their ditch, and the subsequent use of this water for irrigation and domestic purposes at the Marble Mountain Ranch, was initiated prior to 1914 using at least as much, if not more, water than is used today. All available evidence suggests that the diversion and use has been maintained in a diligent and continuous fashion ever since. Consequently, we believe that a court would find that the Coles have a valid claim of a pre-1914 appropriative right to divert water for the full irrigation and domestic uses currently maintained, including reasonable conveyance losses.

While the Cole's current diversion of water for power purposes is not technically covered by a permit, this diversion and use has been ongoing for almost 60 years. Diversions prior to a determination regarding issuance of a permit are very common, especially for long-standing diversions such as the Cole's. The State Water Resources Control Board (SWRCB) has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to initiate enforcement against a person who files an application promptly upon notification of the complaint, and then

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Klamath Forest Alliance

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AUG 22 2002

diligently pursues the application, complies with all application requirements and requests for information, and cooperates with SWRCB staff. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Potential Injury to Other Uses of Water - Another important factor in considering enforcement is the extent of injury caused by the water diversion. If a complaint investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide *not* to take enforcement action. The SWRCB may also consider the degree of hardship that enforcement action would impose on persons who rely on the diversion of water when it decides whether to take enforcement action in response to a complaint. Based on available evidence and rationale described in the Staff Report of Investigation, Complaint Unit staff concluded that there would be little potential for harm to other diverters or public trust resources if the Coles were allowed to divert water for power purposes, as long as a minimum bypass flow is maintained similar to that occurring during their investigation. You disagree with this conclusion, and make reference to the professional opinions of staff for the National Marine Fisheries Service, Department of Fish and Game, Karuk Tribe, and Humboldt State University. While we have received copies of these opinions, the evidence and logical rationale on which these opinions are based has not been submitted. Consequently, I believe the *prima facie* evidence utilized by Complaint Unit staff is more persuasive. Asking the Coles to terminate their diversion would also cause severe economic hardship on them without providing much if any benefit to the instream resources.

I do agree with you that the Cole's application has been pending for far too long. This application has been noticed and protests received. I doubt the parties will be able to resolve these protests amicably amongst themselves. The next steps in the process would be to complete an environmental review of the project pursuant to the California Environmental Quality Act (CEQA), and then proceed to protest resolution via either a field investigation or formal hearing. I have directed the Division's Environmental Section to give as much priority as possible to this application so that final resolution of the protests can be achieved as soon as feasible. I have also asked the Division's Application and Environmental units to send copies of all correspondence to you so that you will be kept apprised of the progress in this matter.

In the meantime, I expect the Coles to maintain a minimum bypass, as described in the Staff Report of Investigation. Failure to do so could result in a reevaluation of the need for enforcement action prior to a final determination of the Cole's request for a permit.

If there are any questions regarding this matter, please contact Charles Rich, Chief of the Division's Complaint Unit, at (916) 341-5377.

Sincerely,



Edward C. Anton, Chief
Division of Water Rights

cc: See next page.

Klamath Forest Alliance

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AUG 22 2002

cc: Mr. Doug and Mrs. Heidi Cole
c/o Jan Goldsmith
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
Attention Mr. Ron Presley and
Jane Vorpapel
601 Locust Street
Redding, CA 96001

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman and
Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klinge Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556

FAX Coversheet

**From: Michael Contreras
Environmental Specialist III
Complaint Unit**

**Phone: (916) 341-5307
Fax: (916) 341-5400
e-mail: mcontreras@waterrights.swrcb.ca.gov**

**To: Jane Vorpapel
Date: July 19, 2002
Subject: Cole's Application #29449**

Fax: (530) 225-2381

Jane:

The following pages are the filed report of investigation regarding the Cole's diversion on Stanshaw Creek, tributary to the Klamath River in Siskiyou County, resulting from a complaint.

Although DFG Warden Ron Presley received a copy directly, please accept this fax for your own use.

I would be happy to discuss the matter with you on Monday, July 22nd after you have had opportunity to look through our report.

Have a nice day.

Michael Contreras



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
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Division of Water Rights: <http://www.waterrights.ca.gov>

WR-193



Gray Davis
Governor

In Reply Refer to:
363:MC:262.0(47-40-01)

MAY 23 2002

Klamath Forest Alliance
c/o Law offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Mr. Doug and Mrs. Heidi Cole
c/o Ms. Jan Goldsmith
Kronick, Moskowitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Ladies and Gentlemen:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE – ALLEGING UNREASONABLE DIVERSION

Complaint Unit staff of the Division of Water Rights have completed their investigation of the complaint lodged by the Klamath Forest Alliance (KFA) against Doug and Heidi Cole (dba Marble Mountain Ranch). A copy of the Staff Report of Investigation regarding this matter is enclosed. Complaint Unit staff reached the following conclusions:

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Coles' ditch to cover both the diversion and bypass requirement with subsequent measurement and release of a bypass back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

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Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

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MAY 29 2002

Based on these conclusions, Complaint Unit staff believe the following actions are appropriate:

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their Point of Diversion to maintain a flow in lower Stanshaw Creek below the Highway 96 culverts similar to that present during the October 16, 2001, field investigation (≈ 0.7 cfs).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Coles' ditch is not allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small, hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or
 - b) if full diversion of the creek into the Coles' ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
4. That the parties give serious consideration to a physical solution similar to that discussed in the Staff Report of Investigation.

If either party to the complaint disagrees with the conclusions reached by Complaint Unit staff, please let me know of the points with which you disagree and the specific evidence you believe is available to substantiate or justify a different conclusion or action. If we do not hear from you within 30 days from the date of this letter, we will assume that you agree with the conclusions and recommendations contained therein. If the Coles are unable to produce evidence to justify a different recommendation, failure on their part to maintain the bypass flows as specified may result in appropriate enforcement action without further notice. Similarly, if the KFA is unable to provide evidence to justify a different course of action, this complaint would be subject to closure without further notice.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,



Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

3

MAY 23 2002

cc: Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman
Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klinge Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556



Winston H. Hickox
Secretary for
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WR-193



Gray Davis
Governor

Memorandum to File

To: File Number 262.0 (47-40-01)

Date: MAY 23 2002

From:

Charles A. Rich
Charles A. Rich, Chief
Complaint Unit

Michael Contreras
Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

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measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

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After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 - 200 feet above the terminal

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pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommend that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

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Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for power purposes in her letter of August 20, 2001, Complaint Unit staff are not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believe that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The SWRCB has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Another weighed factor is the extent of injury caused by the water diversion. If an investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide not to take enforcement action. The SWRCB may also consider the degree of hardship enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

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May 23, 2002

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phyllis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. **Pre-1914 appropriative claim of right for domestic / irrigation use.** This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. **Application A029449** – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. **Small Domestic Registration D030945R** – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

*Cole's
did not
get a letter
From DFG
regarding
conditions*

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land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "innocent until proven guilty" concept of the law.

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- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: "*The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage.*" While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

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The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of ±50%.

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problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of $\frac{1}{2}$ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 - 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

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would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an Injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of $\frac{1}{2}$ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

*What
about
our
protests?*

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

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The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

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CONCLUSIONS

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their 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).
2. That the required bypass flow be determined in one of two fashions:
 - a) If full diversion of the creek into the Cole's ditch is not allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

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hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) If full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.



State Water Resources Control Board

WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
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Gray Davis
Governor


Memorandum to File

To: File Number 262.0 (47-40-01)

Date: MAY 23 2002

From:


Charles A. Rich, Chief
Complaint Unit


Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 – 200 feet above the terminal

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommend that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for power purposes in her letter of August 20, 2001, Complaint Unit staff are not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believe that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The SWRCB has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Another weighed factor is the extent of injury caused by the water diversion. If an investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide not to take enforcement action. The SWRCB may also consider the degree of hardship enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phylis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. Pre-1914 appropriative claim of right for domestic / irrigation use. This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. Application A029449 – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. Small Domestic Registration D030945R – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "*innocent until proven guilty*" concept of the law.

- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: *"The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage."* While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of ±50%.

problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of $\frac{1}{2}$ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 – 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of $\frac{1}{2}$ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

CONCLUSIONS

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their 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).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Cole's ditch is not allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) if full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.



FACSIMILE TRANSMISSION
CALIFORNIA DEPARTMENT OF FISH AND GAME
NORTHERN CALIFORNIA-NORTH COAST REGION (REGION 1)
1625 SOUTH MAIN STREET
YREKA, CALIFORNIA 96097



Telephone # (530) 841-2550 [] (Yreka Stream Improvement Center)
841-2552 [X] (District Fisheries Biologist)
841-2554 [] (Fisheries Biologist- Shasta River Resource Assessment)
841-2555 [] (Law Enforcement)
436-2347 [] (Stream Alteration Agreements)

If Fax is unreadable or you have question(s) regarding this FAX call telephone number of sender checked above.

FAX - (530) 841-2551

To: JANE Vorpage

Date: 10 - 01 - 01

Fax #: Redding HQ

No. of Pages: 3 (including this cover sheet)

From: DENNIS MARIA

Subject: Cole Tour (Stanshaw Creek)

Comments:

JANE -

Attached letter FYI. I am not sure how another tour is going to change ~~anything~~ ^{anything}. Also, I am not sure what Irving Creek has to do with any of this. See you on the 17th!

Dennis

RECEIVED
OCT - 1 2001
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Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>



Gray Davis
Governor

SEP 20 2001

To Attached Mailing List

The Division of Water Rights (Division) received a complaint against Doug and Heidi Cole on June 18, 2001, lodged by Don Mooney, legal counsel representing the Klamath Forest Alliance (KFA). On August 20, 2001, an Answer to Complaint was received from Janet Goldsmith, legal counsel for the Coles. Based on a short telephone discussion with Mr. Mooney prior to him leaving on vacation, we do not believe that Ms. Goldsmith's response adequately resolves the complaint filed on behalf of the KFA. Therefore, unless notified to the contrary, the next step in the complaint process is to schedule a field investigation.

We propose to conduct this investigation on **Wednesday, October 17, 2001**. We would like to have all interested parties meet at the Marble Mountain Ranch at 9:00 a.m. on that date. Because the issues raised by KFA relate to the health and well being of anadromous fish, we would appreciate the participation of representatives from the National Marine Fisheries Service and the California Department of Fish and Game. We will be inspecting both Stanshaw Creek below the point of diversion and Irving Creek below the point where diverted water is released to this creek. Because the ditch heads on Forest Service property, we would also appreciate the participation of a representative from the U.S. Forest Service. If these agencies do not participate in this investigation or make other arrangements for their input, we will assume that they have no position or interest in this matter.

If this date is unworkable for any party, please let me know what alternate dates are better. However, Division staff believe that this investigation must be conducted before the onset of winter rains. Therefore, we are not willing to postpone this investigation beyond October 26th.

Please let me know if you intend to participate in the October 17th investigation, or if some other date/time during that week would be preferable. I can be reached by telephone at (916) 341-5307, or by e-mail at mcontreras@waterrights.swrcb.ca.gov.

Sincerely,

Michael Contreras

Attachment

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."

SEP 20 2001

Mailing List

Kronick, Moskovitz, Tiedemann & Girard
Attention Ms. Janet Goldsmith
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-4416

Mr. Don Mooney
129 C Street, Suite 2
Davis, CA 95616

National Marine Fish Service
Santa Rosa Field Office
Attention Ms. Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Department of Fish and Game
Environmental Services
Attention Dennis Maria
Attention Ron Prestly
601 Locust Street
Redding, CA 96001

U.S. Department of Agriculture
Orleans Ranger District
Attention Bill Heitler, District Ranger
P.O. Drawer 410
Orleans, CA 95556-0410

California Environmental Protection Agency

*"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption.
For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."*



State Water Resources Control Board

WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
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Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

JUL 02 2001

Mr. Doug and Ms. Heidi Cole
92250 Highway 96
Somes Bar, California 95568

Dear Doug and Heidi:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE ALLEGING UNREASONABLE DIVERSION

The State Water Resources Control Board's (SWRCB) Division of Water Rights has received a complaint on behalf of the Klamath Forest Alliance (KFA) regarding your diversion of water from Stanshaw Creek, a tributary to the Klamath River. In a letter from their attorney, your water rights are questioned and it is alleged that your diversion is unreasonable in that it compromises the downstream fishery.

Enclosed for your review is a copy of the June 14, 2001 letter, an "Answer to Complaint" form, and an information pamphlet. Please use the form to respond to the allegations within 15 days from the date of this letter. Upon receipt of your responses, all items submitted by each party will be evaluated to determine whether further action is required by the SWRCB.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,

Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."

005272

DONALD B. MOONEY
Admitted in California and Oregon

129 C Street, Suite 2
Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

June 14, 2001

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

*Re: Unlawful Diversion of Water by Doug and Heidi Cole from
Stanshaw Creek*

Dear Mr. Schueller:

This letter is written on the behalf of the Klamath Forest Alliance ("KFA") regarding the unlawful diversion of water from Stanshaw Creek, a tributary to the Klamath River. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. To that end, KFA requests that without any further delay the State Water Resources Control Board's Division of Water Rights ("SWRCB") issue an order that directs Doug and Heidi Cole to cease and desist their unlawful diversion of water from Stanshaw Creek, as such diversion adversely impacts public trust resources, including but not limited to coho salmon, a federally listed species.

Although the Coles divert up to 3.0 cfs from Stanshaw Creek, the Coles do not possess an appropriative water right to divert this quantity of water. (See letter dated September 15, 1998, from Harry M. Schueller to Doug Cole, Regarding: Unauthorized Diversion - Stanshaw Creek in Siskiyou County ("Schueller Letter")) For your convenience a copy of your letter is attached as Exhibit A to this letter.) To the extent that the Coles divert water based upon a claim to a pre-1914 appropriative water right, California water law limits any such water right to the amount of water put to continuous, reasonable and beneficial use regardless of the original water right. (See Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) According to the SWRCB's Division of Water Rights, any claim the Coles may have to a pre-1914 appropriative water is limited to the Coles' historic domestic and irrigation use. The SWRCB has quantified such use to be 0.11 cfs. (See Schueller Letter p. 1 & 2) This quantity is based on the yet unsubstantiated assumption that the Coles are successors in interest to Sam Stanshaw's water rights as established in a March 25, 1867 letter by Mr. Stanshaw. (See copy of the March 25, 1867, Stanshaw Water Rights Notice attached as Exhibit B to this letter.)

The Coles, however, have failed to provide any evidence to the SWRCB that the Stanshaw Water Right Notice applies to their land. Unless the Coles can substantiate the assumption that Stanshaw Water Rights Notice applies to their property, any diversion of water by the Coles from Stanshaw Creek violates

California Water Code, section 1200 *et seq.* It should be noted that former water diversion ditches and pipes, large rock piles and abandoned mining equipment indicate that large scale mining and water consumption from Stanshaw Creek, took place on the land now owned by the Fisher Family, not the Coles. Furthermore, Stanshaw Creek itself flows through the former and not the latter. If the Coles can prove that they are successors to Stanshaw's water rights, then any diversion of water in excess of a resulting pre-1914 appropriative water right of approximately 0.11 cfs violates Water Code, section 1200 *et seq.* In either event, the Coles do not possess an appropriative water right to support their current water diversion practices and such practices are contrary to law.

As the Coles do not possess a valid water right for their current diversion of water, the Coles filed an application to appropriate water seeking to divert 3 cfs from Stanshaw Creek via a flume which is 12-inches deep, 24-inches wide, and 5,200 feet long then through a penstock of 16-inch diameter, 455 foot long steel pipe from Stanshaw Creek, a tributary to the Klamath River, in Siskiyou County (Application to Appropriate Water No. 29449). According to the Cole's application, the penstock utilizes 200 feet of fall to generate a maximum of 33.9 kilowatts at 80 percent efficiency at a hydroelectric plant above Irving Creek. The water is then released into Irving Creek and then into the Klamath River. Despite the fact that the Coles have not obtained a water rights permit from the SWRCB for the diversion of water, the Coles continue to divert up to 3 cfs from Stanshaw Creek.¹

In the Fall of 2000, the California Department of Fish and Game ("DFG") obtained an injunction against the Coles for violating sections 1603 and 5937 of the Fish and Game Code. The injunction required that the Coles remove portions of the dam that they had constructed in Stanshaw Creek. The Coles used this illegal obstruction to pool water in order to assist their diversion from Stanshaw Creek. It must be noted, however, that the injunction obtained by DFG applies only to the illegal obstruction in Stanshaw Creek and does not address the unlawful diversion of water. It is KFA's understanding that even though the Coles or DFG may have modified the diversion structure as required by the injunction, the Coles continue to divert water in excess of any pre-1914 appropriative water right.

In your September 15, 1998, letter to the Coles, you stated that within 45 days of your letter, the Coles must provide information to the Division of Water Rights substantiating their claims to a pre-1914 appropriative water right for their

¹ On November 15, 1999, the SWRCB granted the Coles' request for the registration of a small domestic use pursuant to Water Code section 1228 *et seq.* (Certificate No. R 480, Application 30945R). The Coles' small domestic use registration limits the Coles' diversion to 10 acre-feet per annum ("afa") and does not allow hydroelectric generation as a purpose of use. The Coles' current water diversion practices far exceed the 10-afa limitation. For instance, at a diversion rate of 2.5 cfs, the Coles' exceed the 10-afa limitation in just 4 days. Additionally, the Small Domestic Use Registration requires that the Coles obtain all necessary federal, state and local approvals which the Coles have failed to do.

current water diversion. If the Coles failed to provide the requested information, the matter would be referred to the Division of Water Rights' Complaint Unit to consider appropriate enforcement action. It is our understanding that although two and one-half years have passed since your letter to the Coles, the Coles have not provided the requested information. Despite the Coles' failure to comply with your request, this matter has not been referred to the Complaints Unit and the Coles continue to unlawfully divert water from Stanshaw Creek.

In many instances the unlawful diversion of water may not have a significant impact to public trust resources and other legal users of water while an application to appropriate is reviewed and considered by the SWRCB. In such instances, it is our understanding that the SWRCB's informal practice is to allow such diversions to continue until the application to appropriate has been denied or approved. In the present situation, however, the Coles' unlawful diversion has significant impacts to public trust resources and may result in a violation of section 9 of the federal Endangered Species Act, 16 U.S.C. § 1538.²

Stanshaw Creek and the Klamath River contain coho salmon (*Oncorhynchus kisutch*) which are in the Southern Oregon/Northern California Coasts ESU and are listed as threatened under the federal ESA. See 50 C.F.R. § 102(a)(4). In a letter dated October 5, 2000, from William M. Heitler, District Ranger to Doug and Heidi Cole, Mr. Heitler stated that the National Marine Fisheries Service ("NMFS") and DFG are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting coho salmon. (A copy of Mr. Heitler's October 5, 2000 letter is attached to this letter as Exhibit C.) Stanshaw Creek also contains steelhead (*Oncorhynchus mykiss*) which are in the Klamath Mountains Province and are listed as candidate species under the ESA and a species of concern to DFG.

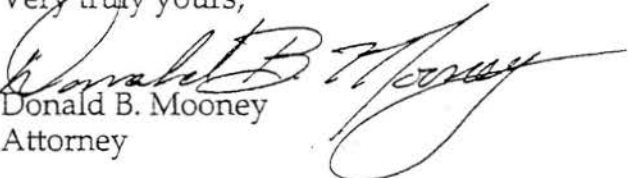
As the Coles' unauthorized diversion of water poses a significant risk to public trust resources in and along Stanshaw Creek and the Klamath River, including but not limited to the impacts to coho salmon, a federally listed species, KFA respectfully requests that the SWRCB follow through on its September 15, 1998, letter and immediately refer this matter to the Complaint Unit. KFA also

² The courts have ruled that when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition. (*Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997), cert. denied, 119 S.Ct. 81, and cert. denied, 119 S.Ct. 437 (1998).) The same rationale that caused the court in *Strahan* to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the SWRCB's decision to allow the Coles to continue diverting water from Stanshaw Creek, even though the SWRCB has concluded that Coles do not possess an appropriative water right. In addition, recent case law confirms that the failure of government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act. (*Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999).)

requests that the SWRCB direct the Coles to cease and desist from any further diversion of water from Stanshaw Creek in excess of an established pre-1914 water right until the SWRCB has the opportunity to review and consider the Coles' Application to Appropriate Water and the associated protests as well as any biological assessment prepared by the United States Forest Service and a biological opinion prepared by NMFS.

Please do not hesitate to contact me if you have any questions regarding this matter. I can be reached at (530) 758-2377.

Very truly yours,


Donald B. Mooney
Attorney

cc: Felice Pace
Robert Miller
Charles Rich
Larry Allen

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 20.2.2Application 029449

1. 1-7-13.SWRCB.to Cole Attny.App 29449 Cancellation
2. 11-02-12.SWRCB. to Cole Attny. App 29449.req for info
3. 3-30-12. SWRCB. to Cole. App 29449
4. 12-6-06 SWRCB.to DFG and Cole's.App 29449. NMFS Protest
- 4-4-00. SWRCB. to DFG. App 29449 Protest accepted
5. 11-9-05. SWRCB. to Cole. CEQA
6. 06-22-01.SWRCB. to KF. App 29449
7. 3-22-00.SWRCB.to Cole.statement of water diversion and use.S015022
8. 3-27-89. SWRBC.Notice.App. 29449
9. 9-15-98. SWRCB.to Coles. Unauth. Diversion



WR-193

EDMUND G. BROWN JR.
GOVERNORMATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

JAN 07 2013

In Reply Refer to:
MJM:29449**CERTIFIED MAIL**

Marble Mountain Ranch
c/o Ms. Barbara Brenner
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814

Dear Ms. Brenner:

ORDER CANCELING APPLICATION 29449, STANSHAW CREEK IN SISKIYOU COUNTY

The Division of Water Rights is canceling Application 29449, due to failure to submit information requested by the Division. An order canceling the application is enclosed.

The order can also be viewed at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/compliance/revisions/

If you disagree with the enclosed order, you may file a petition for reconsideration with the State Water Resources Control Board (State Water Board) to set aside the cancellation and reinstate the application in accordance with California Code of Regulations, title 23, sections 768 and 769. Section 768 requires that the petition be submitted within 30 days of the date of the order, and be based on one or more of the causes listed in that section. The petition must contain the information required by section 769.

It is your responsibility to remove or modify diversion works or impoundments to ensure that water subject to this cancellation is not diverted and used. Unauthorized diversion and use of water is considered a trespass and subject to enforcement action under Water Code sections 1052 and 1831. Pursuant to Water Code section 1052, any diversion of water from the point of diversion identified in this application may be subject to Administrative Civil Liability of up to \$500 per day without further notice. The State Water Board also may issue a Cease and Desist Order in response to an unauthorized diversion or threatened unauthorized diversion pursuant to Water Code section 1831.

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

005278

Marble Mountain Ranch
c/o Ms. Barbara Brenner

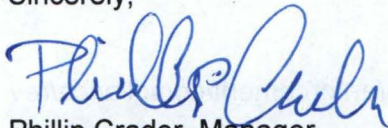
- 2 -

Before initiating any work in a stream channel, you should consult with the Department of Fish and Game and the Regional Water Quality Control Board to ensure that removal of project facilities does not adversely affect a fishery or result in unregulated sediment discharge to a waterway. You must also consult the Department of Water Resources, Division of Safety of Dams if a jurisdictional size dam will be removed or breached (dam height 25 feet or more, or reservoir volume 50 acre-feet or more). These agencies may require a permit or other approval prior to any construction activity.

Some diverters claim rights to divert independent of a permit, license, registration or certification issued by the State Water Board, such as diversions under riparian or pre-1914 rights. With limited exceptions, Water Code section 5101 requires that a Statement of Water Diversion and Use be filed for these diversions. Water Code section 5107 (c)(1) provides that the State Water Board may impose a civil liability of \$1,000, plus \$500 per day for each additional day on which the violation continues if the person fails to file a statement within 30 days after the board has called the violation to the attention of that person. These penalties are in addition to any penalties that may be imposed if the diverter does not hold a valid right or diverts in excess of what is authorized under that right. This letter serves as your notice of the statement requirement and potential penalty.

If you require further assistance, please contact Matt McCarthy at (916) 341-5310 or mmccarthy@waterboards.ca.gov. Written correspondence or inquiries should be addressed as follows: State Water Resources Control Board, Division of Water Rights, Attn: Matt McCarthy, P.O. Box 2000, Sacramento, CA, 95812-2000.

Sincerely,



Phillip Crader, Manager
Permitting and Licensing Section
Division of Water Rights

Enclosure

cc (certified w/enclosure): Douglas Cole, et al.
92520 Highway 96
Somes Bar, CA 95568

cc (w/o enclosure): T. James Fisher, et al.
100 Tomorrow Rd
Somes Bar, CA 95568

Konrad Fisher
100 Tomorrow Rd
Somes Bar, CA 95568

California Sportfishing Protection Alliance
1608 Francisco Street
Berkeley, CA 94703

Klamath National Forest
Ukonom Ranger District
c/o Mr. Jon Grunbaum
P.O. Drawer 410
Orleans, CA 95556

ec (w/o enclosure): State Water Resources Control Board
Taro Murano
tmurano@waterboards.ca.gov

Regional Water Quality Control Board
Bryan McFadin
bmcfadin@waterboards.ca.gov

Department of Fish and Game
Jane Vorpapel
jvorpapel@dfg.ca.gov

National Marine Fisheries Service
Margaret Tauzer
margaret.tauzer@noaa.gov

State Water Resources Control Board

NOV 02 2012

In Reply Refer to:
MJM:A029449

Marble Mountain Ranch
c/o Ms. Barbara Brenner
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814

Dear Ms. Brenner:

**APPLICATION 29449 OF DOUGLAS COLE, ET AL., STANSHAW CREEK TRIBUTARY TO
KLAMATH RIVER IN SISKIYOU COUNTY**

By letter dated March 30, 2012, State Water Resources Control Board (State Water Board), Division of Water Rights (Division) staff requested that Douglas Cole (Applicant) provide a plan within sixty days to supply information necessary to document compliance with Water Code section 1275, subdivision (b). This information is necessary in order to continue processing Application 29449.

By letter dated May 29, 2012, you requested additional time to gather information about the Applicant's claim of pre-1914 right. Division staff granted your request. In your letter, however, you indicated that it had become apparent that the Applicant holds a valid pre-1914 water right that would negate the need for Application 29449.

By letter dated October 1, 2012, you provided information regarding the Applicant's claim of pre-1914 right. In the letter, you state that the State Water Board has no authority to adjudicate a pre-1914 right and thus has no jurisdiction over the Applicant's pre-1914 claim of right.

Pre-1914 Claim and Statement Requirements

The Applicant filed Statement of Water Diversion and Use (Statement) No. 15022 with the Division on December 1, 1998. According to Division files, no Supplemental Statements have been filed pursuant to Water Code section 5104, subdivision (a). Consequently, Statement No. 15022 is inactive in the Division's records. In your October 1, 2012 letter, you indicate that the Applicant has made continuous use of water pursuant to their pre-1914 claim of right.

With limited exceptions, Water Code section 5101 requires that a Statement be filed for a diversion not covered by a permit or license. After an Initial Statement is filed, Water Code section 5104 requires Supplemental Statements to be filed at three-year intervals. Water Code section 5107, subdivision (c)(1) provides that the State Water Board may impose a civil liability of \$1,000, plus \$500 per day for each additional day on which the violation continues if the person fails to file a

NOV 02 2012

Statement within 30 days after the State Water Board has called the violation to the attention of that person. These penalties are in addition to any penalties that may be imposed if the diverter does not hold a valid right or diverts in excess of what is authorized under that right. This letter serves as your notice of the Statement requirement and potential penalty. You should immediately file a new Statement, or contact Mr. Bob Rinker to see if Statement No. 15022 can be reactivated so you can file online Supplemental Statements. Mr. Rinker can be reached at (916)-322-3143 or by email at rrinker@waterboards.ca.gov.

Request for Information

In the Division's March 30, 2012 letter, the Division threatened cancellation of Application 29449, pursuant to Water Code section 1276, if the requested information was not received within the time period specified. To date, the Division has not received the requested information. If the Division does not receive the requested information within 30 days of the date of this letter, Application 29449 will be cancelled.

Matt McCarthy is the staff person presently assigned to this matter, and he may be contacted at (916) 341-5310 or mmccarthy@waterboards.ca.gov. Written correspondence or inquiries should be addressed as follows: State Water Resources Control Board; Division of Water Rights; Attn: Matt McCarthy; P.O. Box 2000; Sacramento, CA 95812-2000.

Sincerely,



Phillip Crader, Manager
Permitting and Licensing Section
Division of Water Rights

- cc: Marble Mountain Ranch
c/o Douglas Cole
92529 Highway 96
Somes Bar, CA 95568
- ec: State Water Resources Control Board
Matthew McCarthy
mmccarthy@waterboards.ca.gov
- John O'Hagan
johagan@waterboards.ca.gov
- Taro Murano
tmurano@waterboards.ca.gov
- Bob Rinker
rrinker@waterboards.ca.gov
- ec: Continues on next page.

Marble Mountain Ranch
c/o Ms. Barbara Brenner

- 3 -

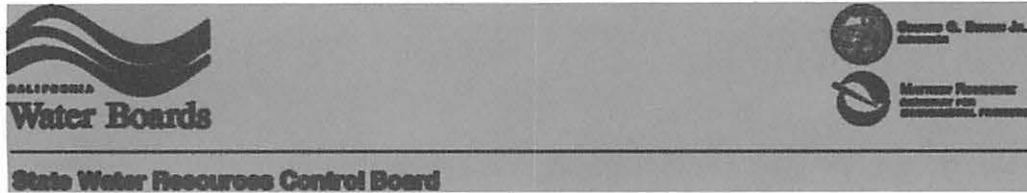
WR-193

NOV 02 2012

ec: Department of Fish and Game
Jane Vorpagel
jvorpage@dfg.ca.gov

National Marine Fisheries Service
Margaret Tauzer
margaret.tauzer@noaa.gov

005283



MAR 30 2012

In Reply Refer
To: MMcCarthy: A029449

Mr. Douglas Cole
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

APPLICATION 29449 OF DOUGLAS COLE, ET AL., STANSHAW CREEK TRIBUTARY TO
KLAMATH RIVER IN SISKIYOU COUNTY

Division of Water Rights (Division) staff has reviewed Application 29449 to determine the next step in application processing.

Stanshaw Creek is a tributary to the Klamath River and serves as thermal refuge for coho salmon (*Oncorhynchus kisutch*), which is currently listed as threatened on both state and federal endangered species lists. According to staff from the National Marine Fisheries Service (NMFS) and the Department of Fish and Game (DFG), Stanshaw Creek is an important refuge for juvenile coho salmon and steelhead trout (*O. mykiss*) which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. Both fish have been documented in Stanshaw Creek.

NMFS and DFG have both requested that any permit issued pursuant to your application include a minimum bypass flow to protect salmonids in Stanshaw Creek. You have agreed to alter your diversion system to return flows back to Stanshaw Creek, but only if grant funds are available to cover the costs of such construction. To date, you have not agreed to maintain a bypass flow in Stanshaw Creek nor have you secured grant funds.

Since you have indicated that you will not fund the measures identified as necessary to protect public trust resources, it appears that the Division lacks the information needed to support a finding that the requirements of Water Code section 1275, subdivision (b) have been met. Water Code section 1275, subdivision (b) states that the State Water Board may request the following information:

Information needed to comply, or demonstrate compliance with, any applicable requirements of the Fish and Game Code or the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.)

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

♻️ RECYCLED PAPER



In Reply Refer
To MMCA 20419

MAR 30 2012

Mr. Douglas Cole
Mable Mountain Ranch
8520 Highway 98
Socorro, NM 87801

Dear Mr. Cole:

APPLICATION 20419 OF DOUGLAS COLE ET AL, STANSHAW CREEK TRIBUTARY TO
KIAMATH RIVER IN SISKIYOU COUNTY

Division of Water Rights (Division) and has reviewed Application 20419 to determine the next
step in application processing.

Stanshaw Creek is a tributary to the Kiamath River and serves as thermal refuge for cold
water (nonpoint) trout which is currently listed as threatened on both state and
federal endangered species lists. According to staff from the National Marine Fisheries Service
(NMFS) and the Department of Fish and Game (DFG), Stanshaw Creek is an important refuge
for winter cutthroat trout and steelhead trout (O mykiss) which may need to secure the winter
habitat and low dissolved oxygen levels occasionally found in the Kiamath River during
the winter season and early fall months. Both fish have been documented in Stanshaw Creek.

NMFS and DFG have both requested that any permit issued pursuant to your application
include a minimum bypass flow to protect salmonids in Stanshaw Creek. You have agreed to
alter your diversion system to return flow back to Stanshaw Creek, but only if grant funds are
available to cover the costs of such construction. To date, you have not agreed to maintain a
bypass flow in Stanshaw Creek nor have you secured grant funds.

Since you have indicated that you will not fund the measures identified as necessary to protect
public trust resources, it appears that the Division lacks the information needed to support a
grant that the requirements of Water Code section 1735, subdivision (b) have been met.
Water Code section 1735, subdivision (b) states that the State Water Board may request the
following information:

Information needed to comply or demonstrate compliance with any applicable requirement of
the Fish and Game Code or the Federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531
et seq.).

Mr. Douglas Cole

- 2 -

MAR 30 2012

Pursuant to Water Code section 1276, the Division may cancel Application 29449 unless, within the next 60 days, the Applicant provides a plan to supply the information necessary to document compliance with Water Code section 1275, subdivision (b).

Matt McCarthy is the staff person presently assigned to this matter, and he may be contacted at (916) 341-5310 or mmccarthy@waterboards.ca.gov. Written correspondences or inquiries should be addressed as follows: State Water Resources Control Board, Division of Water Rights, Attn: Matt McCarthy, PO Box 2000, Sacramento, CA, 95812-2000.

Sincerely,

ORIGINAL SIGNED BY:

Phillip Crader, Manager
Permitting and Licensing Section
Division of Water Rights

ec: State Water Resources Control Board
John O'Hagan
johagan@waterboards.ca.gov

Department of Fish and Game
Jane Vorpapel
jvorpapel@dfg.ca.gov

National Marine Fisheries Service
Margaret Tauzer
margaret.tauzer@noaa.gov



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
Mailing Address: P.O. Box 2000 ♦ Sacramento, California 95812-2000
FAX: 916.341.5400 ♦ www.waterrights.ca.gov

WR-193



Arnold Schwarzenegger
Governor

MEMORANDUM

TO: Jane Vorpapel
CALIFORNIA DEPARTMENT OF FISH AND GAME
601 Locust Street
Redding, CA 96001

FROM: Katherine Mrowka, Chief
Watershed Unit 3
DIVISION OF WATER RIGHTS

DATE: ~~DEL 7 8 2008~~

SUBJECT: APPLICATION 29449 OF DOUG COLE, MARBLE MOUNTAIN RANCH,
STANSHAW CREEK IN SISKIYOU COUNTY

Division of Water Rights (Division) staff understands that there has been recent progress in addressing the public trust resource needs associated with Application 29449. A response is requested within the next 45 days that states any proposed protest dismissal conditions that have been developed for this matter.

I can be contacted at (916) 341-5363.

✓ cc: Douglas Cole
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

Will Harling
Mid Klamath Watershed
P.O. Box 764
Somes Bar, CA 95568

California Environmental Protection Agency



Recycled Paper

005287



State Water Resources Control Board

WR-198



Linda S. Adams

Secretary for

Environmental Protection

Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300

P.O. Box 2000 ♦ Sacramento, California 95812-2000

Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger

Governor

In Reply Refer
to:334:KDM:29449

~~CALL 11 5 2001~~

Douglas Cole
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

APPLICATION 29449 OF DOUGLAS T. COLE, STANSHAW CREEK IN
SISKIYOU COUNTY

The National Marine Fisheries Service (NMFS) protested Application 29449 on the basis of potential injury to public trust resources. NMFS provided protest dismissal conditions by letter dated November 15, 2001. The Division has no record to indicate whether you concur with the dismissal conditions. A response is requested within the next 45 days stating whether you are amenable to the conditions or if the conditions have been modified subsequent to the November 15 letter and you are amenable to the modified conditions.

If you have any questions, I can be contacted at (916) 341-5363.

Sincerely,

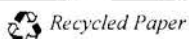
ORIGINAL SIGNED BY:

Katherine Mrowka, Chief
Watershed Unit 3

cc: National Marine Fisheries Service
Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Will Harling
Mid Klamath Watershed
P.O. Box 764
Somes Bar, CA 95568

California Environmental Protection Agency



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State Water Resources Control Board

Voreppes
WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
901 P Street • Sacramento, California 95814 • (916) 657-0765
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 657-1485 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

MEMORANDUM

TO: Mr. Donald B. Koch, Regional Manager
Department of Fish and Game
601 Locust Street
Redding, CA 96001

FROM: *Yoko Mooring*
Yoko Mooring
Sanitary Engineering Associate
Application Unit
DIVISION OF WATER RIGHTS

DATE: APR 04 2000

SUBJECT: APPLICATION 29449 OF COLE--STANSHAW CREEK TRIBUTARY TO
KLAMATH RIVER IN SISKIYOU COUNTY

Your protest has been accepted. In your protest, you request an extension of time for a field review to develop suitable minimum bypass flow conditions. You are granted the extension of time until July 1, 2000 to complete your study and submit protest dismissal terms. The applicant is not required to answer your protest until these terms are submitted.

Please let us know promptly if you and the applicant reach agreement and you withdraw your protest. If you have any questions, please call me at (916) 657-1965.

cc: Doug Cole, et al.
92520 Highway 96
Somes Bar, CA 95568

RECEIVED

APR - 5 2000

Dept. of F&G Region 1



State Water Resources Control Board

WR-193



Alan C. Lloyd, Ph.D.
Agency Secretary

Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
Mailing Address: P.O. Box 2000 ♦ Sacramento, California 95812-2000
FAX: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

NOV 09 2005

Doug Cole, et al.
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

MEMORANDUM OF UNDERSTANDING FOR PREPARATION OF ENVIRONMENTAL DOCUMENT AND WATER AVAILABILITY ANALYSIS

Your water right application(s) has/have been reviewed to determine what steps you will need to take before the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) can continue processing your application(s). The required steps are discussed below.

California Environmental Quality Act (CEQA) Documents

CEQA requires that the State Water Board, as Lead Agency, directly or under contract, prepare the appropriate environmental documentation prior to taking any discretionary action, such as approving a water right application. You are responsible for all costs related to the environmental evaluation and preparation of CEQA documents. This includes the related fishery impact studies discussed below. You are required to enter into a Memorandum of Understanding (MOU) that defines your role and the roles of the State Water Board and your environmental consultant(s) for preparing the appropriate CEQA documents. A copy of the MOU template can be obtained at www.waterrights.ca.gov/forms (click on *Memorandum of Understanding for Preparation of Environmental Documents*). If you are unable to access the Division's web page, a copy can be obtained by contacting the Division at the above address or telephone number.

If you think that CEQA does not apply to this project, please provide written justification and documentation to support your position. Also note that the final determination regarding the applicability of CEQA to the appropriate water right process is the responsibility of the State Water Board as Lead Agency.

307, 308
15328, 15333 small water
exemptions: modifications
CEQA Guidelines
Sect 15301-305
301-333

California Environmental Protection Agency

Doug Cole, et al.

- 2 -

Potential Cumulative Impacts on Threatened Fish

National Marine Fisheries Service (NOAA Fisheries Service) listed the Central California Coast coho salmon (*Oncorhynchus kisutch*) and the Central California Coast steelhead (*O. mykiss*) as threatened under the federal Endangered Species Act. Subsequently, NOAA Fisheries Service and the California Department of Fish and Game (DFG) developed a method to assess potential site-specific and cumulative impacts of proposed water projects on anadromous fishery resources in coastal watersheds. This assessment method is described in a document titled *Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams (Draft)* (Guidelines), prepared by NOAA Fisheries Service and DFG and dated June 17, 2002. A copy of this document can be obtained at www.waterrights.ca.gov/coastal_streams/index.html.

Request for Information

The applicant is responsible for completing most technical activities associated with processing a water right application, including resolution of valid protests filed against the application. These technical activities may require that you hire qualified engineering and environmental consultants. They will analyze the project watershed and, if necessary, recommend specific project modifications or actions (mitigation measures) to: 1) prevent your project from contributing to significant cumulative impacts on anadromous fishery resources in the watershed; 2) prevent your project from causing or contributing to other significant environmental impacts; and 3) resolve valid protests against the project. You or your environmental consultant(s) must also prepare the appropriate CEQA documents. A list of environmental and engineering consultants who are familiar with the preparation of water rights analyses and CEQA documents can be obtained at www.waterrights.ca.gov/wrinfo/contacts.htm.

As part of this process, you must determine whether the total diversion demand in the project watershed, including your proposed diversion(s), may cause a significant adverse impact to anadromous fishery resources. Documentation to support a finding that there is water available for appropriation for this project must also be provided according to California Water Code section 1375 (d). To meet these requirements, the applicant must prepare and submit to the Division a Water Availability Analysis/Cumulative Flow Impairment Index Report (WAA/CFII Report) for review and acceptance. An example of how the WAA/CFII Report should be formatted can be viewed at www.waterrights.ca.gov/forms. The WAA/CFII Report's results may require additional site-specific hydrological and biological surveys/analyses in consultation with NOAA Fisheries Service and DFG. Please consult the Guidelines for further information.

In view of the above discussion, please advise the Division in writing within 30 days of the date of this letter if you wish to continue pursuing a water right permit for your project. Your response should also acknowledge that you agree to retain the appropriate engineering and environmental consultants to prepare the WAA/CFII Report and appropriate CEQA documents. If you do not respond in writing within the time allowed, we will assume that you no longer wish



State Water Resources Control Board

WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5300
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>

Gray Davis
Governor

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>.

JUN 22 2001

Mr. Konrad Fisher
3210 Kingle Road NW
Washington D.C. 20008

Dear Mr. Fisher:

APPLICATION 29449 OF DOUG COLE ET. AL. TO DIVERT 3.0 CUBIC FEET PER SECOND (CFS) OF WATER FROM STANSHAW CREEK TRIBUTARY TO KLAMATH RIVER IN SISKIYOU COUNTY FOR GENERATION OF 33.9 KILOWATTS OF ELECTRICITY

Per our phone conversation on 21 June, 2001, I have enclosed text, tables, and a map from the May, 1965 bulletin authored by the Department of Water Resources (DWR) entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6) that is pertinent to the above mentioned application. As you will see in Table 4 on page 58 of the copied report, the type of apparent water right is incorrectly listed as riparian. Page 31 states, "Those [diversions] which have been neither adjudicated nor based on appropriations [water right applications or pre-1914 appropriations], but for which the area of use is apparently riparian to the streams or which the owner claims to be riparian are listed as 'riparian.'" Either DWR incorrectly came to this conclusion or the owner incorrectly stated that it was a riparian right. It is interesting here to note that neither the owner at the time, L.H. Hayes, nor the previous owner, McMertree, listed this right as a pre-1914 appropriation even though the indicated date of first use on the table is "About 1800."

As you will also see in the enclosures, 362 acre-feet (af) was *measured* at the nozzle in 1958; this would be the amount of water that was put to beneficial use. This calculates to a daily average beneficial use of:

$$\begin{aligned} 362 \text{ af/yr} \div 365 \text{ days/yr} &= 0.99 \text{ af/day} \\ 0.99 \text{ af/day} \div 1.98 \text{ af/day/cfs} &= 0.50 \text{ cfs} \end{aligned}$$

Average instantaneous flow per month could also be calculated using data from Table 5. Small domestic use is not calculated in this figure, although that would be negligible at less than 10 af/yr. I also assume that seepage losses are not figured into this since this is measured at the nozzle rather than the point of diversion, but I would not expect seepage losses to nearly approach 2.5 cfs.

JUN 22 2001

Mr. Konrad Fisher

2

Please also note that: 1) 1958 was an "unusually wet year," with Klamath River flows nearly double that of the average annual flow, and 2) 6 kilowatts of electricity were generated by the diversion in question. Hence, an average rate of 0.5 cfs through the nozzle was probably all that was needed to generate 6 kilowatts, and this lower rate was not the result of low flows available for diversion from Stanshaw Creek.

If I can be of further assistance, please call me at (916) 341-5392.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. E. Miller', with a stylized, cursive script.

Robert E. Miller
Environmental Specialist II
Environmental Review Unit 2

Enclosures

State of California, State Water Resources Control Board
Division of Water Rights
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400 Web: <http://waterrights.ca.gov>
S015022
2005, 2006, 2007
SUPPLEMENTAL STATEMENT OF WATER DIVERSION AND USE FORM
Owner(s) of Record:
DOUGLAS T COLE; SHIRLLE MORGAN
Primary Contact:
AQUA ENGINEERING & CONSULTING
PO BOX 160621
SACRAMENTO, CA 95816
Phone No. 916-612-3539
Fax No.
E-mail Address:
Agent:
Address:
Phone No.
Fax No.
E-mail Address:
Notifying the Division of Water Rights of ownership or address changes is the responsibility of the claimant
Please Complete and Return This Form by JULY 1, 2008
Source Name: STANSHAW CREEK
Tributary To:
County: Siskiyou
Diversion within: SW 1/4 of NE 1/4 Section 33, T 13 N, R 6 E, HB&M
Year of First Use:
Name of Diversion works:
**Assessor Parcel Number
of the Diversion site:**
A. Water is Used Under: Riparian claim ____ Pre-1914 claim ____ Court Decree No.: ____ Other (explain): ____
B. Year of First Use: (Please provide if missing in the Division of Rights database (ewrims)) ____
C. Rate of Diversion: The rate of diversion of water for each month used and entered in the table below is shown in units of:
Gallons per minute (gpm) ____ Gallons per day (gpd) ____ Cubic feet per second (cfs) ____

Year	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Average Rate
2005													
2006													
2007													

D. Quantity of Water Used: The quantity of water used each month and entered in the table below is shown in units of:
Gallons ____ Million Gallons (MG) ____ Acre-feet (AF) ____

Year	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Total Annual
2005													
2006													
2007													

E. Purpose of Use – Specify number of acres irrigated, stock watered, persons served, etc.
Irrigation ____ acres; Stockwatering ____; Domestic ____;
Other (specify) ____
Parcel Number(s) of Place of Use: ____
**F. Changes in Method of Diversion – Describe any changes in your project since your previous statement was filed.
(New pump, enlarged diversion dam, location of diversion, etc.)**
G. Please answer only those questions below which are applicable to your project.
1. Conservation of water
a. Are you now employing water conservation efforts? YES ____ NO ____
Describe any water conservation efforts you have initiated: ____
b. If you are claiming credit for water conservation under section 1011 of the Water Code for your claimed pre-1914 appropriative right, please show the amount of water conserved:
Reduction in Diversions:
Year ____ (AF/MG) Year ____ (AF/MG) Year ____ (AF/MG)

Reduction in consumptive use:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG) ^{WS}193

I have data to support the above surface water use reductions due to conservation efforts. YES _____ NO _____

2. Water quality and wastewater reclamation

- a. Are you now or have you been using reclaimed water from a wastewater treatment facility, desalination facility or water polluted by waste to a degree which unreasonably affects such water for other beneficial uses? YES _____ NO _____.
- b. If you are claiming credit due to the substitution of reclaimed water, desalinated water or polluted water in lieu of a claimed pre-1914 appropriative right under section 1010 of the Water Code, please show amounts of reduced diversions and amounts of substitute water supply used:

Amount of reduced diversion:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)

State the type of substitute water supply: _____

Amount of substitute water supply used:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)

I have data to support the above surface water use reductions due to the use of a substitute water supply. YES _____ NO _____.

3. Conjunctive use of surface water and groundwater

- a. Are you now using groundwater in lieu of surface water? YES _____ NO _____.
- b. If you are claiming credit due to the substitution of groundwater for a claimed pre-1914 appropriative right under section 1011.5 of the Water Code, please show the amounts of groundwater used:
- Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)
- I have data to support the above surface water use reductions due to the use of groundwater. YES _____ NO _____.

I understand that it may be necessary to document the water savings claimed in "F" above if credit under Water Code sections 1010 and 1011 is sought in the future.

I declare that the information in this report is true to the best of my knowledge and belief.

DATE: _____, 20_____ at _____, California

SIGNATURE: _____

PRINTED NAME: _____
(first name) (middle initial) (last name)

COMPANY NAME: _____

ITEM CONTINUATION If there is insufficient space for your answers, please use the space provided below or add an attachment sheet.

GENERAL INFORMATION PERTAINING TO WATER RIGHTS IN CALIFORNIA

There are two principal types of surface water rights in California. They are riparian and appropriative rights.

A riparian right enables an owner of land bordering a natural lake or stream to take and use water on his riparian land. Riparian land must be in the same watershed as the water source and must never have been severed from the sources of supply by an intervening parcel without reservation of the riparian right to the severed parcel. Generally, a riparian water user must share the water supply with other riparian users. Riparian rights may be used to divert the natural flow of a stream but may not be used to store water for later use or to divert water which originates in a different watershed, water previously stored by others, return flows from use of groundwater, or other "foreign" water to the natural stream system.

An appropriative right is required for use of water on non-riparian land and for storage of water. Generally, appropriative rights may be exercised only when there is a surplus not needed by riparian water users. After the formation of the California Water Commission back on December 19, 1914, new appropriators have been required to obtain a permit and license from the State. Appropriative rights can be granted to waters "foreign" to the natural stream system.

Statements of Water Diversion and Use must be filed by riparian and pre-1914 appropriative water users as set forth in Water Code section 5100 with specific exceptions. The filing of a statement (1) provides a record of water use, (2) enables the State to notify such users if someone proposes a new appropriation upstream from their diversions, and (3) assists the State to determine if additional water is available for future appropriators.

The above discussion is provided for general information. For more specific information concerning water rights, please contact an attorney or write to this office. We have several pamphlets available. They include: (1) Statements of Water Diversion and Use, (2) Information Pertaining to Water Rights in California, and (3) Appropriation of Water in California.



S015022%\$%2004

2002, 2003, 2004

SUPPLEMENTAL STATEMENT OF WATER DIVERSION AND USE

If the information below is inaccurate, please line it out in red and provide current information.

Notify this office if ownership or address changes occur during the coming year.

Please Complete and Return This Form by JULY 1, 2005.

***If the mail recipient's name, address or phone No. is wrong or missing, please correct.**

Owner of Record: DOUGLAS T COLE; SHIRLLE MORGAN;

PRIMARY CONTACT OR AGENT FOR MAIL & REPORTING:

AQUA ENGINEERING & CONSULTING

C/O SEAN BAGHEBAN

PO BOX 160621

SACRAMENTO, CA 95816

STATEMENT NO.: S015022
CONTACT PHONE NO.: (916)612-3539

Source Name: STANSHAW CREEK
Tributary To: KLAMATH RIVER
County: Siskiyou
Diversion Within: SW1/4 of NE1/4 Section 33, T13N, R06E, HB&M

Year of First Use:
Parcel Number:

Return Mail

A. **Water is Used Under:** Riparian claim _____ Pre-1914 right _____ Other (explain): _____

B. **Year of First Use:** (Please provide if missing above) _____

C. **Amount of Use:** Enter the amount (or the approximate amount) of water used each month, using the table below.

Amounts below are in: Gallons				Million Gallons (MG)				Acre-feet (AF)				Other	Total Annual
Year	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	
2002													
2003													
2004													

D. **Purpose of Use** – Specify number of acres irrigated, stock watered, persons served, etc.

Irrigation _____ acres; Stockwatering _____; Domestic _____;

Other (specify) _____

E. **Changes in Method of Diversion** – Describe any changes in your project since your previous statement was filed.
(New pump, enlarged diversion dam, location of diversion, etc.)

F. Please answer only those questions below which are applicable to your project.

1. Conservation of water

a. Are you now employing water conservation efforts? YES _____ NO _____
Describe any water conservation efforts you have initiated: _____

b. If you are claiming credit for water conservation under section 1011 of the Water Code for your claimed pre-1914 appropriative right, please show the amount of water conserved:

Reduction in Diversions:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)

Reduction in consumptive use:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)

I have data to support the above surface water use reductions due to conservation efforts. YES _____ NO _____

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84

2. Water quality and wastewater reclamation

WR-193

- a. Are you now or have you been using reclaimed water from a wastewater treatment facility, desalination facility or water polluted by waste to a degree which unreasonably affects such water for other beneficial uses? YES ____ NO ____.
- b. If you are claiming credit due to the substitution of reclaimed water, desalinated water or polluted water in lieu of a claimed pre-1914 appropriative right under section 1010 of the Water Code, please show amounts of reduced diversions and amounts of substitute water supply used:

Amount of reduced diversion:

Year ____ (AF/MG) Year ____ (AF/MG) Year ____ (AF/MG)

State the type of substitute water supply: _____

Amount of substitute water supply used:

Year ____ (AF/MG) Year ____ (AF/MG) Year ____ (AF/MG)

I have data to support the above surface water use reductions due to the use of a substitute water supply. YES ____ NO ____.

3. Conjunctive use of surface water and groundwater

- a. Are you now using groundwater in lieu of surface water? YES ____ NO ____.
- b. If you are claiming credit due to the substitution of groundwater for a claimed pre-1914 appropriative right under section 1011.5 of the Water Code, please show the amounts of groundwater used:

Year ____ (AF/MG) Year ____ (AF/MG) Year ____ (AF/MG)

I have data to support the above surface water use reductions due to the use of groundwater. YES ____ NO ____.

I understand that it may be necessary to document the water savings claimed in "F" above if credit under Water Code sections 1010 and 1011 is sought in the future.

I declare that the information in this report is true to the best of my knowledge and belief.

DATE: _____, 20____ at _____, California

SIGNATURE: _____

PRINTED NAME: _____
(first name) (middle initial) (last name)

COMPANY NAME: _____

If there is insufficient space for your answers, please use the space provided below.

ITEM	CONTINUATION
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

GENERAL INFORMATION PERTAINING TO WATER RIGHTS IN CALIFORNIA

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An appropriative right is required for use of water on non-riparian land and for storage of water. Generally, appropriative rights may be exercised only when there is a surplus not needed by riparian water users. Since 1914, new appropriators have been required to obtain a permit and license from the State. Appropriative rights can be granted to waters "foreign" to the natural stream system.

Statements of Water Diversion and Use must be filed by riparian and pre-1914 appropriative water users as set forth in Water Code section 5100 with specific exceptions. The filing of a statement (1) provides a record of water use, (2) enables the State to notify such users if someone proposes a new appropriation upstream from their diversions, and (3) assists the State to determine if additional water is available for future appropriators.

The above discussion is provided for general information. For more specific information concerning water rights, please contact an attorney or write to this office. We have several pamphlets available. They include: (1) Statements of Water Diversion and Use, (2) Information Pertaining to Water Rights in California, and (3) Appropriation of Water in California.



State Water Resources Control Board

SURNAME
WR-193



Winston H. Hickox
*Secretary for
Environmental
Protection*

Division of Water Rights
901 P Street • Sacramento, California 95814 • (916) 657-0765
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 657-1485 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

In Reply Refer
to:332:KSN:S015022

MAR 22 2000

Douglas T. Cole
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

STATEMENT OF WATER DIVERSION AND USE, STATEMENT NUMBER S015022

Your statement of water diversion and use has been received and assigned the above number. You should refer to this number in any future correspondence to this office regarding the statement.

A copy of the statement is enclosed for your records.

Please notify us of any change in address or change in ownership.

The law requires that supplemental statements be filed at three-year intervals. The form is automatically sent to you by the State Water Resources Control Board at the close of the period.

Thank you for your cooperation. If you have any questions or concerns, please telephone me at (916) 657-1872.

Sincerely,

ORIGINAL SIGNED BY:

Koso Nodohara
Sanitary Engineering Associate
Petition Unit

Enclosure

KSNodehara:ksn/tvonrotz:3-17-00
u:/ksn/S015022 ST-TRANS-LTR

STATEMENT OF WATER DIVERSION & USECLAIMANT: DOUGLAS T COLEFILE NUMBER: S015022 NAME INDX(S): _____CLAIM(S) RECEIVED BY: MAIL _____ OC _____ DATE REC'D: 12-1-98ACCEPT: _____ RETURN: _____ STREAM CODE: 101904000QUAD MAP CODE: B-607 QUAD MAP NAME: Somes Bar.CALIF COORD: ZONE 1 N 0785300 E 1589300

REMARKS: _____

_____S015022
005299

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

98 DEC -1 AM 11:27

STATEMENT OF WATER DIVERSION AND USE

(This is not a Water Right)

This statement should be typewritten or legibly written in ink.

- A. Name of person diverting water Douglas T. Cole (Marble Mountain Ranch)
Address 92520 Highway 96
Somes Bar, CA 95568 Telephone: (530) 469-3437
- B. Water is used under: — Riparian claim; ☒ Pre 1914 right; — Other (explain)
- C. Name of body of water at point of diversion Stanshaw Creek
Tributary to Klamath River, thence Pacific Ocean
- D. Place of diversion SW 1/4 NE 1/4 Section 33, Township 13N, Range 6E, H B&M, Siskiyou County, and locate it on a print from a U.S.G.S. quad sheet or make a sketch on the section grid on the reverse side with regard to section lines and prominent local landmarks. Name of works Marble Mountain Ranch
- E. Do you own the land at the point of diversion? YES ☐ NO ☒
- F. Capacity of diversion works 2.5 (cfs or gpm) Capacity of storage reservoir — (gallons or acre-feet)
Type of diversion facility: Gravity ☒, Pump —
Method of measurement: Weir —, Flume ☒, Electric Meter —, Water Meter —, Estimate —
- G. State quantity of water used each month in gallons or acre-feet

Year	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total Annual
	29.5	29.5	29.5	29.5	24.5	21.5	29.5	29.5	29.5	29.5	29.5	29.5	354.

If monthly and annual use are not known, check months in which water was used. State extent of use in units, such as acres of each crop irrigated, average number of persons served, number of stock watered, etc.

Total annual amount is based on 0.49 cfs.

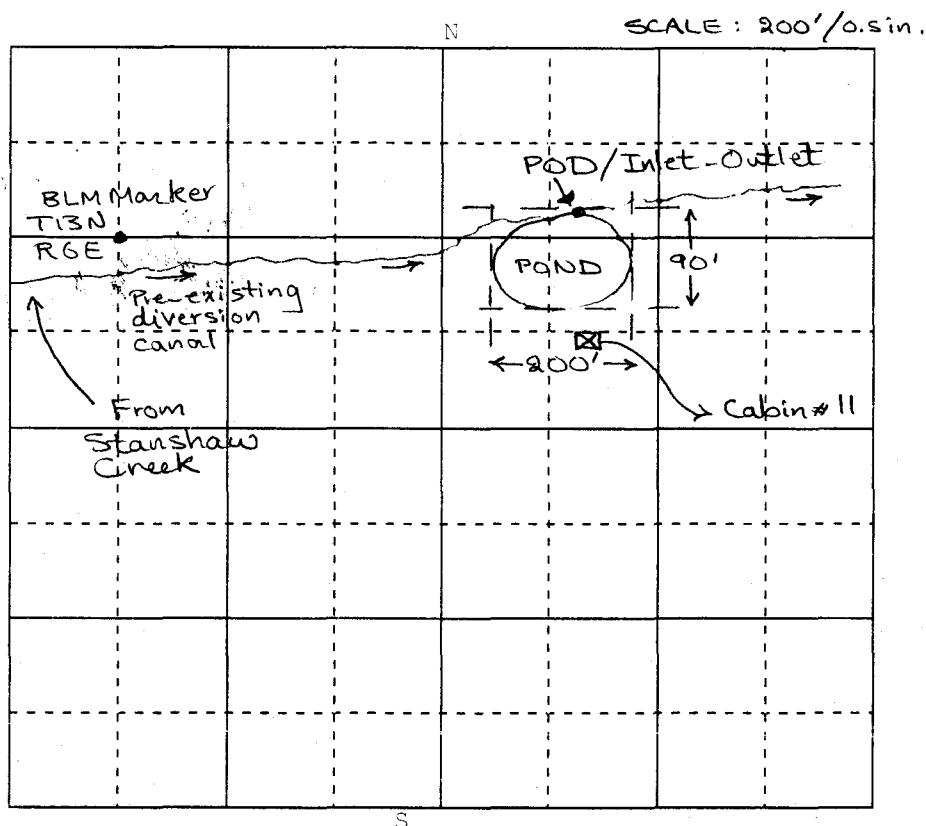
- H. Annual water use in recent years: Maximum — Minimum — (gallons or acre-feet)
- I. Purpose of use (what water is being used for) Irrigation, recreation, domestic
- J. General description or location of place of use (use sketch of section grid on reverse if you desire) See sketch
- K. Year of first use as nearly as known —
- L. Name of person filing statement Sean Bagheban, P.E.
Position: Agent/Consultant for Mr. Cole
Address: P.O. Box 160621, Sacramento, CA 95816

I declare under penalty of perjury that the above is true and correct to the best of my knowledge and belief.

Dated: Nov. 27, 19 98, at Sacramento, California

Signature: Sean Bagheban

The location of the diversion point and the place of use may be sketched on this section grid. If it is used, please enter the section(s), township and range below and show any streams or other landmarks that will assist in identifying the area.



Section(s) 33

Township 13 N ; Range 6 E ; Humboldt B&M

INSTRUCTIONS:

A separate statement should be filed for each point of diversion.

A duplicate copy will be returned for your file.

Please send the completed statement to: State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000



W. H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Division of Water Rights
901 P Street • Sacramento, California 95814 • (916) 657-0765
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 657-1485 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Sept 98

WR-193



Gray Davis
Governor

NOTICE OF APPLICATION TO APPROPRIATE WATER

RECEIVED
APR 20 2000

BY: _____

APPLICATION 29449

DATE FILED March 27, 1989

Notice is hereby given that Doug Dole, Heidi Cole, Norman D. Cole, and Caroline Cole have filed an application for a water right permit for diversion of water from Stanshaw Creek tributary to Klamath River in Siskiyou county. The State Water Resources Control Board (SWRCB) will determine whether a water right permit should be issued for the application and, if so, whether conditions should be included in the permit to protect the environment and other downstream water users. This notice provides a description of the proposed project and also describes the procedure and time frame for submittal of a protest against the application. This notice and future notices of Applications to Appropriate Water by Permit, may be viewed and printed at the Division of Water Rights web site www.waterrights.ca.gov. Any correspondence to the applicant shall be mailed to:

Doug Cole, et al.
92520 Highway 96
Somes Bar, CA 95568

DESCRIPTION OF THE PROJECT

The applicant seeks a right to directly divert 3 cubic feet per second from Stanshaw Creek for hydroelectric power generation via flume of 12-inch deep, 24-inch wide, and 5,200 feet long, then through penstock of 16-inch diameter, 455 feet long steel pipe. The penstock is utilizing 200 feet of fall to generate a maximum of 33.9 kilowatts at 80% efficiency at a power plant just above Irving Creek. The maximum theoretical horsepower capable of being generated by the works is 56.8. After use, the water will be returned to Irving Creek through the ditch, thence the Klamath River.

The project is located approximately 6 miles north of Somes Bar and 2½ miles west of Marble Mountain Wilderness.

APPLICATION INFORMATION

The applicant proposes to divert water from Stanshaw Creek tributary to Klamath River. The Point of Diversion is located within the projected Section 33, T13N, R6E, HB&M. The Place of Use is at the powerhouse within the projected Section 33, T13N, R6E, HB&M. The diversion and place of use are located within the County of Siskiyou. The discharge will be returned to Irving Creek in projected Section 4 T12N, R6E, HB&M.

APPLICATION 29449

Amount of water applied for: 3.0 cfs (Direct Diversion), not to exceed a total of 2,168.1 AFA.

Water will be used for: Hydroelectric.

The applicant has requested to divert water from: January 1 to December 31.

ENVIRONMENTAL INFORMATION

Based on a preliminary review of information provided by the applicant, the project may have a potential for causing a significant effect on the environment. If you have information which indicates that the project will cause a significant effect on the environment, please send this information immediately to:

Mr. Mike Falkenstein,
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000 Sacramento, CA 95812-2000.

This information will be reviewed in accordance with CEQA.

PROCEDURE FOR SUBMITTING PROTESTS

Any person may file a protest against the application. The protest must be submitted in writing to the SWRCB and to the applicant within **40 days** of the date of this notice. Parties may file protests based on any of the following factors:

- . Injury to existing water rights.
- . Adverse environmental impact.
- . Not in the public interest.
- . Contrary to law.
- . Not within the jurisdiction of the SWRCB.

All protests must clearly describe the objections to approval of the application and the factual basis for those objections. If the objection is based on injury to existing water rights, the protest must describe the specific injury to the existing water right that would result from approval of the application. In addition, the party claiming injury to prior water rights must provide specific information that describes the basis of the existing right, the date the use began, the quantity of water used, the purpose of use and the place of use. Please note that any water right permit issued by the SWRCB is subject to and includes conditions to protect vested water rights.

If the protest is based on environmental grounds, or other factors listed above, the protest must be accompanied by a statement of facts supporting the basis of the protest. If sufficient information is not submitted, the SWRCB may reject the protest or request that the protestant submit additional information.

APPLICATION 29449

A protest should be submitted on a standard protest form available from the SWRCB, but can be submitted in letter form. Protests may be submitted by FAX, but the original(s) must be submitted to the SWRCB. An informational pamphlet is available that provides additional information relating to water rights and the procedure for filing protests. Please contact the person listed below if you would like a copy of the pamphlet or protest forms. For good cause, the SWRCB may grant an extension in time to file a protest. A request for an extension of time must be submitted in a timely manner, must specify the additional time required, and state why additional time is needed to file the protest.

RESOLUTION OF PROTESTS

A copy of the protest shall be sent to the applicant. The protest shall include a description of any measures that could be taken to resolve the protest, including modification of the application (i.e., amount, season of diversion, etc.) or conditions (i.e., fish bypass flow, measuring device, etc.) that could be included in the water right permit. The protestant(s) and the applicant are encouraged to discuss methods that could be used to resolve the protest. If the protest(s) can not be resolved, the SWRCB may conduct a field investigation with all interested parties or may hold a water right hearing.

Please contact the engineer listed below if you would like to request an extension of time to file a protest.

CONTACT PERSON

To obtain additional information regarding this project, or to obtain copies of the protest forms or pamphlet, please call Yoko Mooring at (916) 657-1965.

DATE OF NOTICE: **JAN 23 2000**



Peter M. Rooney
Secretary for
Environmental
Protection

State Water Resources Control Board

John P. Caffrey, Chairman

Division of Water Rights

901 P Street • Sacramento, California 95814 • (916) 657-0765 FAX (916) 657-1485
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
Internet Address: <http://www.swrcb.ca.gov>



Pete Wilson
Governor

SEPTEMBER 15 1998

In Reply Refer
to:332:CM:29449, 29450

Doug Cole, Heidi Cole,
Norman D. Cole, Caroline Cole
c/o Mr. Doug Cole
92520 Highway 96
Somes Bar, CA 95568

RECEIVED

AUG - 1 2000

Dept. of F&G Region

Dear Mr. Cole:

UNAUTHORIZED DIVERSION--STANSHAW CREEK IN SISKIYOU COUNTY

I understand that you have been involved in an ongoing discussion with the Division of Water Rights (Division) regarding your diversion and use of water from Stanshaw Creek in Siskiyou county. It is my understanding that you have on file with the Division, two pending applications to appropriate water, numbered 29449 and 29450. These applications were filed by the previous owner of your property in Somes Bar, California to authorize his diversions from Stanshaw Creek for use upon the parcel which you now own. You claim pre-1914 appropriative rights as a basis for your ongoing and, apparently increasing diversions for domestic use and hydroelectric power production and you have expressed a desire to withdraw your pending applications.

To date, the Division has been unwilling to cancel your pending applications because you do not appear to have a valid pre-1914 claim for the water you are currently diverting. The Division has supplied you and your attorney with evidence to show that the upper limit of your claim of pre-1914 appropriative rights is 0.49 cubic feet per second (cfs), continuous flow and may appropriately be only 0.11 cfs. This assertion is based upon information contained within the May, 1965 bulletin by the Department of Water Resources entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6). This publication lists the property, which you now own and states that the total amount of water diverted for irrigation, domestic, stockwatering, and power production totaled 362 acre-feet, annually. This total usage equates to a continuous flow rate of approximately 1/2 cfs. This information was verified by Mr. Marvin Goss, Forest Service Hydrologist, who lived on your property while it was under prior ownership. Mr. Goss evaluated the flow capacity of the ditch as well as measuring the actual amount of water put to use generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel.

Please understand that the nature of any appropriative right is such that it is limited to the amount of water put to continuous, reasonable and beneficial use regardless of the original "face value" of the appropriation. Your predecessor in interest, Mr. Young, submitted a copy of a water appropriation notice by Samuel Stanshaw dating well into pre-1914 times, claiming

RECEIVED
AUG 2 1 1998
005305
Dept. of F&G Region I

Copy: Vorpagel 9-21-98

SEPTEMBER 15 1998

600 miner's inches (15 cfs) of water from Stanshaw Creek for mining purposes. You claim to be successor in interest to Mr. Stanshaw's water rights. Although you have submitted no information to suggest that those rights ever pertained to your parcel of land, the Division is willing to accept, given that you are the current operator of an obviously old ditch on Stanshaw Creek, that you are the successor in interest to Mr. Stanshaw's water rights. However, you are not entitled to the entire 15 cfs appropriation described in Mr. Stanshaw's original notice, due to the documented failure of the previous landowners to apply that amount of water to beneficial use; additionally, your ditch is not capable of carrying that much water and expansion of the ditch does not allow you to reclaim water previously lost by nonuse. All appropriative water rights are limited as to both amount and season to the amounts actually used, which has been documented, in your case, as a maximum of 0.49 cfs for power generation and domestic purposes.

On September 23, 1997 an engineer from this office visited your site and observed that you were diverting water from Stanshaw Creek to supply your hydroelectric power plant. No measurements were taken at that time, but it was the opinion of the engineer that your diversions were well in excess of 0.49 cfs. Based upon the observations made during this visit, Division staff has attempted to help you understand the limitations of your claimed right and the need for the two pending applications. This subject has been discussed in considerable detail with your attorney. You continue to maintain that your current diversions are authorized by your "pre-1914 rights". 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 0.11 cfs. On June 3, 1998 an engineer from this Division measured the flow rate in your ditch (located upon public lands) and determined that you were diverting 2.4 cfs from Stanshaw Creek to operate your hydroelectric power plant.

The Division has received a report from the Department of Fish and Game that you have recently constructed a reservoir upon your property. It is difficult to envision how such a reservoir, constructed in 1998, could be authorized by a pre-1914 appropriative right. Although a pre-1914 right may be changed as to purpose of use, place of use, or point of diversion without the approval of this Division, such a change cannot serve to increase the amount of the right. The construction of a new reservoir is generally considered to be an increase in a water right and usually requires the filing of a new application to appropriate water.

At this time, the Division is willing to cancel application 29450, filed for 0.11 cfs for domestic and irrigation use, as soon as you complete and submit the enclosed Request for Cancellation form and the Statement of Water Diversion and Use form. It would appear that the diversion of this water is authorized under your pre-1914 claim of right. There is no information in our files to indicate that any diversion in excess of 0.11 cfs is authorized under your pre-1914 claim. Consequently, I recommend that you work with my staff to process application 29449. In the event you do not wish to process application 29449, please submit evidence to substantiate your alleged pre-1914 claim of right including a discussion of the recently constructed reservoir (capacity, amount and season of use, basis of right). Such evidence should clearly show the extent water was continuously used from the time of the appropriation to the present. Our files indicate that the hydroelectric plant was installed in the 1940's, so you may wish to substantiate the use of this water between 1914 and 1950. Any claim in excess of 0.49 cfs should be accompanied by substantial evidence to refute the Department of Water Resources' Bulletin 94-6 as well as the testimony of Mr. Goss.

Mr. Doug Cole

-3-

SEPTEMBER 15 1998

If the Division fails to receive the following within 45 days of the date of this letter, this matter will be referred to our Complaints Unit to consider appropriate enforcement action which may include the imposition of Administrative Civil Liabilities (fines) of up to \$500 per day for continued unauthorized use of water:

1. Description and location of your reservoir, use thereof, and basis of right to store water. If a basis cannot be documented, submit the enclosed application forms, properly completed along with the required fees.
2. Statement indicating whether you wish to continue processing application 29449; if not, substantial evidence which shows that your diversion of water has been continuously maintained in time and amount since December 19, 1914;
3. Completed Request for Cancellation form relating to application 29450 as well as a completed Statement of Water Diversion and Use for your domestic and irrigation use of water. *Please note that, in accordance with Section 5105 of the Water Code, the Division is authorized to investigate and determine the facts relating to your diversion, at your expense, if you do not submit a properly completed Statement of Water Diversion and Use within 60 days.*

If you have any further questions, Chris Murray, the engineer assigned to this case, can be reached at (916) 657-2167.

Sincerely,

ORIGINAL SIGNED BY:

Harry M. Schueller, Chief
Division of Water Rights

Enclosures

CERTIFIED

cc: Nancy Smith, Esq.
1041 East Green Street, Suite 203
Pasadena, CA 91106-2417

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001



Winston H. Hickox
*Secretary for
Environmental
Protection*

State Water Resources Control Board

WR-193



Gray Davis
Governor

Division of Water Rights

901 P Street • Sacramento, California 95814 • (916) 657-2170
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 657-1485 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

ORDER REJECTING AND CANCELING

APPLICATION 29450

Applicant: Doug Cole, Heidi Cole, Norman Cole, and Caroline Cole

Source: Stanshaw Creek thence Klamath River in Siskiyou County

It is ordered that this application is hereby rejected and canceled, without prejudice, upon the records of the State Water Resources Control Board because a request has been received from, or on behalf of the applicant that the application be canceled.

Applicant is hereby put on notice that any diversion of water from the proposed point(s) of diversion proposed under this application may be subject to an Administrative Civil Liability penalty of up to \$500 per day without further notice, pursuant to Water Code section 1052 et seq., unless the diversion is covered by an existing right.

If diversions will be made under claim of riparian or pre-1914 water rights, diversions shall be documented by the filing of a Statement of Water Diversion and Use in accordance with Water Code section 5100 et seq.

ORIGINAL SIGNED BY:

Harry M. Schueller, Chief
Division of Water Rights

Dated: JUL 16 1999

AQUA ENGINEERING & CONSULTING**Water Rights • Bay Delta • Modeling • Design**

November 25, 1998

Mr. Chris Murray
State Water Resources Control Board
Division of Water Rights
901 P Street
Sacramento, CA 95814

Subject: 332:CM:29449,29450

Dear Mr. Murray:

This letter is to inform you that I will be representing Mr. Douglas Cole concerning water rights for the Marble Mountain Ranch. Mr. Cole has retained my services and notified the State Water Resources Control Board (Board) in his November 18, 1998 letter. My clients and I are committed to working diligently with the Board staff to reach an equitable solution.

Also, per our telephone conversations on November 17 and 25, 1998, and considering the letter from the Board to my clients, dated September 15, 1998, I am taking the actions that are outlined below.

- Filing a Registration of Small Domestic Use Appropriation;
- Filing a Request for Cancellation of Application 29450, and a Statement of Water Diversion and Use;
- Working closely with Board staff to modify and process application 29449.

I would like to thank you in advance for your professional cooperation and understanding. Please do not hesitate to contact me if you have any questions or concerns. I can be reached by telephone at (916) 612-3539.

Sincerely,

ORIGINAL SIGNED BY

SEAN BAGHEBAN, P.E.

RECEIVED

NOV 30 1998

Dept. of F&G Region I

cc: Mr. Douglas Cole
92520 Highway 96
Somes Bar, CA 95568

Mr. Ron Prestly
Department of Fish and Game
Environmental Services
601 Locust Street
Redding, CA 96001

Memorandum

To : Steve Conger

Date: January 4, 1979

From : Department of Fish and Game - Region 1, Eureka

Subject: Stanshaw and Sandy Bar Creeks

Thanks very much for your survey information on the above creeks. I had no information whatsoever on either creek in the Eureka files. Rogers agrees with your analysis, that steelhead probably cannot negotiate the culverts. He also says that there is little or no steelhead habitat above the culverts because of very steep gradient.

This will be of great help at the next Project Development Team meeting with Caltrans about the culvert repairs.

Thanks, again.

Don A. La Faunce
Assoc. Fishery Biologist

DAL:km

cc: Rogers

DEPARTMENT OF FISH AND GAME
FIELD CORRESPONDENCE

FROM: S. L. Hanger, Colons

PLACE Stanchaw, Sandy Bar Creek

TO: Don La Jaurie

DATE 12-30-78

SUBJECT: Surveys of Stanchaw, Sandy Bar Creek, Liskiyou Co.

On this date I made cursory surveys of Stanchaw Cr. and Sandy Bar Cr., from Hwy. 96 culvert downstream to mouth.

Culverts: Stanchaw Cr. - Twin, 6' dia. C.M.P. with concrete lining bottom.

Culvert approx. 150' long or longer, with dogleg in center.

Sandy Bar Cr. - Twin, 6' dia. C.M.P. with concrete lining bottom.

Length approx. 50'-75', fairly steep drop.

Riparian vegetation: Both streams well shaded with alder overstory. Sandy Bar Cr. overstory mixed with firs, madrone and alder.

Stanchaw Creek had heavy understory of brush & blackberries.

Fish Life: - None observed in either stream. Stanchaw Cr. appears barren in area checked. It is improbable that fish migrate up from Klamath. Mouth of creek bifurcates, drops 8 ft. to Klamath.

Sandy Bar Creek probably has run of steelhead during normal flows. Flows now will impale upstream migrants. It is possible that SH might be able to traverse culvert at Sandy Bar Cr. during "normal" winter flows.

Flows: Stanchaw Cr., 1 c.f.w.; Sandy Bar Cr. - 5-7 c.f.w. Both streams are extremely low, possibly reflecting drought flows.

If flows increase, it is possible that SH will migrate into Sandy Bar Cr. and attempt to spawn in pools downstream from culvert at Hwy. 96.

S. L. C.

c.c. - Dave Rogers

CALIFORNIA DIVISION OF FISH AND GAME **STREAM SURVEY**

FILE FORM

No. _____

NAME Stanshaw Creek COUNTY Siskiyou

STREAM SECTION FROM Mouth To 1/2 mile upstream LENGTH 0.5 mile

TRIBUTARY TO Klamath River Twp. 13N R. 6E Sec. 33

OTHER NAMES _____ RIVER SYSTEM Klamath River

SOURCES OF DATA Stream survey by G. Itano and P. Kalvass, Cal. DFG, 8/4/75.

Observations through entire section surveyed.

EXTENT OF OBSERVATION
Include Name of Surveyor, Date, Etc.
LOCATION
RELATION TO OTHER WATERS
GENERAL DESCRIPTION
Watershed
Immediate Drainage Basin
Altitude (Range)
Gradient
Width
Depth
Flow (Range)
Velocity
Bottom
Spawning Areas
Pools
Shelter
Barriers
Diversions
Temperatures
Food
Aquatic Plants
Winter Conditions
Pollution
Springs
FISHES PRESENT AND SUCCESS
OTHER VERTEBRATES
FISHING INTENSITY
OTHER RECREATIONAL USE
ACCESSIBILITY
OWNERSHIP
POSTED OR OPEN
IMPROVEMENTS
PAST STOCKING
GENERAL ESTIMATE
RECOMMENDED MANAGEMENT
SKETCH MAP
REFERENCES AND MAPS

Altitude: At mouth- 600 feet; Headwaters originate at 4720 feet.

Gradient: 20%

Width: Average of 8 feet, narrowing to 4 feet in upper reaches surveyed.

Depth: To 3 feet in pools; averaging 6- 10 inches.

Flow: Estimated at between 2- 5 cfs.

Velocity profile: From mouth to 50 feet above culverts under hiway 96 flow is rapid; Velocity becomes cascading further upstream as gradient of stream increases and depth decreases.

Bottom: Much of the stream bed is rubble, with little gravel and some sand in pools.

Spawning areas: Due to a lack of adequate spawning gravels there are few good spawning areas. Occasional gravelly pools observed below culverts, however some of these were silted and inordinately sandy.

Pools: Pool to riffle ratio of about 1:1; many pools of 2- 3 feet deep above hiway 96 culverts; large pool 3 feet deep and 6 feet long below twin culverts under 96.

Shelter: Entire section surveyed densely overgrown with local hardwoods and bushes.

Barriers: Two large U- shaped culverts under hiway 96, approximately 150 feet in length are probable barriers to anadromous salmonid migrations upstream. Gradient of culverts is long and gradual slope with a generally smooth concrete bottom. Stream survey of summer 1964 (Clark and Bugbee) reports that local residents observed steelhead just below culverts but none above them. Approximately 50 feet above culverts area of cascades and shallow water leading to a 5 foot, 50 degree gradient waterfall constitute a possible barrier to migrating fish, though in higher flows fish may be able to bypass waterfall.

Diversions: Many abandoned and inoperative rubber-tube type and steel piping diversions observed above hiway 96 crossing.

Aquatic plants: None observed.

Pollution: None observed.

Food: Caddis, Stone, and Dragon fly observed in larval stages, but not plentiful.

Fishes present: Salmonid fry observed below culverts, probably steelhead smolts, though not numerous. No fry of any type seen above culverts.

Fishing intensity: Light; though inoperative, abandoned dwellings observed near mouth of creek on south side, aptly referred to as the 'Old Man River Lodge'.

Accessibility: State route 96 crosses Stanshaw Creek 1/2 mile upstream from mouth; dirt road from 96 near crossing parallels creek to the mouth at lodge referred to above. Upper section is accessible only by foot due to dense riparian growth, however forestry road 13N12 from 96 crosses headwaters of creek.

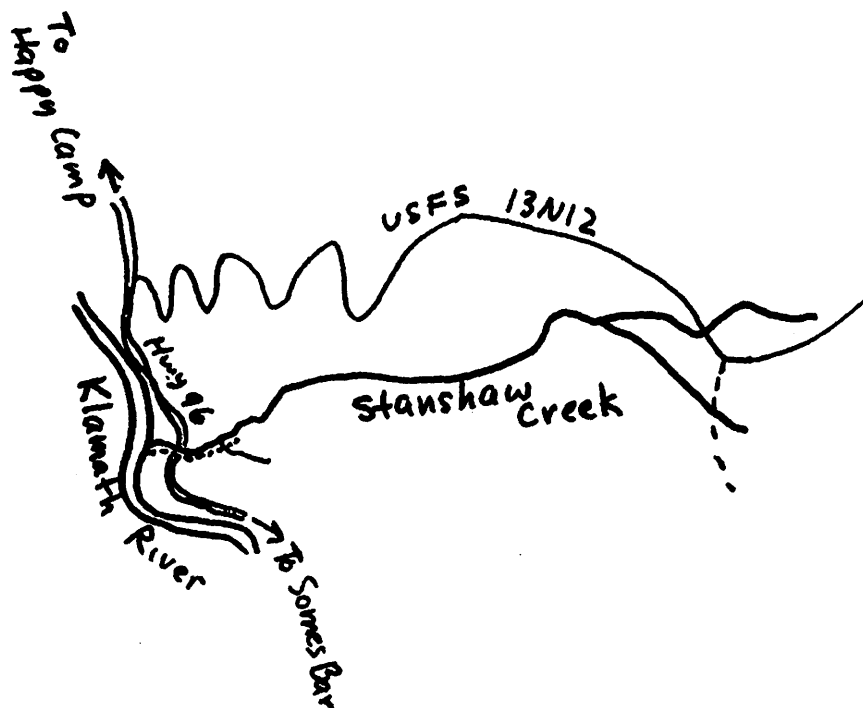
Ownership: From State Route 96 to mouth land is privately owned. ^{East} ~~West~~ of hiway is
USFS land.
Posted or open: Open.

Station Data

Station:	1.	2.
Location:	Mouth.	$\frac{1}{2}$ mile up from mouth.
Width:	8 feet.	8 feet.
Depth:	6 inches.	2 feet.
Bottom:	Rubble to gravel.	Sand, gravel, rubble.
Spawning area:	No.	No.
Flow and velocity:	Rapid, II.	Slow, II.
Stream condition:	Clear.	Clear.
Water temperature:	60F.	62F.
Air temperature:	90F.	82F.
Time:	1430.	1530.
Date:	8/4/75.	8/4/75.
Weather:	Clear.	Clear.
Altitude:	600 feet.	850 feet.

Recommended management: Possible modification of culvert bottoms (ie. baffling, etc.) could open up ~~western~~ section of stream for anadromous salmonids. Due to good canopy over stream, upper reaches above route 96 could be managed for resident rainbow trout, though they would probably have to be introduced. Manage lower section of stream as adequate anadromous salmonid stream.

Stanshaw Creek Siskiyou County (Orleans & Forks of Salmon Quadrangle



Legend

Scale: 1 inch = 1 mile
Portion surveyed - - - -

Stanshaw Creek

October 2⁴, 1969

At mouth @ 1000

51°F

1 cfs

crystal clear

Mouth easily accessible from Mammoth River for steelhead; not enough flow for king salmon. First 75 yards of stream flat and sandy-gravel bottom - good steelhead spawning area. A culvert is present under Highway 96 about 250 yards up-stream from its mouth. Steelhead can ascend stream to culvert, but cascades and almost no spawning area make stream past flat delta area unattractive to steelhead.

Culvert is about 70 yards long with flat concrete bottom - impossible for fish to pass. Stream above culvert becomes more steep and bottom changes to mostly bedrock.

Rd

Asst. F. B.

Stanshaw Creek

February 2, 1968

At mouth @ 1230

H₂O temperature - 42°F

Estimated flow - 20 cfs

Water clarity - turbid

Salmon do not enter stream, save possibly for a few silver salmon. Steelhead probably ascend as far as a few hundred yards above Highway 96. Passage under Highway 96 is guaranteed by a unique split culvert, which has for its bottom the natural stream bottom and for its sides cemented rock. Actually it is probably more of a budge than a culvert.

Phil

Asst. F.B.

STANSHAW CREEK
Siskiyou County
Aug. 5, 1964

Location of Mouth: R6E, T13N
 Tributary To: Klamath River
 Stream Section: From the mouth to 3 miles upstream to the forks.
 Accessibility: State 96 crosses the stream and there is also a U.S. Forest Service road which leaves 96 between Stanshaw Creek and Sandy Bar Creek and crosses Stanshaw Creek three miles upstream at the Forks.
 Ownership: U. S. Forest Service.

DRAINAGE CHARACTERISTICS

1. Topography - The stream flows for $4\frac{1}{2}$ miles through a steep canyon and is primarily cascading water.
2. Vegetation - The canyon walls exhibited various hardwoods and firs, the stream had vegetation that was mainly berry vines and heavy brush.

STREAM CONDITIONS

1. Depth - Average depth was 6-8 inches.
2. Width - Average width was 3-4 feet.
3. Flow - the estimated flow was 2-3 c.f.s.
4. Pool-riffle ratio - cascading water.
5. Altitude - Headwaters originate at 4720 feet and the mouth is situated at 600 feet above sea level.
6. Gradient - 20%
7. Shape of Stream - The stream bottom is composed of coarse rubble and boulders.

SPAWNING CONDITIONS

1. Anadromous fish would probably be unable to utilize this stream for spawning, however, resident trout apparently do spawn in the upper reaches of the stream.

HABITAT SUITABILITY

1. The insects were scarce, but stone fly and caddis fly were present in small numbers.
2. There is good shelter throughout the stream with low hanging trees and pools.

STREAM OBSTRUCTIONS

1. Due to the steepness of the stream, the chances of anadromous fish getting beyond the culvert on Hwy. 96 are very slim. Local residents report that steelhead do make it up the road, but not beyond.
2. About $1\frac{1}{2}$ miles upstream from the road there is an extremely steep area about 200 yards in length that would have to be considered a definite barrier.

FISHINGS

1. Only three salmonids were observed during the survey. These were located

about 1 mile down from the Flume take-off (see below), fish seen were from 4-6 inches in length, and were assumed to be resident trout.

LIVESTRINGS

1. Approximately 1 mile upstream from the road, a flume takes-off from the creek. Average width - 12 inches; average depth 4 inches; its flow was estimated between 0.5 and 1 c.f.s. Its purpose - unknown.
2. Approximately 1 mile upstream, a 4 inch pipe line removes some of the stream flow.

RECOMMENDATIONS

1. Manage the stream for a resident trout population.

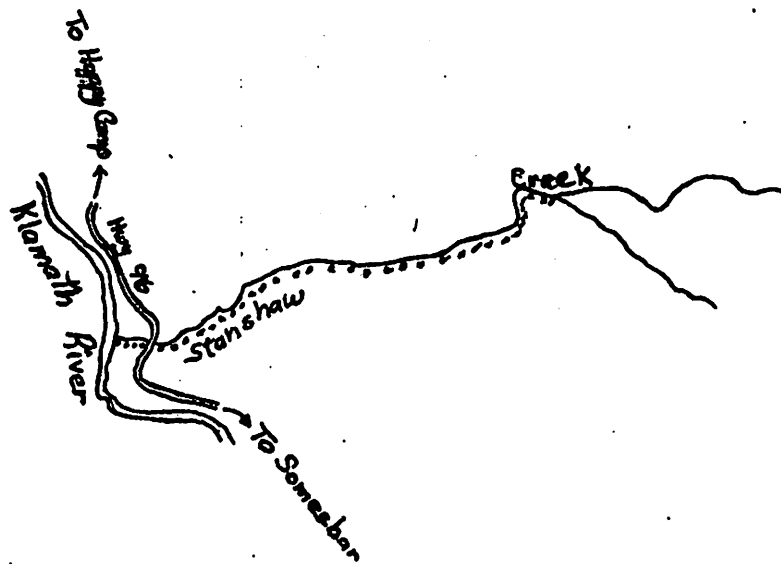
SUMMARY

1. Stanshaw Creek is approximately $4\frac{1}{2}$ miles in length with a flow of 2-3 c.f.s.
2. The stream gradient is 20% with headwaters at 4,750 feet and the mouth at 600 feet above sea level.
3. The stream is primarily cascading water with little or no spawning area for anadromous fish.
4. Three salmonids were observed during the survey.
5. Manage the stream for a resident trout population.

SURVEY CREW: Jack Clark, Steve Bugbee

SURVEY DATE: 8/5/64

Stanshaw Creek Siskiyou County (Orleans & Forks of Salmon Quadrangles)



Legend

Scale: 1 inch = 1 mile

Portion surveyed

May 25, 1961

STANSHAW CREEK

Tributary to: Klamath River

Mouth Location: T. 13 N., R. 6 E., Section 15, S. W. Quarter

DRAINAGE

Stanshaw Creek, a tributary to the Klamath River, has a drainage area of approximately 3,000 surface acres. The drainage extends in an easterly direction from its mouth for about 4 miles. Seven small tributaries empty into the drainage area.

The drainage is characterized by steep, heavily forested mountains covered primarily with fir, pine, maple, alder and poison oak.

STREAM CONDITIONS

Physical Profile: The average flow of Stanshaw Creek was estimated at 40 cfs. This estimate was made at Highway 96. The average width was about 15 foot and the average depth was 7 inches.

The pool-riffle ratio was estimated at 60:20. The entire stream is a series of pools that cascade down the stream bed. Riffles were observed in limited areas but were more common above the water diversion pipe located about 200 yards above the highway.

The bottom is predominately rubble and boulders although some gravel was observed in areas of less torrential flow.

HABITAT SUITABILITY

Shelter is abundant along Stanshaw Creek in the form of boulders, brush, pools, and logs.

Spawning area is quite limited on Stanshaw Creek especially in the lower and upper portions. The area above the water diversion pipe contains some riffle area suitable for spawning anadromous fish. Some spawning potential is located from the mouth to the highway.

Nursery area is available along the entire stream. Pools with back-eddies are quite common.

STREAM OBSTRUCTIONS

Log Jams: Six partial barriers of debris accumulations were recorded on Stanshaw Creek below the upper limits to anadromous fish. These barriers

contained about 730 cubic feet of material. None of these barriers are a total barrier and at present, removal does not seem to be pressing.

Natural Barriers: A 75 yard long series of high falls creates an impassable barrier to anadromous fish about one mile above the mouth. These falls should be considered as the upper limits to anadromous fish.

FISHES

Salmonid fry were observed in many pools along Stanshaw Creek. The fry were too small to make an identification.

A local resident of this area says he used to see steelhead running up Stanshaw Creek although not for several years.

SUMMARY

Stanshaw Creek has a drainage area of about 3,000 surface acres.

The stream has a pool-riffle ratio of about 80:20.

Drainage area is limited on the stream although some areas contain gravel suitable for anadromous fish.

Six partial barriers were located below the upper limits to anadromous fish. The upper limits to anadromous fish is about 1 mile above the mouth and consist of a high series of falls.

RECOMMENDATIONS

1. Remove partial barriers although they are not a pressing problem.
2. Manage lower portions below series of falls as an anadromous fishery.
3. Manage area above falls as a resident trout stream.

Surveyed by: Tom Sawyer and Mike Kruse

Surveyed on: May 25, 1961

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 20.2.3 Small Domestic R480

1. 9-3-09. SWRCB. to DFG. R480
2. 4-8-05. SWRCB. to Cole. R480. pond registration



State Water Resources Control Board



WR-193

Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300

P.O. Box 2000 ♦ Sacramento, California 95812-2000

Fax: 916.341.5400 ♦ www.waterboards.ca.gov/waterrights

Linda S. Adams

Secretary for
Environmental Protection

Arnold Schwarzenegger
Governor

*drafted
letter 10/8/9 to Weaver
due out by 10/15/02*

MEMORANDUM

45 days
SEP 9 AM 9 24
DFG - Sacramento

TO: Gary Stacey, Regional Manager
Department of Fish and Game
Northern Region
601 Locust Street
Redding, CA 96001

Katherine Mrowka

FROM: Katherine Mrowka, Chief
Inland Streams Unit
DIVISION OF WATER RIGHTS

DATE: **SEP 03 2009**

SUBJECT: REQUEST FOR DEPARTMENT OF FISH AND GAME WRITTEN CONDITIONS FOR SMALL DOMESTIC USE REGISTRATION IN THE NAME OF DOUGLAS COLE, REGISTRATION NO. D030945R, CERTIFICATE NO. R480; DIVERSION FROM STANSHAW CREEK TRIBUTARY TO KLAMATH RIVER IN SISKIYOU COUNTY

On August 25, 2009 and August 27, 2009 the Division of Water Rights (Division) staff discussed or e-mailed the Department of Fish and Game (DFG) regarding Small Domestic Use (SDU) Certificate No. R480 regarding the lack of DFG written conditions for the SDU.

1600
The Division of Water Rights (Division) received this Registration on September 9, 1999, and the Certificate was issued on November 30, 1999. Our records indicate that Division staff visited the site in May 1999. Mr. Squires, agent for Mr. Cole, indicated DFG had made a site visit and that Mr. Cole was entering into an Agreement with DFG. The Division never received either written conditions for the SDU, or a copy of the DFG Streambed Alteration Agreement. (DFG Code § 1600 et seq.)

Mr. Cole returned his Registrant Report and Request for Renewal in August, 2004, along with his renewal fee. A subsequent conversation with Yoko Mooring of this office and Jane Vorpagal, dated January 18, 2005, is summarized in a contact report in our records. Subsequently, on April 8, 2005, the Division sent Mr. Cole a letter requesting that he contact DFG again to obtain a written clearance letter from DFG. Division staff stated that his renewal was pending the DFG clearance letter. This office never received a letter from DFG regarding clearance for this SDU, and consequently, Certificate R480 has not been renewed.

Emails from Ms. Vorpagal of August 25 and 27, 2009 state that DFG has not issued clearance for this SDU, and DFG may require a new Streambed Alteration Agreement. The emails also state that Mr. Cole may need to file an Incidental Take permit for Coho. Please confirm in writing whether or not DFG will require either or both the Streambed Alteration Agreement and Incidental Take permit for this Registration.

Gary Stacey, Regional Manager
Department of Fish and Game

- 2 -

The ongoing protest regarding pending Application A029449, and the complaint regarding Mr. Cole's pre-1914 claim of right are separate issues and should be considered separately.

We will put a hold on the renewal process for this Registration for 45 days. If no response is received within 45 days of this letter, we will assume that DFG has determined that no special conditions for the Small Domestic Use Registration are required. We will proceed with the renewal process, if Mr. Cole submits his Report and Request for Renewal, along with the renewal fee.

Enclosures: Copy of Original Application
Copy of Certificate R480

cc: (with enclosures)

Jane Vorpagal
Department of Fish and Game
Northern Region
601 Locust Street
Redding, CA 96001

bcc: Katherine Mrowka, Steve Herrera, Chuck Rich (electronic copy of memo only)

sjw:08282009: DCC: 09/02/09

u:\perdrv\swilson\LSU SDU Registration\D030945R DFG clearance memo 08282009

MINIMUM FILING FEE: \$100.00
FILE ORIGINAL & ONE COPY
TYPE OR PRINT IN BLACK INK
(For explanation of entries required, see
booklet "How to File an Application to
Appropriate Water in California")

STATE OF CALIFORNIA
State Water Resources Control Board
DIVISION OF WATER RIGHTS
901 P Street, Sacramento
P. O. Box 2000, Sacramento, CA 95812-2000

99 SEP 17 11 3 57

☐ APPLICATION TO APPROPRIATE WATER BY PERMIT

(Check one
box only)

or

☒ REGISTRATION OF SMALL DOMESTIC USE APPROPRIATION*

(If this form is used to register a small domestic use appropriation, the
terms "application" and "applicant" herein, and in related forms, shall
mean "registration" and "registrant".)

Application No. 30945 R
(Leave blank)

1. APPLICANT

Douglas T. Cole (Name of applicant) (530) 469-3437
(Telephone number where you may be reached
between 8 a. m. and 5 p. m. - include area code)
92520 Highway 96
Somes Bar CA 95568
(Mailing address) (City or town) (State) (Zip code)

2. SOURCE

- a. The name of the source at the point of diversion is Stanshaw Creek
(If unnamed, state that it is an unnamed stream, spring, etc.)
tributary to Klamath River thence Pacific Ocean
- b. In a normal year does the stream dry up at any point downstream from your project? YES ☐ NO ☒ If yes, during
what months is it usually dry? From _____ to _____
What alternate sources are available to your project should a portion of your requested direct diversion season be
excluded because of a dry stream or nonavailability of water? None

3. POINTS of DIVERSION and REDIVERSION

- a. The point(s) of diversion will be in the County of Siskiyou

List all points giving coordinate distances from section corner or other tie as allowed by Board regulations i. e. California Coordinate System	Point is within (40-acre subdivision)	Section	Township	Range	Base and Meridian
785,300' N , 1,589,300' E	SW 1/4 of NE 1/4	33	13N	6E	H
CA. COORD. ZONE 1	1/4 of 1/4				
	1/4 of 1/4				

- c. Does applicant own the land at the point of diversion? YES ☐ NO ☒
- d. If applicant does not own the land at point of diversion, state name and address of owner and what steps have been taken
to obtain right of access: Applicant has a recorded easement,

U.S. Forest Service
Somes Bar, California

FOR0053-R2

12/1/98
\$100.00
C.S.

4. PURPOSE of USE, AMOUNT and SEASON

a. In the table below, state the purpose(s) for which water is to be appropriated, the quantities of water for each purpose, and the dates between which diversions will be made. Use gallons per day if rate is less than 0.025 cubic foot per second (approximately 16,000 gallons per day). Purpose must only be "Domestic" for registration of small domestic use.*

PURPOSE OF USE (Irrigation, Domestic, etc.)	DIRECT DIVERSION				STORAGE		
	QUANTITY		SEASON OF DIVERSION		AMOUNT	COLLECTION SEASON	
	RATE (Cubic feet per second or gallons per day)	AMOUNT (Acre-feet per year)	Beginning Date (Mo. & Day)	Ending Date (Mo. & Day)	Acre-feet per annum	Beginning Date (Mo. & Day)	Ending Date (Mo. & Day)
Domestic					10.0	Jan. 1	Dec. 31
					10.0		

b. Total combined amount taken by direct diversion and storage during any one year will be 10.0 acre-feet.

*Not to exceed 4,500 gallons per day by direct diversion or 10 acre-feet per annum by storage.

5. JUSTIFICATION OF AMOUNT (For small domestic use registration, complete item b. only)

a. IRRIGATION: Maximum area to be irrigated in any one year is _____ acres.

CROP	ACRES	METHOD OF IRRIGATION (Sprinklers, flooding, etc.)	ACRE-FEET PER YEAR	NORMAL SEASON	
				Beginning Date	Ending Date

b. DOMESTIC: Number of residences to be served is 3. Separately owned? YES ☒ NO ☐

Total number of people to be served is 9. Estimated daily use per person is 100.

Total area of domestic lawns and gardens is 8,500 square feet. (Gallons per day)

Incidental domestic uses are _____
(Dust control area, number and kind of domestic animals, etc.)

c. STOCKWATERING: Kind of stock _____ Maximum number _____
Describe type of operation: _____

(Feed lot, dairy, range, etc.)

d. RECREATIONAL: Type of recreation: Fishing ☐ Swimming ☐ Boating ☐ Other ☐

e. MUNICIPAL: (Estimated projected use)

POPULATION 5-Year periods until use is completed		MAXIMUM MONTH		ANNUAL USE		
PERIOD	POP.	Average daily use (gal. per capita)	Rate of diversion (cfs)	Average daily use (gal. per capita)	Acre-foot (per capita)	Total acre-feet
Present						

Month of maximum use during year is _____. Month of minimum use during year is _____.

- f. **HEAT CONTROL:** The total area to be heat protected is _____ net acres.
 Type of crop protected is _____
 Rate at which water is applied to use is _____ gpm per acre.
 The heat protection season will begin about _____ and end about _____
 (Date) (Date)
- g. **FROST PROTECTION:** The total area to be frost protected is _____ net acres.
 Type of crop protected is _____
 Rate at which water is applied to use is _____ gpm per acre.
 The frost protection season will begin about _____ and end about _____
 (Date) (Date)
- h. **INDUSTRIAL:** Type of industry is _____
 Basis for determination of amount of water needed is _____
- i. **MINING:** The name of the claim is _____ . Patented ☐ Unpatented ☐
 The nature of the mine is _____ . Mineral to be mined is _____
 Type of milling or processing is _____
 After use, the water will be discharged into _____
 (Name of stream)
 in _____ 1/4 of _____ 1/4 of Section _____ , T _____ , R _____ , _____ B. & M.
 (40-acre subdivision)
- j. **POWER:** The total fall to be utilized is _____ feet. The maximum amount of water to be used through the penstock is _____ cubic feet per second. The maximum theoretical horsepower capable of being generated by the works is _____. Electrical capacity is _____ kilowatts at _____ % efficiency.
 (Cubic feet per second x fall ÷ 8.8) (Hp x 0.746 x efficiency)
 After use, the water will be discharged into _____
 (Name of stream)
 in _____ 1/4 of _____ 1/4 of Section _____ , T _____ , R _____ , _____ B. & M. FERC No. _____
 (40-acre subdivision)
- k. **FISH AND WILDLIFE PRESERVATION AND/OR ENHANCEMENT:** YES ☐ NO ☐ If yes, list specific species and habitat-type that will be preserved or enhanced in item 17 of Environmental Information form WR 1-2.
- l. **OTHER:** Describe use: _____. Basis for determination of amount of water needed is _____

6. PLACE OF USE

- a. Does applicant own the land where the water will be used? YES ☒ NO ☐ Is land in joint ownership? YES ☐ NO ☐
 (All joint owners should include their names as applicants and sign the application.)
 If applicant does not own land where the water will be used, give name and address of owner and state what arrangements have been made with the owner. _____

b.

USE IS WITHIN (40-acre subdivision)	SECTION	TOWNSHIP	RANGE	BASE & MERIDIAN	IF IRRIGATED	
					Number of acres	Presently cultivated (Y/N)
SW 1/4 of NE 1/4	33	13N	6E	H		
1/4 of 1/4						
1/4 of 1/4						
1/4 of 1/4						
1/4 of 1/4						
1/4 of 1/4						

(If area is unsurveyed, state the location as if lines of the public land survey were projected, or contact the Division of Water Rights. If space does not permit listing all 40-acre tracts, include on another sheet or state sections, townships and ranges, and show detail on map.)

7. DIVERSION WORKS

- a. Diversion will be by gravity by means of flume
(Dam, pipe in unobstructed channel, pipe through dam, siphon, weir, gate, etc.)
- b. Diversion will be by pumping from n/a Pump discharge rate — Horsepower —
(Sump, offset well, channel, reservoir, etc.) (cfs or gpd)
- c. Conduit from diversion point to first lateral or to offstream storage reservoir:

CONDUIT (Pipe or channel)	MATERIAL (Type of pipe or channel lining) (Indicate if pipe is buried or not)	CROSS SECTIONAL DIMENSION (Pipe diameter or ditch depth and top and bottom width)	LENGTH (Feet)	TOTAL LIFT OR FALL		CAPACITY (Estimate)
				Feet	+ or -	
Channel	Earthen	12" in. deep 24" in. wide	5,200'	40'	10'	2.5-3.0
Pipe	Steel (not buried)	16" in. diam.	455'	200'	1'	2.5-3.0

- d. Storage reservoirs: (For underground storage, complete Supplement 1 to WR1, available upon request.)

Name or number of reservoir, if any	DAM				RESERVOIR		
	Vertical height from downstream toe of slope to spillway level (ft.)	Construction material	Dam length (ft.)	Freeboard Dam height above spillway crest (ft.)	Approximate surface area when full (acres)	Approximate capacity (acre-feet)	Maximum water depth (ft.)
						10	

- e. Outlet pipe: (For storage reservoirs having a capacity of 10 acre-feet or more.)

Diameter of outlet pipe (inches)	Length of outlet pipe (feet)	FALL (Vertical distance between entrance and exit of outlet pipe in feet)	HEAD (Vertical distance from spillway to outlet pipe in reservoir in feet)	Estimated storage below outlet pipe entrance (dead storage)

- f.. If water will be stored and the reservoir is not at the point of diversion, the maximum rate of diversion to offstream storage will be _____ cfs. Diversion to offstream storage will be made by: ☐ Pumping ☐ Gravity

8. COMPLETION SCHEDULE

- a. Year work will start n/a b. Year work will be completed n/a
c. Year water will be used to the full extent intended 2005 d. If completed, year of first use 1876

9. GENERAL

- a. Name of the post office most used by those living near the proposed point of diversion is _____
- b. Does any part of the place of use comprise a subdivision on file with the State Department of Real Estate? YES ☐ NO ☐
If yes, state name of the subdivision _____
If no, is subdivision of these lands contemplated? YES ☐ NO ☐
Is it planned to individually meter each service connection? YES ☐ NO ☐ If yes, When? _____
- c. List the names and addresses of diverters of water from the source of supply downstream from the proposed point of diversion: _____
- d. Is the source used for navigation, including use by pleasure boats, for a significant part of each year at the point of diversion, or does the source substantially contribute to a waterway which is used for navigation, including use by pleasure boats? YES ☐ NO ☐ If yes, explain: _____

10. EXISTING WATER RIGHT

Do you claim an existing right for the use of all or part of the water sought by this application? YES ☐ NO ☐

If yes, complete table below:

Nature of Right (riparian, appropriative, groundwater.)	Year of First Use	Purpose of use made in recent years including amount, if known	Season of Use	Source	Location of Point of Diversion

11. AUTHORIZED AGENT (Optional)

With respect to ☒ all matters concerning this water right application ☐ those matters designated as follows:

Sean Bagheban (Name of agent) (916) 612-3539 (Telephone number of agent between 8 a. m. and 5 p. m.)
P.O. Box 160621 (Mailing address) Sacramento (City or town) CA (State) 95816 (Zip code)

is authorized to act on my behalf as my agent.

12. SIGNATURE OF APPLICANT AUTHORIZED AGENT

I (~~we~~) declare under penalty of perjury that the above is true and correct to the best of my (~~our~~) knowledge and belief.

Dated Nov. 27 19 98, at Sacramento, California

(If there is more than one owner of the project,
please indicate their relationship.)

Ms. Mr. Sean Bagheban

Miss. Mrs. _____

(Signature of applicant)

Sean Bagheban

Ms. Mr.

Miss. Mrs. _____

(Signature of applicant)

Additional information needed for preparation of this application may be found in the Instruction Booklet entitled "HOW TO FILE AN APPLICATION TO APPROPRIATE WATER IN CALIFORNIA". If there is insufficient space for answers in this form, attach extra sheets. Please cross-reference all remarks to the numbered item of the application to which they may refer. Send original application and one copy to the STATE WATER RESOURCES CONTROL BOARD, DIVISION OF WATER RIGHTS, P. O. Box 2000, Sacramento, CA 95812-2000, with \$100 minimum filing fee.

NOTE:

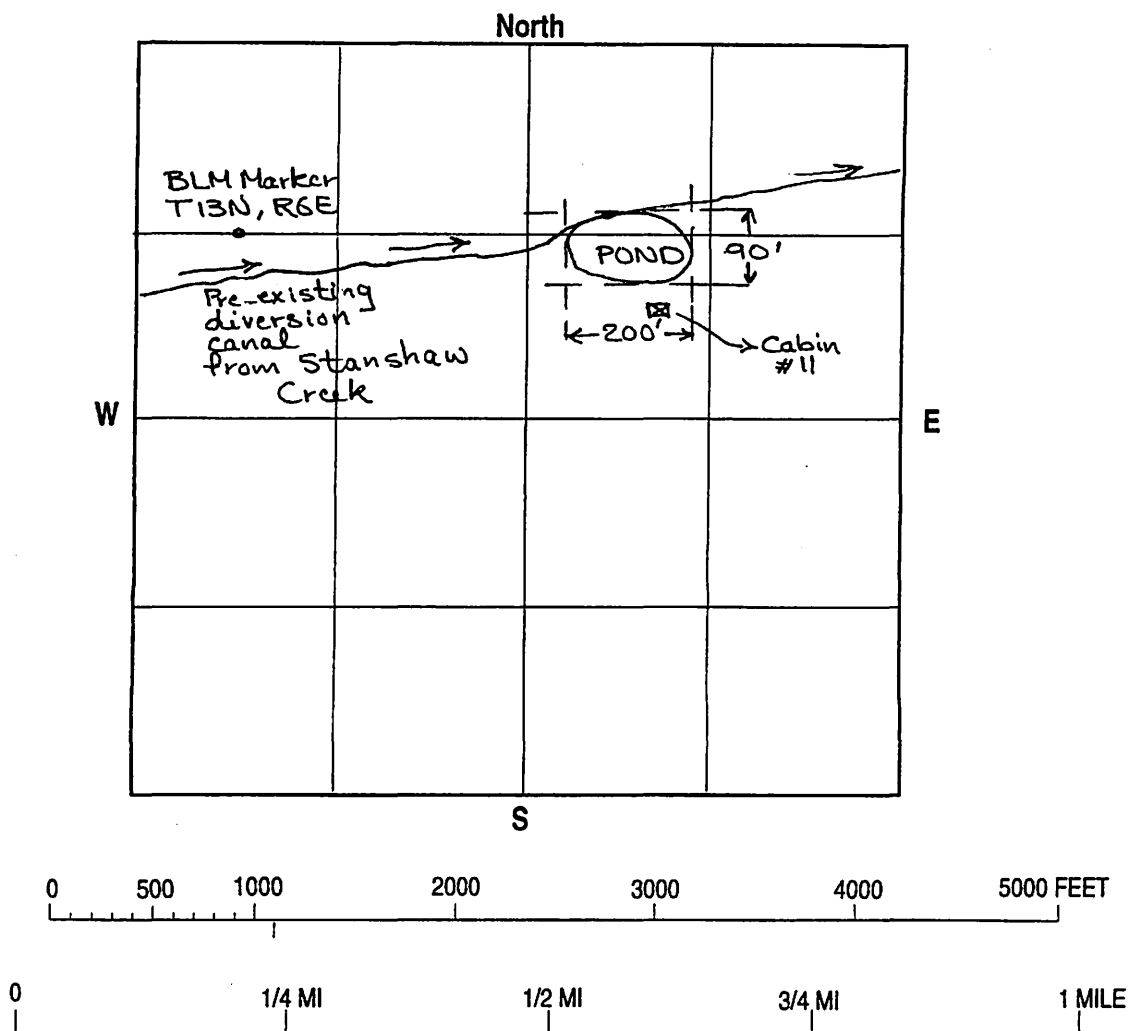
If this application is approved for a permit, a minimum permit fee of \$100 will be required before the permit is issued.
There is no additional fee for registration of small domestic.

FOR0053-R2

13. MAP

(Please complete legibly, as much detail as possible, or attach a suitable alternative. See example in instruction booklet.)

SECTION(S) 33 TOWNSHIP 13N RANGE 6E, H B. & M.



- (1) Show location of the stream or spring, and give name.
- (2) Locate and describe the point of diversion (i. e. the point at which water is to be taken from the stream or spring) in the following way: Begin at the most convenient known corner of the public land survey, such as a section or quarter section corner (if on unsurveyed land more than two miles from a section corner, begin at a mark or some natural object or permanent monument that can be readily found and recognized) and measure directly north or south until opposite the point which it is desired to locate; then measure directly east or west to the desired point. Show these distances in figures on the map as shown in the instructions.
- (3) Show location of the main ditch or pipeline from the point of diversion.
- (4) Indicate clearly the proposed place of use of the water.

14. SUPPLEMENTAL INFORMATION

- a. If you are applying for a permit, Environmental Information form WR1-2 should be completed and attached to this form.
- b. If you are registering a small domestic use, Fish and Game Information form WR1-3 should be completed and attached to this form.
- c. If you are applying for underground storage, Supplement 1 to WR 1 (available upon request) should be completed and attached to this form.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
901 P STREET, SACRAMENTO, CA 95814
MAILING ADDRESS
P.O. BOX 2000, SACRAMENTO, CA 95812-2000

REGISTRATION OF SMALL DOMESTIC USE APPROPRIATION
FISH AND GAME INFORMATION

APPLICATION NO. 30945R
(leave blank)

IN ORDER FOR YOUR REGISTRATION OF SMALL DOMESTIC USE TO BE ACCEPTED AS COMPLETE, YOU SHOULD DO THE FOLLOWING:

- A) Complete Application/Registration for WR 1 to the best of your ability.
- B) Contact the Environmental Services Supervisor for the California Department of Fish and Game region in which your diversion will be located (see last page of this form) to discuss your project and the information to be included in this form.
- C) Complete, sign, and date this form. (Note certification above your signature).
- D) Send a copy of this form and a copy of form WR 1 to the Environmental Services Supervisor of the regional office of the California Department of Fish and Game (see last page of this form for address).
- E) Send the original of this form and form WR 1 to the Division of Water Rights at the mailing address given at the top of this page.

IF YOUR COMPLETED FORMS MEET THE REQUIREMENTS OF THE WATER CODE, IF YOU HAVE PAID THE \$100.00 FILING FEE, AND IF YOUR DIVERSION WILL NOT BE FROM A STREAM DECLARED BY THE STATE WATER RESOURCES CONTROL BOARD TO BE FULLY APPROPRIATED OR FROM A STREAM SEGMENT FOR WHICH THE DEPARTMENT OF FISH AND GAME HAS ESTABLISHED STREAMFLOW REQUIREMENTS (THE DIVISION OF WATER RIGHTS MAINTAINS CURRENT LISTS FOR THESE), YOUR REGISTRATION WILL BE ACCEPTED AND EVIDENCED BY A CERTIFICATE OF REGISTRATION, A COPY OF WHICH WILL BE MAILED TO YOU.

PROJECT DESCRIPTION

1. Provide a brief description of your project including, but not limited to, the type of diversion structure and conveyance facilities, any existing facilities, and how the project will operate.

Water is diverted from Stanshaw Creek and conveyed
through a flume to the property. Water is stored in an
oval-shaped pond and used for domestic purposes.

Owner is Douglas T. Cole

Marble Mountain Ranch

92520 Highway 96

Somes Bar, CA 95568

Tel: (530) 469-3437

FISH AND WILDLIFE INFORMATION

2. Will this project require a Department of Fish and Game Streambed Alteration Agreement? No If yes, has one been filed? n/a
3. What resident or migratory game or nongame fish species occur in affected streams? Steelhead,
resident trout
What season of the year do they occur in the stream? Year-round
4. Do any plants or animals which are (1) federally-identified as candidate, threatened, or endangered; (2) state-listed as rare, threatened, or endangered; or (3) listed by the Department of Fish and Game Natural Diversity Data Base occur in the project area? No
- (If so, a survey will need to be completed that identifies the species and the habitat requiring protection.)
5. Will your project have an adverse effect on any resident or migratory fish populations, any wildlife populations, or any rare or endangered plant or animal species? No If so, explain: n/a
6. Will your project adversely affect wetlands? No
- (If so, a survey will need to be completed that identifies the habitat requiring protection.)
7. What measures are you proposing to incorporate into your project to protect fish, wildlife, or endangered or rare species? Appropriate seasonal fish flows.

CERTIFICATION

By signing and submitting this form to the State Water Resources Control Board, I certify that I have contacted the Environmental Services Supervisor for the California Department of Fish and Game region in which my point of diversion is located, that I have furnished a copy of this form and Application/Registration form WR 1 to said Supervisor, and that I will comply with all lawful conditions required by the California Department of Fish and Game.

I further certify that all of the information given in this form is true and correct to the best of my knowledge and belief.

Date: Nov. 27, 1998

Signature: Sean Bagheban

Sean Bagheban (Agent of record)

P.O. Box 160621 PRINT NAME

Sacramento STREET ADDRESS

CITY

CA 95816

STATE

ZIP

916 612-3539

TELEPHONE NUMBER

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

DIVISION OF WATER RIGHTS

SMALL DOMESTIC USE REGISTRATION

CERTIFICATE NO. R 480

**Application 30945R of Douglas T. Cole
 92520 Highway 96
 Somes Bar, CA 95568**

filed with the State Water Resources Control Board (SWRCB) on September 17, 1999 meets the requirements for registration of small domestic use specified in Article 2.7 (commencing with section 1228) of Chapter 1 of Part 2 of Division 2 of the Water Code. The appropriation is subject to the following conditions.

1. Source:

Stanshaw Creek

Tributary to:

Klamath River thence
Pacific Ocean

within the County of Siskiyou

2. Location of Point of Diversion: By California Coordinate System, Zone 1	Point is within (40-acre subdivision)	Section	Township	Range	Base and Meridian
North 785,300 feet and East 1,589,300 feet	SW ¼ of NE ¼	33	13N	6E	H

3. Purpose of Use:	4. Place of Use:	Section	Township	Range	Base and Meridian	Acres
DOMESTIC	SW ¼ of NE ¼	33	13N	6E	H	

The place of use is shown on a map on file with the SWRCB.

APPLICATION 30945R

REGISTRATION CERTIFICATE NO. R. 480

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.

6. Appropriation of water pursuant to this registration shall be made in accordance with the information set forth in the completed registration form as to source, location of point of diversion, purpose of use, place of use, and quantity and season of diversion. This information is reproduced as conditions 1 through 5 of this certificate.

7. The appropriation registered herein shall be limited to the use of water in houses, resorts, motels, organization camps, campgrounds, and other similar facilities, including the incidental watering of domestic stock for family sustenance or enjoyment, the irrigation of not to exceed one-half acre of lawn, ornamental shrubbery, or gardens at any single establishment, and the human consumption, cooking, and sanitary needs at campgrounds or resorts.

8. Any storage of water registered herein may include impoundment for incidental aesthetic, recreational, or fish and wildlife purposes.

9. This appropriation is limited to the season of diversion specified in condition 5 herein. If such specified season is less than the actual season of need, an alternative supply of water, or other valid right, shall be utilized for all uses outside of the season registered herein.

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 SWRCB 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.

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.

12. Registrant shall allow representatives of the SWRCB, and other parties as may be authorized from time to time by the SWRCB, reasonable access to project works to determine compliance with the terms and conditions of this registration.

APPLICATION 30945R

REGISTRATION CERTIFICATE NO. R. 480

13. If the registrant does not own the point of diversion, this registration shall not be construed as conferring upon the registrant right of access to the point of diversion.
14. To the extent that water available for use under this registration is return flow, imported water, or wastewater, this registration shall not be construed, as giving any assurance that such supply will continue.
15. Diversion works shall be constructed and water applied to beneficial use with due diligence.
16. In accordance with sections 1600 through 1607 and 6100 of the Fish and Game Code, no work shall be started on the diversion works and no water shall be diverted until registrant has entered into a stream or lake alteration agreement with the California Department of Fish and Game and/or the Department has determined that measures to protect fishlife have been incorporated into the plans for construction of such diversion works. Construction, operation, and maintenance costs of any required facility are the responsibility of the registrant.
17. In compliance with section 5937 of the Fish and Game 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 Game, 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.
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 the California Department of Fish and Game.
19. No construction shall be commenced and no water shall be diverted under this registration until all necessary federal, state, and local approvals have been obtained, including obtaining and complying with any waste discharge requirements from the appropriate California Regional Water Quality Control Board.
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 Game 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.

APPLICATION 30945R

REGISTRATION CERTIFICATE NO. R. 480

21. This registration is subject to the submittal of a report of water use and satisfactory renewal of the registration, on forms to be furnished by the SWRCB, including payment of the then-current renewal fees prior to the expiration of each five-year period following the date of first filing the completed registration.

22. The point or points of diversion and the place of use registered herein may be changed by filing a completed amended registration form with the SWRCB, including payment of the then-current registration fee. Such change shall not operate to the injury of any legal user of the water involved.

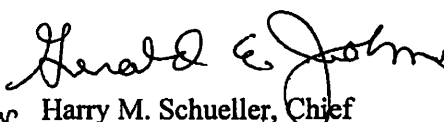
23. The appropriation registered herein shall be totally or partially forfeited for nonuse if the diversion is abandoned or if all or any part of the diversion is not beneficially used for a continuous period of five years.

24. The appropriation registered herein is subject to enforcement, including but not limited to revocation, by the SWRCB if 1) the SWRCB 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 SWRCB finds that the registrant is in violation of the conditions of this registration.

25. In the event that water is to be collected to storage under this registration, the Registrant shall install and maintain an outlet pipe of adequate size and capacity through the dam, as near as practicable to the bottom of the natural stream channel so that water that is not authorized for collection to storage can be bypassed through the dam. In the event that the dam is already constructed, registrant shall provide other means satisfactory to the Chief of the Division of Water Rights for bypassing water. Before storing water in the reservoir, registrant shall provide evidence that substantiates that the outlet pipe or other means of bypassing water has been installed. Evidence shall include photographs showing the completed works or a certification by a registered engineer. The facilities shall be maintained and operated to ensure compliance with the terms of this registration.

Dated: 11/15/99

STATE WATER RESOURCES CONTROL BOARD


for Harry M. Schueller, Chief
Division of Water Rights



State Water Resources Control Board

WR-1



Alan C. Lloyd, Ph.D.
Agency Secretary

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
Mailing Address: P.O. Box 2000 ♦ Sacramento, California 95812-2000
FAX: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

1001 I Street, 14th Floor

APR 08 2005

In Reply Refer
to:331:YM:D30945R

Douglas T. Cole
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

SMALL DOMESTIC USE REGISTRATION D30945R, CERTIFICATE NO. R480,
STANSHAW CREEK TRIBUTARY TO KLAMATH RIVER IN SISKIYOU COUNTY

Thank you for submitting a Report of Registrant for your pond. After reviewing your file for renewal and contacting the Department of Fish and Game (DFG), there has apparently been no clearance issued from the DFG on Certificate No. R480. However, on November 17, 1998, your agent of record (Sean Bagheban) signed a form stating you had contacted an Environmental Services Supervisor from DFG.

As Condition 19 of Certificate No. R480 states, you are required to obtain all necessary federal, state, and local approvals. Your specific attention is directed to Conditions 16, 17, and 18. Before your certificate is renewed, you are requested to send the Division of Water Rights a copy of DFG clearance. If you do not have one, please contact DFG and obtain written clearance. Your renewal is pending submittal of DFG clearance.

If you have any questions, please call me at (916) 341-5362.

Sincerely,

Yoko Mooring
Engineering Associate
Water Rights Processing

cc: Jane Vorpagel
Northern California Region
Department of Fish and Game
601 Locust Street
Redding, CA 96001

California Environmental Protection Agency



005337

United States Department of Justice

Office of the Attorney General

Washington, D.C. 20530

Enclosed for the Bureau are two copies of a letterhead memorandum dated and captioned as above.

Very truly yours,
 [Signature]

100-443888

Enclosed for the Bureau are two copies of a letterhead memorandum dated and captioned as above.

Very truly yours,
 [Signature]

Enclosed for the Bureau are two copies of a letterhead memorandum dated and captioned as above.

The Bureau is requested to advise the Department of Justice of any information received from the Bureau of the Federal Bureau of Investigation (FBI) regarding the activities of the [redacted] in the [redacted] area. This information should be furnished to the Department of Justice as soon as it is received.

The Bureau is requested to advise the Department of Justice of any information received from the Bureau of the Federal Bureau of Investigation (FBI) regarding the activities of the [redacted] in the [redacted] area. This information should be furnished to the Department of Justice as soon as it is received.

If you have any questions, please call me at (916) 441-2331.

Sincerely,
 [Signature]

Enclosed for the Bureau are two copies of a letterhead memorandum dated and captioned as above.

Very truly yours,
 [Signature]

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 20.2.4 Young's Ranch

1. 02-04-93.SWRCB.to Young's.App29450
2. 03-17-90.Consultant.Hydrology Report.Young's Ranch

(916) 657-1951

FAX: (916) 657-2388

	Youngs request	SWRCB recommended
domestic	.22 cfs	.02
irrigation	.12	.09
total	.34 cfs	.11

In Reply Refer
to:333:KDM:29450

FEBRUARY 04 1993

Robert E. and Mary Judith Young
c/o Thomas W. Birmingham
770 L Street, Suite 1200
Sacramento, CA 95814

Dear Mr. Birmingham:

APPLICATION 29450 OF ROBERT E. AND MARY JUDITH YOUNG--STANSHAW CREEK IN SISKIYOU COUNTY

On July 22, 1992, Division of Water Rights (Division) staff wrote to inform your clients, Robert and Mary Judith Young, that additional information is required before Division staff will be able to complete the initial review of Application 29450. No response was received. The issues which require a response are listed below.

The first issue which must be addressed is the quantities of water which were requested for both domestic and irrigation purposes. The application requests a right to directly divert 0.22 cubic feet per second (cfs) for domestic purposes. 3 residences, 44 recreational vehicle hookups, 11 housekeeping cabins, 14 mobile homes and one lodge will be served. Based on the quantities considered reasonably necessary pursuant to Title 23, California Code of Regulations Section 697, Division of Water Rights (Division) staff calculates the total beneficial use for these facilities to be 0.02 cfs.

Beneficial use was calculated using 75 gallons per day (gpd) per person for the residences, and an average of 4 persons in each house. The recreational vehicles are estimated to use 30 gpd for 2 people. The housekeeping units would require 55 gpd for four people, and the mobile homes would require a similar amount of water. No information was provided about the lodge. Thus, Division staff estimates that 20 people would use the lodge, and each person would require 55 gpd. If any of these estimates are incorrect, please provide information regarding actual occupancy rates and water duties. Based upon these estimates, Division staff recommends that domestic use under Application 29450 be reduced to 0.02 cfs. The 0.02 cfs was calculated by multiplying the number of each type of facility, such as 3 residences, times the estimated daily usage (75 gpd), times the number of persons (4 people), then multiplying by the conversion factor of 1 cfs per 646,317 gpd.

SURNAME
DWR 540 REV. 1-88

2-3-93 Kassel 2/3/93

EXHIBIT I

4-11-68

005341

FEBRUARY 04 1993

Robert E. and Mary Judith Young

-2-

Irrigation water duty of 1 cfs for each 80 acres of irrigated area is considered reasonable for Siskiyou county. Thus, irrigation of the 7 acres of alfalfa listed in the application should require 0.09 cfs. The application requests 0.12 cfs. Thus, Division staff recommends that Application 29450 be reduced to 0.09 cfs for irrigation purposes. Please respond and state whether your client concurs with these recommendations.

Additional information is also required to complete the environmental supplement to the application. The following information is required:

Question 4 of Environmental Supplement

Indicate whether or not any permitting agency prepared any environmental documents for the project. If so, please complete the answers to the last part of questions number 4.

Question 7b

Please describe the types of existing vegetation (such as grasslands, pine forest, oak-grass foothills, etc.) at the point of diversion, immediately downstream of the point of diversion, and at the place where the water is to be used. Please be sure to include photographs of these areas with the vegetation types showing in the photographs.

Question 8

Indicate what changes in the project site and surrounding area will occur or are likely to occur because of construction and operation of the project.

Question 16

Indicate whether or not your client is willing to make the changes in the project as recommended by the Department of Fish and Game.

A response is requested within the next 30 days. Please note that failure by an applicant to comply with a written request for information within a reasonable time may be cause for the Division to cancel an application pursuant to Government Code Section 65956(c). Division staff is available to answer any questions you might have. I can be contacted at (916) 657-1951.

Sincerely,

ORIGINAL SIGNED BY

Katherine Mrowka
Associate WRC Engineer
Hearings Unit

cc: Robert E. and Mary Judith Young
Young's Ranch
Somes Bar, CA 95568

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RIGHTY SIGNED BY

SECRET

[illegible]

Subject is recommended by the Department of Labor and Social Indicators Bureau of Labor Statistics as suitable to make the crosses in the

7067100-10

the project to assess results of construction and operation of the project.
[Indicate how standards in the project will be monitored and how they will apply to

~~SECRET~~

1. The first step in the process of the
 2. is to determine the nature of the problem.
 3. The second step is to determine the scope of the problem.
 4. The third step is to determine the causes of the problem.
 5. The fourth step is to determine the effects of the problem.
 6. The fifth step is to determine the solutions to the problem.
 7. The sixth step is to determine the implementation of the solutions.
 8. The seventh step is to determine the evaluation of the solutions.
 9. The eighth step is to determine the maintenance of the solutions.
 10. The ninth step is to determine the termination of the solutions.
 11. The tenth step is to determine the continuation of the solutions.

00521700-00

1. The following information was obtained from the files of the FBI:

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When a person is the subject of the following information it should be added to the information: it also should be added to consider the qualifications.

[illegible]

REPORT OF THE JOINT SELECT COMMITTEE ON THE

- 5 -

LESENIBA 07 1852

March 17, 1990

Marvin Goss
1881 Fieldbrook RD
Arcata, CA 95521

Mr. Jeffrey A. Meith
PO Box 1679
Oroville, CA 95965

Re: Information Needed from Hydrologist (Ms. Short, 11/27/89)

Dear Mr. Meith,

The following is in response to information you requested in your letter to Ms. Short, dated 11/27/89:

1. Watershed Areas:

Stanshaw Creek watershed area at Young's Ranch diversion: 2285ac(3.57 mi²).

Mountain Home Ranch sub-watershed area: 190ac(0.30 mi²), or 8% of the Stanshaw Creek watershed area.

Source: Forks of the Salmon NW, USGS Topo. Quad. (1955).

2. Comparable Streams in Region used for Extrapolation:

Indian Creek (Happy Camp, CA)

Salmon River (Somes Bar, CA)

Source: "Runoff Depth-Duration Frequency in Selected California Watersheds", DWR Memo Report 1/73;

"Klamath River Investigation", DWR Bulletin No. 83(1960).

3. History of the Young Diversion:

Since 1858: 0.49 cfs

Source: "Descriptions of Surface Water Diversions in Klamath River Hydrographic Unit", Pg. 58,
Table 4 (Continued).

I do not have the necessary information to address the specific consumptive and non-consumptive water use requirements at Young's Ranch.

4. Irrigation and domestic requirements for Mountain Home Ranch:

I do not have the necessary information to address the specific consumptive and non-consumptive water use requirements at Mountain Home Ranch.

5. Current Diversion Capability of Young's Ranch: 1.25 cfs

Source: Physical measurements and Text-Book on Hydraulics, Russell, Pgs. 147-153 (1915).

6. Other Available Sources of Supply:

There do not appear to be any other adjacent sources of water that can be feasibly developed for either Mountain Home or Young's ranches.

7. Substantial Accretions to Flow in Stanshaw Creek:

There are no substantial accretions to flow in Stanshaw Creek downstream of Mountain Home Ranch, other than very short duration events with resulting immediate stream runoff.

Mr. Meith
Re: Information Needed from Hydrologist
March 17, 1990
Page -2-

Myanmar
- some history

8. Estimated Flow Characteristics of Stanshaw Creek: (All estimates in cfs)

a. Average:

1) Stanshaw Creek (Annual: 12.9 cfs)

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
30	20	15	29	26	10	4	2	2	2	4	20

2) Mountain Home Ranch Drainage (Annual: 1.0 cfs)

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2.4	1.6	1.2	1.8	2.1	0.6	0.3	.15	.15	.15	0.3	1.8

3) Net-flow at Young's Ranch Diversion, Stanshaw Creek (Annual: 11.9 cfs)

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
27.6	18.4	13.8	21.2	23.9	9.2	3.7	1.85	1.85	1.85	3.7	18.4

b. Low-flow: (Probability: 1 in 50 yrs. using the 1976-77 drought as a model)

1) Stanshaw Creek

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
1.2	2.0	1.2	5.8	9.0	10.0	4.0	1.7	1.0	1.3	1.0	1.2

2) Mountain Home Ranch Drainage

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
0.10	0.15	0.10	0.50	0.70	0.80	0.30	0.13	-0.1	0.10	-0.1	0.10

3) Net-flow at Young's Ranch Diversion, Stanshaw Creek

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
1.1	1.8	1.1	5.3	8.3	9.2	3.7	1.6	0.9	1.2	0.9	1.1

c. Instantaneous Peak Flow of Stanshaw Creek for given Return Period:

Annual	5-Year	10-Year	25-Year	50-Year	100-Year
225	350	550	800	1000	1250

Source: "Runoff Depth-Duration Frequency in Selected California Watersheds", DWR Memo Report 1/73.

9. Incremental Increases or Decreases in Flow along Stanshaw Creek:

It is highly unlikely that the flow in Stanshaw Creek Varies between the outlet of the Mountain Home subwatershed and the diversion for Young's Ranch, since the diversion is immediately downstream from the tributary's outlet. There are no other diversions in this short reach and the surface water and geologic characteristics are homogeneous. Any effect from groundwater characteristics would merely add to the overall flow.

Mr. Meith
Re: Information Needed from Hydrologist
March 17, 1990
Page -3-

Synopsis:

The Young's Ranch diversion and earth-channel/fume capacity exceeds only the lowest flows which rarely occur on Stanshaw Creek between August and December during drought years. The only time this condition has been documented was in 1977 when the flow available for diversion was 0.9 cfs (0.35 cfs below diversion capability), but still 1.75 times greater than historic use (0.48 cfs). Less than 0.1 cfs was available for use (and used) by the Mountain Home Ranch during this period.

During at least 98.4 percent of the time, too much, not too little flow at the Young's Ranch diversion is the primary concern due to the sediment-carrying characteristics of both Stanshaw Creek and the earth-channel/fume. Neither the earth-channel/fume, albeit poorly designed and maintained, nor flow characteristics of Stanshaw Creek have limited the availability of water at Young's Ranch during the documented period of use (since 1958).

* Prior claims (or rights) for more water by Young's Ranch (Ref: Protest to Appl. 25446) appear to have long-since been abandoned through documented non-use, in accordance with California State Water Law administrative procedures.

Basis for the foregoing statements are as follows:

1. I was the District Hydrologist at the Ukonom Ranger District, USFS between June 1974 and September 1977.
2. I lived at Young's (nee Hayes) Ranch between June 1974 and September 1977.
3. Between 1974 and 1977, I did, on several occasions, evaluate the design and inspect the condition of the Young's Ranch diversion and earth-channel/fume.
4. I was the State Water Rights coordinator for the Bureau of Land Management's State Office in Phoenix, AZ between September 1979 and December 1981.
5. I hold a B.S. Degree in Geology and an M.S. Degree in Watershed Management.

I hope this information is useful to you. Please contact me if you have any further questions on this matter or desire clarification.

Sincerely yours,



Marvin Goss
HYDROLOGIST

cc: Ms. Barbara Short -

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 30.1 USFS

1. 8-11-10.USFS.to Cole.new power plant
2. 10-19-01.USFS.to file.Case Report.Chronology
3. 10-18-01.USFS. to file.Water Right Complaint Meeting
4. 5-8-01.USFS.to Pace
5. 3-22-01.USFS. to file.site visit and meeting summary
6. 3-9-00. USFS. to SWRCB.App 29449
7. 8-17-64.USFS.to Reg Forester.ditch ROW



United States
Department of
Agriculture

Forest
Service

Six Rivers
National Forest

1330 Bayshore Way
Eureka, CA 95501-3841
(707) 442-1721 Text (TTY)
(707) 442-1721 Voice

File Code: 2770

Date: August 11, 2010

Mr. Douglas Cole
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole: •

This is in response to your proposal as presented to George Frey on July 8, 2010, to develop a new power plant and penstock in association with your existing hydro power project.

The project as described would use the same water intake source on Stanshaw Creek but the existing penstock would be extended, bypassing the current hydro power plant on your property. The penstock would continue down slope where it would leave your property, go under Highway 96 and continue down a non-system road on National Forest System lands to a point on a low bench above the Klamath River. The penstock would enter a new hydro plant which would generate approximate the same or slightly more power than the old system produced. Your old power plant would be bypassed and kept intact as an emergency back-up. Additional ancillary improvements would include a pole line to transmit power back to the Marble Mountain Ranch, improvements to the lining of the ditch carrying water to the penstock and construction of an outtake pipeline that would disperse the water from the power plant either to an existing pond ¼ mile upriver or directly to the Klamath River. You stated that only half the water currently diverted from Stanshaw Creek would be needed for this proposal. You also stated that if the outflow water from the new power plant is directed to an existing pond then it may be possible to create a fishery in the pond.

This project falls under the authority of the Federal Energy Regulatory Commission (FERC). FERC regulates power plants, both large and small on federal lands. As your proposal will include a new penstock, power plant and out take pipeline on National Forest System lands FERC is the regulating agency. Because this proposal is below 5 mega watts it will be under its small hydro regulations and exempt from licensing. Although exempt from licensing it will still require a Forest Service special use permit authorization. George Frey provided you with a copy of the FERC Small Hydro Handbook.

You need to submit an application to FERC for this project. The Forest Service will work with you and FERC to complete the processing of this proposal. An environmental analysis and Section 7 Wild & Scenic River determination for the proposed project will be required before permit issuance. Costs for processing the permit will be subject to recovery by the Forest Service.

Enclosed is a sketch map of your existing and proposed hydro system. It may be helpful as you develop the proposal for FERC. When George reviewed the proposal on the ground he noted



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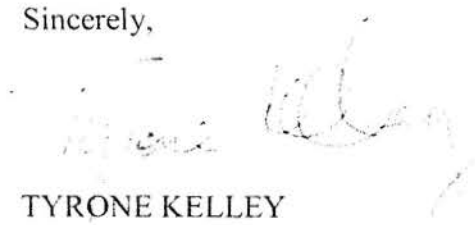


several issues that will need further investigation.

- You will need an accurate map of the proposal in both plan and profile views showing property lines, the diversion location in Stanshaw Creek, ditch line, existing penstock, existing power plant, proposed penstock, access road from Highway 96 to the Klamath River, proposed new power plant, proposed pole line and proposed outflow pipeline from the power plant.
- The new penstock is proposed to be located in a cross drain culvert under State Highway 96. A Caltrans encroachment permit will be needed for this use.
- The new power plant is located on a low bench above the Klamath River. Your proposed location may be within the 100 year flood level. You will need an accurate measurement of the power plants elevation above the Klamath River's annual mean high water level and an estimation of the 20 and 100 year flood levels. This issue will become more important if the dams on the Klamath River are removed and high winter flows are not regulated.
- The proposed power plant and penstock will be within the wild and scenic river corridor of the Klamath River. The river is designated as "recreational" in this reach. At a minimum, some type of screen will be needed to hide the power plant, penstock and outflow pipeline.
- One option of your proposal is to direct the outflow from the new power plant to a pond ¼ mile up river. In plotting out the location of the new power plant it appears that the pond will be higher than the outflow from your power plant. This issue needs to be verified by establishing the elevation of both the new power plant and the pond. Also, from a fisheries prospective, this proposal would not be as positive as running the water from the new power plant directly to the Klamath River. The cold water input to the Klamath River helps cool the river in the summer. Running the water into a pond where it will warm up before it flows into the Klamath is not as desirable as placing it directly into the Klamath River.

If you have any questions contact George Frey, the permit administrator, at (707) 441-3631.

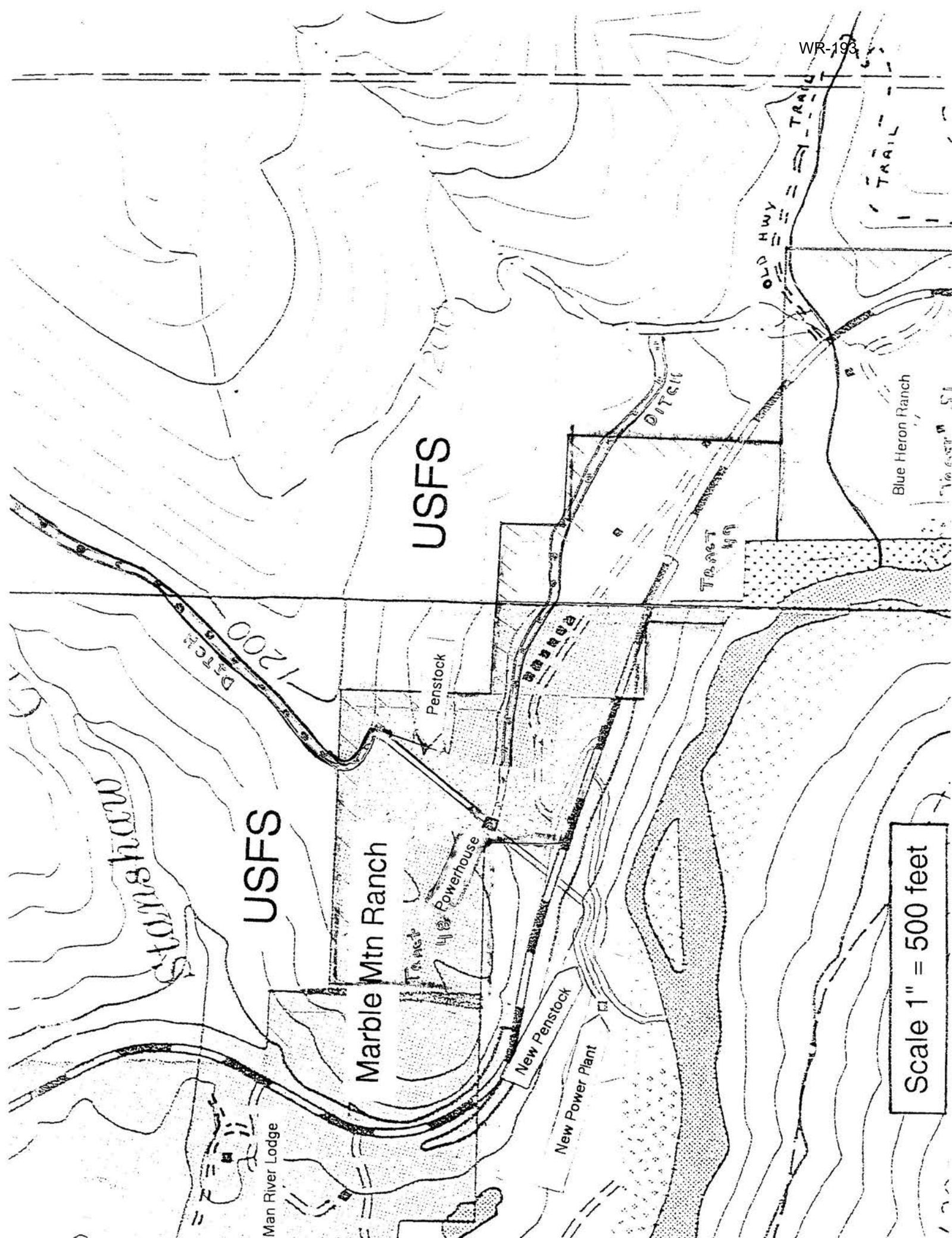
Sincerely,



TYRONE KELLEY
Forest Supervisor

Enclosure

cc: Nolan C Colegrove



Scale 1" = 500 feet

Case Report

Stanshaw Creek Water Diversion 10/19/2001

Ukonom Ranger District - Klamath National Forest

Problem

An historic diversion in Stanshaw Creek for the purpose of supplying water to the Marble Mountain Ranch (Section 33 T13N R6E HM) has been a recent source of concern by neighbors, state fish and game wardens and a local environmental group. The diversion has substantially dewatered Stanshaw Creek below the diversion and reduced spawning habitat for anadromous fish in the lower reaches of the creek.

Chronology

3/25/1867 - E. Stanshaw recorded in the County Records Office a Notice of water use (the State of California did not grant water rights till 1914). Stanshaw stated that he had

"taken hold for mining and for purpose of irrigation 600 inches of the water running in Stanshaw Creek. So called the water so taken, being carried by ditch and flume, to and past my dwelling home; second by ditch and flume running up the Klamath River to my upper field, said creek being in Dillon Township, State of California, County of Klamath."

600 inches of water denotes the measurement of the period which was in miner's inches - a miner's inch is the amount of water that would discharge through a 1" x 1" opening under a prescribed head of water. In Northern California it equals 0.025 cu. ft./sec. 600 miner's inch of water is equal to 15 cu ft/sec. The water in this ditch, following use on the homestead, empties into Irving Creek - three quarters of a mile south of Stanshaw Creek.

5/6/1905 - Klamath National Forest created by Presidential proclamation

3/27/1911 - Samuel Stanshaw is granted a Homestead Patent

1912? At some point a hydro power plant utilizing a Pelton wheel was developed. The current owners of the Marble Mtn. Ranch, Doug and Heidi Cole, believe the water wheel was put into place before 1912.

8/17/1964 - Memo from Regional Attorney Russell Mays to Regional Forester confirming that no permit is necessary for the Stanshaw ditch and diversion if it preceded the FS establishment.

Late 1960's or early 1970's - Lew Hayes, owner of the Marble Mtn Ranch, sued the Forest Service for fouling his water as a result of a Forest Service logging operation in

the Stanshaw drainage. The Forest Service settled out of court. I do not have written documentation of the case. It was reported by Orleans/Ukonom District Ranger Bill Heitler.

12/30/1994 - Cole's purchase Marble Mtn. Ranch from the Young's.

1995 - 2000 - A recent call to the State Water Resources Control Board (SWRCB) revealed the Cole's have three filings with the state. The first is a 2.5 cu ft/sec Statement of Diversion (State # S015022). This is probable associated with the 1876 filing in the county recorders office of a notice of water use by E. Stanshaw. The second is a Small Domestic Use for storage of 10 acre feet per year (State # D030945) in a pond on the property. The third is a filing of a power use application for 3 cu ft/sec (State # A029449). This is for use with the hydro project.

1996 - Coles applied for a 0.57 acre Small Tracts Act grant for lands that underlie 3 house trailers, 3 trailer pads and an access road. Improvements were discovered following approval of a BLM Metes and Bounds survey in 1985. Case completed and quit claim granted sometime in 1997 (need copy of recorded deed).

1997 - Completion of a Forest Service trail up Irving Creek. Trail was a cooperative project between the Forest Service and the Coles. The trail accessed the Bull Pine Mine.

1998 - A 0.57 acre Small Tracts Act quit claim is granted by the Forest Service.

4/1999 - The Cal DFG, through its representative Game Warden Ron Presley, and the Cole's entered into a Section 1603 Five Year Maintenance Agreement for Streambed Alteration. The agreement provided for delineating appropriate activities, project modifications and specific measures necessary to protect fish and wildlife resources. The DF&G determined resident trout and aquatic invertebrates would be the wildlife potentially affected by the project due to loss of stream habitat from low flows. The agreement provided that "flows to downstream reaches shall be allowed to pass downstream to maintain wildlife, plant life and aquatic life below the dam in a healthy condition, and to allow fish migration, during all times that the natural stream flow would have supported aquatic life, pursuant to Fish and Game Code section 5937 and 5901". The agreement did not specify a specific bypass volume of water that was to be in the creek below the diversion. The six page agreement identified a number of other construction and maintenance provisions the Cole's were responsible for.

3/9/2000 - Letter from Jon Grunbaum, Happy Camp RD, Klamath NF fisheries biologist to Yoko Mooring of the SWRCB concerning the Cole's filing (#A029449) of a appropriation of water for power use from Stanshaw Creek. Mr. Grunbaum stated the Forest Service was investigating the possible upgrading of the culvert under Highway 96 to allow for fish passage and the Cole's further appropriation of water would make the project pointless. Mr. Grunbaum requested delay of any decision by the SWRCB until more research on Stanshaw Creek is completed. The culvert upgrade project has not

advanced beyond a proposal at this time. Mr. Grunbaum mentioned that as of 4/2001 the SWRCB has not responded to his letter.

9/26/2000 - Documentation of a site visit by District Ranger Bill Heitler and Fisheries Biologist Jon Grunbaum for the purpose of determining if the ditch was on NF land, the age and amount of water diverted. The ditch was definitely on National Forest land, had been in place a long time and diverted 75% of the creeks water. A search of District records indicated no permit authorized the improvements.

10/05/2000 - Letter from District Ranger Bill Heitler to the Cole's stating that the diversion and part of the ditch were on NF lands with no authorization. The letter stated the diversion was causing adverse impacts to fish and that National Marine Fisheries Service and Cal. Dept. of Fish and Game were concerned. The letter gave the Cole's 30 days to respond with any permits they might have authorizing their use. The letter stated the use may predate NF creation and therefore the Cole's may be eligible for a no fee special use permit.

11/03/2000 - J. Konrad Fisher, one of seven owners of the Old Man River Lodge, a parcel that abuts the Marble Mountain Ranch and is adjacent to Stanshaw Creek sent a Freedom of Information Act (FOIA) letter to the Forest Supervisor, Six Rivers NF. He requested all records associated with the Cole water diversion.

11/17/2000 - Letter from Forest Supervisor, Six Rivers National Forest to J. Konrad Fisher answering his FOIA and sending 5 documents including a note written by District Ranger Heitler of a site visit 9/26/2000, a letter from Jon Grunbaum, biologist to SWRCB requesting delay in approving a grant of a 3.0 cu ft/sec appropriation for power use, a recorded notice of taking of water by E Stanshaw in 1867, a copy of the Stanshaw patent and the Cole's 1994 grant deed to the Marble Mtn. Ranch.

3/22/2001 - Documentation of a meeting at the Marble Mtn. Ranch between the Cole's, the Karuk Tribe and the Forest Service concerning efficient use of Stanshaw Creek water and the need as seen by the Tribe of allowing as much water as possible to flow down Stanshaw Creek for the benefit of anadromous fish.

4/2001 - 60 day Notice of filing of a law suit against the Forest Service by the Klamath Forest Alliance. Law suit concerns Forest Service actions in relationship to protecting environmental issues associated with the Coles property.

4/2001 - e-mail from Felice Pace, Conservation Director for the Klamath Forest Alliance, requesting information on Forest Service authorizations associated with the Coles ditch on National Forest land.

4/3/2001 - Article in Siskiyou Newspaper on Coles

4/5/01 - Documents listed that are associated with the Cole property and their water rights.

5/4/2001 - e-mail from Felice Pace requesting info on the Cole use of NF Land

5/8/01 - Draft response letter from Bill Heitler to Felice Pace concerning use of NF land by Coles. Use does not require a special use permit as it predates FS.

6/14/2001 - Letter from Don Mooney, lawyer for KFA and Fisher to SWRCB complaining of improper diversion of water under old 1887 water right established by E. Stanshaw.

7/2/01 - Letter from SWRCB to Coles requesting an answer to the Mooney complaint letter.

10/18/01 - Meeting at Coles with reps for NMFS, KFA, SWRCB, Conrad Fisher, Cal DFG and Karuk Tribe to discuss complaint, view site and discuss possible resolutions. Meeting documented.

Issues

Water Rights

The original taking by E. Stanshaw of 600 inches for mining and irrigation in 1867 appears to be an outstanding right but solely for mining and irrigation, not hydro power production. The Cole's have three water filings with the SWRCB - a Statement of Diversion for 2.5 cu ft/sec, a 10 acre feet right for Small Domestic Use as well as an application for 3 cu ft/sec for power use. The application for the 3 cu ft/sec is needed because their previous recorded rights were not for power production only mining and irrigation. This has resulted in an opportunity by others (Cal. DFG and neighbors) to question additional appropriations when dry season flows result in all the water being diverted by the Cole's.

Need for Authorization by Forest Service

I spoke to Richard Flynn of OGC 4/12/2001 and explained current situation and specifically asked if an authorization for a ditch that predates NF creation is required. He said OGC is divided on the issue. Some attorneys feel every use of National Forest land requires authorization including those that predate NF while others feel no special use permit is required for activities that predate NF creation. He went on to say that if a special use is issued it could not change the rights that the Cole's have. We could not deny them the use of the ditch or have them move it from its current location.

If the Cole's decide to enlarge the ditch or move it then the Forest Service has authority to approve or deny a change but not if the use remains the same.

Ditch Bill Easement

Congress provided users of agricultural ditches that predated NF creation to acquire a Ditch Bill easement. The ditch constructed by E. Stanshaw is believed to be in the same location today. As an improvement that predates the Forest Service it was eligible for a Ditch Bill Easement if an application had been made prior to 12/31/1996. The Cole's have not applied for a Ditch Bill Easement. Applying for the easement is not necessary for maintaining their rights for use of the ditch.

FERC License

The 1920 Federal Power Act requires a license to be obtained for projects utilizing federal lands. The current administer of the Federal Power Act is the Federal Energy Regulatory Agency (FERC). The Cole's and their predecessors have not acquired a FERC license for their power project. The Cole's acknowledge this though I don't know if they have contacted FERC at this time. As a preexisting project the Cole's must apply to FERC for a Petition for Declaratory Order. The size of their hydro operation would probable put them in the "exempt license" category. The Forest Service normally issues a special use permit for the water transmission lines on NF land. In this case the ditch predates NF creation and a special use permit may or may not be needed as the use has not changed (see discussion under "Need for Authorization" above). The water in the ditch is used for multiple purposes including irrigation, domestic use and for running the hydro project. The penstock and powerhouse for the hydro project are all located on private property. Only the ditch that leads to the top of the penstock is on National Forest land.

Trail up Irving Creek

The Klamath Forest Alliance questioned use by the Coles of a trail on National Forest land up Irving Creek. The trail was a cooperative project between the Forest Service and the Coles. It was completed in 1997.

Small Tract Act Case

The Coles applied for a resolution to an innocent trespass by previous owners of siting portions of 3 trails, 3 trailer pads and an access road on 0.57 acres of National Forest land. The Forest Service quit claimed the land to the Coles in 1997 or 1998 (Klamath doesn't have a recorded copy).



United States
Department of
Agriculture

Forest
Service

Six Rivers
National
Forest

1330 Bayshore Way
Eureka, CA 95501
(707) 442-1721 Text (TTY)
(707) 442-1721 Voice

File Code: 2770

Date: 18 October 2001

Route To: *

Subject: Water Right Complaint Meeting
Marble Mtn Ranch

To: Files

This is documentation to the files concerning a meeting held 10/17/2001, 10 am at the Marble Mtn. Ranch concerning a complaint filed by Mr. Fisher against Doug and Heidi Cole's application for a license to divert water from Stanshaw Cr. for the purpose of generating electric power by a pelton wheel.

Present:

Forest Service: George Frey, Leslie Goslin-Burrows

NMFS: Tim Broadman, Dave Rielly, Chuck Glasgow, Stacy Li

Karuk Tribe: Toz Solo, Ron Reed, Philip Albers Jr., Lucill Albers, G. Peters

Cal. Dept. F&G - Ron Presley

Klamath Forest Alliance (KFA) - Don Mooney (attorney), Felice Pace, Jim McCarthy

Complainant - Jim Fisher (adjoining landowner), Michael David Fellow, Maig Houston

State Water Resource Control Board (SWRCB) - Michael Contreras, Chuck Rich

Marble Mtn. Ranch (MMR)- Doug Cole, Jan Goldsmith (attorney)

The meeting was led by Chuck Rich of the SWRCB. The meeting was designed to gather information so SWRCB could make a decision on a 20 year application started by Bob Young, a former owner of MMR and continued by the present owner Doug Cole. Application was for a water diversion to run a pelton wheel. Mr. Rich said the Young's had also applied for and the State of California acknowledges a pre 1914 water right for domestic and agricultural water. That right was associated with a recording of a notice by E. Stanshaw in 1867 for the use of 600 miner inches of water in Stanshaw Creek (1 miners inch = .025 cubic feet per second (cfs) therefore 600 miners inches equals 15 cfs). No one in the audience contested this right. They also have a permit for storage of some water on their property in a small pond. The major complaint is that the Cole's current diversion practically dewateres Stanshaw Cr. below the diversion by placing the water that is not consumed in a ditch that empties into Irving Creek. The Cole's typically take 80% of the water in the creek for their operations. As of the day of the meeting Stanshaw Creek above the diversion was flowing between 1 and 2 cfs.

The Cole's Diversion

The Cole's diversion is located 4,000 horizontal feet east of Highway 96 and over 400 vertical feet above the highway. The diversion (which is composed of river rocks arranged by hand) channels water into a ditch originally built by the Chinese in the late 1800's. The ditch contours from Stanshaw Creek over National Forest land for approximately 3000 feet then enters the Cole's property where some water is drawn off for drinking and the rest runs down a 500 foot



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long, 200 foot vertical 14" diameter steel penstock to a pelton wheel that produces hydroelectric power to run the ranch. The ditch can only carry 3 cfs at maximum. Doug Cole said they need approximately close to 3 cfs to run the pelton wheel. This year the water was so low that he had to stop running the pelton wheel in April and it hasn't run since. He has a diesel generator located next to the pelton wheel that is used when the pelton wheel is not running. The water after flowing past the pelton wheel is then directed into a ditch and channeled along the top end of the Cole's property in a southerly direction for approximately 1,800 feet where it leaves the Cole's property and enters upon National Forest land for 800 feet where it ends at a small natural streambed tributary to Irving Creek. This tributary enters Irving Creek 500 feet above Highway 96.

Blue Heron Ranch taps water from this small tributary with a 4" diameter plastic pipe for domestic, agriculture and I believe hydroelectric use. Blue Heron Ranch has ownership along Irving Creek and I did not follow their waterline above Irving Creek to see if it went onto National Forest land. If I had to guess I would say it probably did but it needs to be checked out. Chuck Rich of SWRCB said that Blue Heron Ranch had no water right to take this diverted water and use it for their own purposes. Blue Heron Ranch has riparian rights to Irving Creek and if they used that water they could do so without a license but not the ditch water coming from Stanshaw Creek.

Mr. Fisher's property.

Mr. Fisher is part owner of a parcel located below the highway and adjacent to Stanshaw Creek. The parcel is also known as Old Man River Ranch. I believe this property and the Cole's were once part of a larger parcel. The property has a number of improvements including a caretakers house, a lodge and 4 cabins down near the river. The property is used primarily for fishing. Water for the property is used for domestic and irrigation. No water right is necessary as the property has riparian rights to Stanshaw Creek. The day of this meeting the creek was very low with less than 0.5 cfs of water was flowing through Stanshaw Cr. The reach of Stanshaw Creek from its mouth to Highway 96 is approximately 1000 feet long. It has some fish holding habitat for salmon but no spawning habitat. The creek crosses under Highway 96 by means of 2 arched culverts that are 5 feet high and 6 feet wide at the base and rest on a concrete slab. The culverts are 380 feet long and rise 30 feet over that length making fish passage almost impossible. A review of the creek above the culvert indicates little salmon holding or spawning habitat. The highway culvert has been looked at in the past by Caltrans (along with all other structures on Highway 96) for replacement with a more fish friendly structure but it is thought by some to be a low priority because of the minimal amount of habitat above the crossing and the expense of replacement.

The Tribe, Cal F&G, NMFS and KFA were all concerned with the lack of water in this lower reach of Stanshaw. They felt the water diverted by the Cole's should be returned to Stanshaw Cr. above the highway.

Forest Service Responsibilities:

At the meeting I was asked the Forest Service position on the issues and responded that the intake and outtake of the Cole's system was on National Forest land but their right predated the National Forest and as such they did not need a permit for their domestic and irrigation water so

long as their improvements remained in the same location as originally constructed. I said the Forest Service may issue a special use permit to the Cole's for the sole purpose of documenting the use as we currently have nothing in our files on the location of the ditch over National Forest lands. The permit could not condition use or charge a fee as the ditch was a prior use.

Use of the water for generation of electricity requires a FERC license and a permit from the Forest Service for its operation. The Cole's were currently pursuing acquiring a water right for that purpose and if they are successful we will work with them as they apply to FERC for an exempt license (exempt because its is less than 5 mega watts and once issued does not have to be relicensed).

The use by the Blue Heron Ranch of any waterline over National Forest land is unauthorized and needs to be addressed by the Forest Service (no representative for the Blue Heron Ranch was at the meeting).


The issues concerning the dewatering of most of Stanshaw creek was also a concern of the Forest Service but we looked to NMFS, the Karuk Tribe and the CF&G to take the lead on the issue as the impacts were on private land below the highway and we had no regulatory authority if the historical diversion on National Forest land continued unchanged.

Fisheries Issues:

Most of the meeting centered around impacts of the project to the coho fishery. The attorney for Cole wanted hard data on impacts to the fisheries but no one had such data. The Tribal had anecdotal information but nothing more. The biologists all felt that Stanshaw Creek was being harmed by the diversion. The general concession was Stanshaw water sent through the Cole's ditch needed to be returned to Stanshaw Creek. Doug Cole said he didn't care which way the water used for the hydro plant went but the expense of replumbing the ditch line over to Stanshaw Creek was beyond him. Felice Pace said KFA was opposed to any new water rights being issued to anyone on the Klamath River feeling that the water was already over prescribed

Conclusion:

Chuck Rich from SWRCB stated at the end of the day that he had to make a recommendation on the complaint to the water rights board and would use the information gathered from today's meeting and would accept any written input from the people at the meeting if it was received prior to November 23, 2001. Comments should specifically address the affects of the Cole's application for a hydro water right on the fisheries in Stanshaw Creek.

The Forest Service should continue to cooperate with the other agencies on sharing known and gathering future fisheries data for Stanshaw and Irving Creek. [We should also follow up on ascertaining the location of the Blue Heron waterline in relationship to National Forest ownership. If they are on National Forest land they need to be told to remove their lines as they do not have a water right to the Stanshaw water.] 

/s/ *George Frey*

GEORGE FREY

Assistant Lands and Minerals Officer



United States
Department of
Agriculture

Forest
Service

Six Rivers
National
Forest

1330 Bayshore Way
Eureka, CA 95501
(707) 442-1721 text (TTY)
(707) 442-1721 voice

File Code: 2720

Date: 5/8

Mr. Felice Pace
Klamath Forest Alliance
P.O. Box 820
Etna, California 96027

Dear Felice:

This is in reply to your e-mail concerning activities associated with Klamath National Forest lands adjacent to the property of Doug and Heidi Cole.

Trail

The trail I believe you are referring to in your letter is the Bull Pine Mine Trail, a Forest Service trail. It was a cooperative project between the Forest Service and Mr. Cole completed in 1997. The trail takes off from an abandoned section of old Highway 96, parallels Irving Creek for 500 feet, cross the creek by means of a ford and climbs the slope on the south side of Irving Creek to the vicinity of the Bull Pine Mine.

Deed

Property line location in this area has historically been difficult because many of the original 1882 government survey corners were missing. The Forest Service, in the early 1980s, requested the BLM review the survey in this township. The BLM did a metes and bound survey in this portion of Township 13 North, Range 6 East. The survey was completed and approved in 1985. The survey indicated that portions of three existing structures, three hookup pads and an access road were on National Forest land between the north edge of Youngs Ranch (Mr. Young was the previous owner of the Coles property) and Highway 96. The Coles bought Youngs Ranch in 1995 and applied to the Forest Service for resolution of situation under the Small Tracts Act (Public Law 97-465). The Cole's case met the requirements of the act which included the finding that the improvements were built on land the property owner believed to be theirs but which subsequent surveys revealed to be National Forest. The Forest Service quit claimed 0.57 acres of National Forest land to the Coles under authority of the Small Tracts Act. There is no riparian area associated with the land quit claimed to the Coles.

Ditch and Water Right

A ditch is present on National Forest land adjacent to Stanshaw Creek which takes water from the creek to the Coles property. The ditch has been in existence, to the best knowledge of Forest Service personnel and previous land owners of the property, since built by E. Stanshaw in 1867. The ditch and water use is noticed in a statement recorded by E. Stanshaw March 25th 1867 in the Klamath County records (now part of Siskiyou County). As such, the ditch and water use



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predates the Forest Service which, in this area, was created by Presidential proclamation May 6, 1905. Since it predates National Forest creation, a permit is not necessary. If a permit were issued it would be for no fee, and used solely to document the location and use of the ditch. The Forest does not currently have a special use permit issued to the Coles for the ditch.

I hope this answers the questions raised in your e-mail.

WILLIAM M. HEITLER
District Ranger

STANSHAW DIVERSION MEETING
MARCH 22,2001

The purpose of the meeting was to familiarize the landowner, Karuk Tribe of California, and the Forest Service with the diversion and related issues. We met at the Marble Mountain Ranch at 9:30 AM, March 22,2001. We met to determine if it was possible to increase flow in Stanshaw Creek while meeting the needs of the Marble Mountain Ranch. Attendees were: Doug Cole, owner, Marble Mountain Ranch, Toz Soto, Mid-Klamath River Sub-Basin Coordinator, Ron Reed, Karuk Tribal Fisheries, and Bill Heitler, District Ranger, Orleans Ranger District.

Mr. Cole has done a considerable amount of work to improve the efficiency of his hydropower plant. He recently replaced the 85-year-old pelton wheel and military surplus generator with a state of the art unit, and upgraded about 100 feet of the penstock with new PVC pipe. He estimates that about 25% less water will be used to generate the same amount of power as the old system. Water from Stanshaw Creek flows from the generator, is used for irrigation and eventually ends up in Irving Creek. Blue Heron Ranch uses the water for hydropower and irrigation.

After looking over the hydro plant, we walked the ditch to Stanshaw Creek. The ditch is in good overall condition and shows signs of regular maintenance. Portions have been reinforced with open topped culvert to reduce exfiltration and minimize the chance of a failure. The diversion structure on Stanshaw Creek is rock rubble reinforced with plastic sheeting. The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction. We did not estimate how much water was by passing the diversion. There is a possibility of additional downstream flow if the ditch can be lined or piped. Currently the Cole's do not have the resources to take on a project such as this. Ron explained the tribal position to Doug. The tribe is concerned about coho survival and feels that adequate flows in Stanshaw Creek are critical to providing refugia. I explained that the Forest Service will not require a fee permit for the ditch and diversion structure since use has been continuous prior to the proclamation of the Klamath National Forest. We do need to document the use in a no fee permit. There is also a question as to whether the ditch is a legal easement included in the deed to the property based on a proclamation signed by President Howard Taft. Toz, in his position as Mid-Klamath River Sub-Basin Coordinator, feels there is a good chance that grants are available to pay for improving the ditch. He will begin looking for funding sources for this project. Ron offered tribal support for the grant.

I left the meeting about 11:00 AM. Ron, Toz and Doug continued the discussion looking for other ways to direct water back into Stanshaw Creek. Ron and Toz will look into the amount of water that is being diverted by other users on the Stanshaw Creek. There may be an opportunity to gain additional water from these users.



Bill Heitler

Site Visit

Stanshaw Creek Water Diversion
NE1/4, Section 33 R7W,T13N

Jon Grunbaum, Fisheries Biologist, Happy Camp and Ukonom Ranger Districts, and I visited the diversion and ditch at about 1330 September 26, 2000. The purpose of our visit was to determine whether or not the diversion and ditch are on National Forest land, inspection the ditch, estimate the age of the ditch and estimate the amount of water diverted from the creek to the ditch.

The ditch and diversion structure provide water for a pelton wheel and irrigation at the Marble Mountain Ranch currently owned by Doug and Heidi Cole. They operate an outfitter guide business from the ranch.

A diversion structure has been constructed across the creek at sometime in the past. There is evidence that this has been in use for a considerable period of time, probably more than 50 years. Local anecdotal evidence supports this conclusion and lends credence to stories that the ditch and diversion were constructed and used since the area was mined in the late 1890's-early 1900's. The ditch has been well maintained and shows no signs of failure or other potential problems. There have been several commercial sized conifers and numerous hardwoods felled along the ditch. The age of the ditch would indicate that it predates the proclamation of the National Forest and may be eligible for an easement. The diversion structure is rubble reinforced with plastic tarps and other miscellaneous materials. The head gate to the ditch is concrete with provisions for boards to control flow. A six-inch gate valve of undetermined age was found about 100 feet below the diversion indicating that the diversion may fail during high water.

Jon and I estimated that about 75% of the flow is diverted from the stream to the ditch. John's professional opinion is that the remaining flow is inadequate to support a fish population. It is my opinion, based on maps, that the structures are completely on National Forest land. A diligent search of records at the Orleans District office and the Klamath National Forest Supervisors office could not locate a special use permit for the ditch or diversion structure. A letter will be sent to the Cole's asking them if they have a permit or other legal document for the ditch and diversion structure. If they cannot produce this information, they will have to remove the diversion structure.

15/ Bill Heitler



United States
Department of
Agriculture

Forest
Service

Klamath
National
Forest

WR-193
Ukonom Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410
(530) 627-3291
TTY (530) 627-3291

File Code: 2670
Route To:

Date: 3/09/2000

Subject: Application to appropriate water by permit #29449

To: Yoko Mooring - State of California: State Water Resources Control Board

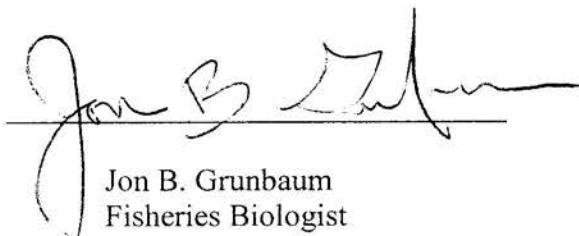
Dear Yoko Mooring:

It has come to my attention that an application (#29449) has been filed to appropriate water from Stanshaw Creek. This application concerns me because the US Forest Service is considering constructing a fish passage facility within the square concrete box culvert under State Highway 96 that is believed to be restricting anadromous fish passage into Stanshaw Creek. The need for construction of fish passage facilities under Highway 96 was identified as an opportunity to restore anadromous fish passage into Stanshaw Creek. This opportunity was identified in the completed *Ishi Pishi / Ukonom Ecosystem Analysis (Klamath National Forest, 1998)*. Reductions of flow in Stanshaw Creek could make construction of fish passage structure under Highway 96 pointless because streamflows could become too low if much water is withdrawn.

Although anadromous fish are not documented in Stanshaw Creek on the Klamath National Forest GIS database, there are many anecdotal accounts that anadromous fish once used to access Stanshaw Creek before construction of the current Highway 96. Indeed, fish habitat surveys conducted in Stanshaw Creek have shown that at least several miles of suitable anadromous fish habitat exists in the Stanshaw Creek watershed.

With the listing of coho salmon as Threatened under the Federal Endangered Species Act and the possible future listing of steelhead, I would recommend that you delay any decision on application #29449 until more research on anadromous fish use of Stanshaw Creek is conducted. The overall strategy of restoring anadromous fish in the Klamath Basin and elsewhere depends greatly on restoring anadromous fish access to their historical habitats.

Thanks for your consideration. If you have any questions or need more information on this subject please feel to call me (530) 492-2243 or (530) 627-3291.



Jon B. Grunbaum
Fisheries Biologist



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005363

Memorandum

AUG 19 1964

DEPARTMENT OF AGRICULTURE

OFFICE OF THE GENERAL COUNSEL

630 Sansome - Rm. 860
San Francisco 94111

Subject: Special Uses - Water
Transmission - Six Rivers -
Donald W. Killian (6/7/63)

August 17, 1964

To: Regional Forester
Attn: L. P. Slattery

Your file no. 2710

In reply to your memorandum of August 5, if the Forest is reasonably sure on the basis of the attached materials and other information that the pipeline has been in place and carrying water continuously since 1876, which is prior to the establishment of the national forest in this area in 1905, then it appears to us that Mr. Killian has a right-of-way for the pipeline over national forest land and does not need a permit therefor, by virtue of 43 U.S. Code, Section 661, which provides in part as follows:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

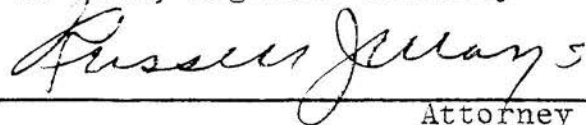
It has been held that this section applies not only to ditches and canals, but also to dams, flumes, pipes, and tunnels.
Peck v. Howard, 167 P. 2d 753.

Accordingly, if the facts are as stated above, Mr. Killian has a right-of-way and no charge can be made for this occupancy.

Your attachments are returned.

Jesse R. Farr, Regional Attorney

By


Attorney

RJMays:dcd
Att.

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**


Supporting Documents – 30.2 DFW

1. 10-15-09. DFG. to SWRCB.Registration req. small domestic R480
2. 2-7-07. DFG. to SWRCB.Cole App.29449. protest dismissal terms
3. 7-5-05. DFG. ltr. to Cole. mitigation
4. 11-20-01. DFG. to SWRCB. Cole App 29449. Complaint Inv.
5. 4-30-99.DFG.Cole 1600 Agreement
6. 01-04-79.DFG.Survey results on Stanshaw

Memorandum

Date: October 15, 2009

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

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

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

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

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

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

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

Ms. Katherine Mrowka, Chief
October 15, 2009
Page Two

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

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

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

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

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

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

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

Ms. Katherine Mrowka, Chief
October 15, 2009
Page Three

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

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

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

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

Ms. Katherine Mrowka, Chief
October 15, 2009
Page Four

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

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

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

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

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

State of California

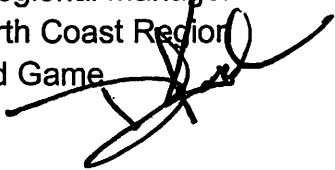
The Resources Agency

M e m o r a n d u m

To: Ms. Katherine Mrowka, Chief
Watershed Unit 3
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Date: February 7, 2007

From: **DONALD B. KOCH**, Regional Manager
Northern California-North Coast Region
Department of Fish and Game
601 Locust Street
Redding, CA 96001



Subject: Application 29449 of Doug Cole, Marble Mountain Ranch, Stanshaw Creek, Siskiyou County

The Department of Fish and Game has received your December 6, 2006, letter which states there has been recent progress in addressing the public trust resource needs associated with Application 29449. You requested a response within 45 days which states any proposed protest dismissal conditions that have been developed for this matter. The Department is not sure what progress you are referring to. Department staff attempted to call you, however, you have been out of the office for several weeks. An attempt was made by the Department to assist the land owner with grant funding to route diverted water back to the Stanshaw Creek watershed. That grant was not funded due, in part, to the unresolved water right issues relating to this diversion.

This diversion was the subject of a complaint investigation as well as a protest on Water Right Application 29449 by the Department on March 17, 2000. The Department has written several letters which should be in the Board's records. Our latest correspondence was a July 5, 2005, letter to Mr. Doug Cole which outlined our primary concerns with this diversion. Board staff received a copy of that letter.

As we stated in our November 20, 2001, letter to the Board, as well as in our letter to Mr. Cole, our primary concerns are for the coho salmon (*Onchorhynchus kisutch*) which rear in the lower reach of Stanshaw Creek below Highway 96.

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

Ms. Katherine Mrowka
February 7, 2007
Page Two

Coldwater habitats such as those provided by Stanshaw Creek are important refuges for juvenile coho salmon which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical coldwater refuge habitats for coho salmon and steelhead in lower Stanshaw Creek need to be accessible to the fish, so sufficient water needs to stay in the stream to maintain connectivity to the Klamath River all year.

The Department currently proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure that existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained. Water temperatures should remain cold and year-round access to the stream from the Klamath River is a better guarantee. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

It is our understanding from discussions with Board staff that water is currently diverted from Stanshaw Creek even when there is not enough flow to run the hydroelectric generators. We believe this procedure results in water being wasted and not being put to beneficial use. This procedure typically occurs during critically dry periods when natural flows are needed to maintain salmonid access from the Klamath River to cooler water, rearing, and refuge habitat found in Stanshaw Creek. If the stream flow in Stanshaw Creek is less than the amount needed to run the hydroelectric plant (3 cfs), then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed to maintain the downstream fishery resources.

During both inspections, various options were discussed which could help satisfy the required downstream flow conditions. We believe two options have merit for the Board and the owner to consider. One option would be returning diverted flows back to Stanshaw Creek after the water is used to generate electricity. Currently, tailwater is discharged to the adjacent drainage of Irvine Creek. Second, improvements to the open ditch system and/or updating the hydroelectric generation system may also allow the applicant to divert less water while still meeting the needs for domestic purposes and electric generation.

Ms. Katherine Mrowka
February 7, 2007
Page Three

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

cc: Mr. James R. Bybee
NOAA Fisheries Service
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Mr. Doug Cole, et al.
92520 Highway 96
Somes Bar, CA 95568

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

ec: Ms. Jane Vorpapel
jvorpapel@dfg.ca.gov

NORTHERN CALIFORNIA-NORTH COAST REGION
 601 Locust Street
 Redding, CA 96001
 (530) 225-2300

July 5, 2005

Mr. Doug Cole
 Marble Mountain Ranch
 92520 Highway 96
 Somes Bar, CA 95568

Dear Mr. Cole:

The Department of Fish and Game has received your letter which details your proposals to mitigate impacts to coho salmon from your current unauthorized diversion in Stanshaw Creek. As you know the Department protested your water right application on March 17, 2000. We are also preparing comments and conditions for your small domestic use application which has come up recently for renewal.

The Department's primary concern regarding your diversion is the protection of anadromous fish habitat in the approximately 0.25 mile reach of Stanshaw Creek from the Highway 96 crossing to the stream's confluence with the Klamath River.

Your letter proposes two phases of mitigation. Phase I involves piping effluent from hydroelectric generation back to Stanshaw Creek above the Stanshaw Creek/Highway 96 culvert. This mitigation method was discussed on various field trips to your ranch during the protest of the water right application. The Department agrees if you pipe this water, which is currently being discharged to Irving Creek, back to Stanshaw Creek, above the Highway 96 culvert, then coho habitat below the culvert should be maintained in this portion of Stanshaw Creek.

Specific flow requirements will be discussed in the future, however, the Department determined in a previous field review that a flow of 2.4 cubic feet per second in Stanshaw Creek below the culvert should maintain suitable habitat for coho salmon.

Phase II in your letter proposes:

- Maintaining current minimum flows past the point of diversion for resident Stanshaw Creek trout.

work out 7-5-05	Verpyle 7-5/05	Turek 7/6/05	K. M. w/ edits 7-7-05	005373	out 7/6/05
SURNAME					

Mr. Doug Cole
July 5, 2005
Page Two

- Installing a half-round culvert in the historic canal line to prevent berm failures, overtopping in high water events and to improve efficiency of water transportation.
- Installing solar power generation systems to compliment hydroelectric generation.

Maintaining current commitments for minimum flows past your "Point of Diversion" is a requirement of your lake or streambed alteration agreement and should not be considered part of Phase II implementation.

The Department supports the concept of your proposals. We look forward to working with you in the future to resolve our protests to your water right applications. If you have questions or comments regarding this letter please contact Staff Environmental Scientist Jane Vorpapel at (530) 225-2124.

Sincerely,

DONALD B. KOCH
Regional Manager

cc: Mr. Jim Sutton
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95814

Mr. Will Harling
Mid Klamath Watershed
P.O. Box 764
Somes Bar, CA 95568

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

bc: Jim Whelan, Mark Elfgen, Anne Manji, Caitlin Bean

Vorpapel:pm W:\Correspondence\2005\Habitat Conservation\coleproposal.doc

State of California

M e m o r a n d u m

To: Mr. Edward C. Anton, Chief
 Division of Water Rights
 State Water Resources Control Board
 Post Office Box 2000
 Sacramento, California 95812-2000

Date: November 20, 2001

From: **Donald B. Koch, Regional Manager**
Northern California-North Coast Region
 Department of Fish and Game
 601 Locust Street, Redding, California 96001

Subject: Complaint Investigation Relating to Application 29449 Doug Cole – Stanshaw Creek,
 Tributary to Klamath River, Siskiyou County

The Department of Fish and Game has reviewed the subject application and attended two site visits with State Water Resources Control Board (Board) staff. The first field investigation was conducted by the Board's application and environmental section on July 26, 2000, and the latest complaint inspection was held on October 17, 2001. On March 17, 2000, we submitted a protest on the application which was accepted by the Board on April 4, 2000. Our protest is based on adverse environmental impacts which could result from reduced flows in Stanshaw Creek. Both the complaint and application refer to an existing unpermitted diversion of water from Stanshaw Creek.

At the time our protest of this application was filed in March 2000, our primary concern was protection of anadromous fish habitat in about a 0.25 mile reach of Stanshaw Creek from the Highway 96 crossing to the stream's confluence with the Klamath River. On April 27, 2001, the California Fish and Game Commission (Commission) accepted a petition to list coho salmon north of San Francisco Bay as an endangered species. Consequently, coho salmon are now considered as a candidate species pursuant to the California Endangered Species Act (CESA). On April 26, 2001, emergency regulations adopted by the Commission pursuant to Fish and Game Code Section 2084 went into effect. These regulations remain in effect during the 12-month candidacy period and authorize the incidental take of coho salmon resulting from diversion of water. The Commission will likely make its final listing decision in early June 2002 and if they decide to list the species, the current Section 2084 incidental-take authorization for water diversions will terminate. After listing, take of coho salmon will be prohibited unless authorized under Fish and Game Code Section 2081(b) or 2080.1. We urge the Board to consider the implications of their actions regarding subject complaint and final decision on water rights application #29449 in light of Fish and Game Code Section 2053 and the potential listing of coho salmon next year.

During the complaint inspection, we were told that the merits of the complaint would be reviewed within 30 days and, therefore, we are submitting these comments and recommendations for the Board's consideration. Formal protest dismissal terms will be submitted to the application unit at a future date.

SURNAME

FG-455 (REV. 1/92)

Vorpayel

Vorpayel
for TurekStacey
Stacey for Koch

005375

11/20/01

Filed
11/20
mailed
11/21/01
SC

Mr. Edward C. Anton
November 20, 2001
Page Two

Federally Listed coho salmon (*Onchorhynchus kisutch*) are known to exist in Stanshaw Creek. Coho salmon were listed as threatened under the Federal Endangered Species Act effective June 5, 1997, and as a candidate under the California Endangered Species Act on April 27, 2001. On two recent occasions, the Department has collected field information within Stanshaw Creek below the subject diversion in the area near its confluence with the Klamath River. On May 25, 2000, we collected 8 young of the year and 18 yearling steelhead trout in this area of Stanshaw Creek. On July 26, 2000, we sampled and found one juvenile coho salmon in Stanshaw Creek below the culverts which run under Highway 96. We believe the Highway 96 culverts are currently a barrier to upstream migration of fish and have, therefore, focused our concerns and mitigation measures on the 0.25 mile stream reach downstream of these culverts. This stream reach is characterized by deep pools, large woody debris, dense overhanging riparian cover shading the stream and generally cool water temperatures and thus provides good rearing and refuge habitat for juvenile coho salmon and steelhead trout. Coldwater habitats such as those provided by Stanshaw Creek are important refuges for juvenile coho salmon which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical cold water refuge habitats for coho salmon and steelhead in lower Stanshaw Creek need to be accessible to the fish so sufficient water needs to stay in the stream to maintain connectivity to the Klamath River all year.

The Department currently proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

It is our understanding from discussions with Board staff that water is currently diverted from Stanshaw Creek even when there is not enough flow to run the hydroelectric generators. We believe this procedure results in water being wasted and not being put to beneficial use. This procedure typically occurs during critically dry periods when natural flows are needed to maintain salmonid access from the Klamath River to cooler water, rearing and refuge habitat found in Stanshaw Creek. If the stream flow in Stanshaw Creek is less than the amount needed to run the hydroelectric plant (3 cfs), then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed to maintain the downstream fishery resources.

Mr. Edward C. Anton
 November 20, 2001
 Page Three

During both inspections, various options were discussed which could help satisfy the required downstream flow conditions. We believe two options have merit for the Board and the owner to consider. One option would be returning diverted flows back to Stanshaw Creek after the water is used to generate electricity. Currently, tailwater is discharged to the adjacent drainage of Irvine Creek. Second, improvements to the open ditch system and/or updating the hydroelectric generation system may also allow the applicant to divert less water while still meeting the needs for domestic purposes and electric generation.

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

cc: Mr. James R. Bybee
 National Marine Fishery Service
 777 Sonoma Avenue, Room 325
 Santa Rosa, California 95404

Mr. Doug Cole, et al.
 92520 Highway 96
 Somes Bar, California 95568

Ms. Jane Vorpapel
 Department of Fish and Game
 601 Locust Street
 Redding, California 96001

bc: G. Stacey D. Maria R. Prestey NANCY
 N. murray L. Weck - HCD - WAH CB
 JV:scW:\Correspondence\2001\habitat conservation\Colecomplaint.wpd

AGREEMENT

REGARDING PROPOSED ACTIVITIES SUBJECT TO CALIFORNIA FISH AND GAME CODE SECTIONS 1600/1606

WHEREAS:

1. Mr. Douglas T. Cole, of Somes Bar, California, representing the property owner, Marble Mountain Ranch, of Somes Bar (jointly referred to as "OPERATOR"), on January 21, 1999 notified (99-0040) the DEPARTMENT of Fish and Game (the DEPARTMENT) of the intent to divert or obstruct the natural flow of, or change the bed or banks of, or use materials from Stanshaw Creek, Siskiyou County, a water over which the DEPARTMENT asserts jurisdiction pursuant to Division 2, Chapter 6 of the California Fish and Game Code.

2. Fish and Game Code Sections 1600 et seq. make provisions for the negotiation of agreements regarding the delineation and definition of appropriate activities, project modifications and/or specific measures necessary to protect fish and wildlife resources.

3. The DEPARTMENT has determined that without the mitigative features identified in this agreement, the activities proposed in the OPERATOR's notification could substantially adversely affect fish and wildlife. The DEPARTMENT's representative, Ron Presley, inspected the site on February 16, 1999 and has determined that resident trout and aquatic invertebrates would be the wildlife potentially affected by this project due to loss of stream habitat due to lower flows.

NOW THEREFORE, IT IS AGREED THAT:

1. If this agreement is found to be in conflict with any other provision of law or general conditions of public safety, it is void.

2. This agreement does not constitute or imply the approval or endorsement of a project, or of specific project features, by the DEPARTMENT of Fish and Game, beyond the DEPARTMENT's limited scope of responsibility, established by Code Sections 1600 et seq. This agreement does not therefore assure concurrence by the DEPARTMENT with the issuance of permits from this or any other agency. Independent review and recommendations will be provided by the DEPARTMENT as appropriate on those projects where local, state, or federal permits or environmental reports are required. This includes but is not limited to CEQA and NEPA project review. Any fish and wildlife protective or mitigative features that are adopted by a CEQA or NEPA lead agency or made the conditions for the issuance of a permit, for this project, become part of the project description for which this agreement is written.

3. If the project could result in the "take" of a state listed rare, threatened or endangered species, OPERATOR has the responsibility to obtain from the DEPARTMENT, a California Endangered Species Act Permit (CESA 2081 Permit). The DEPARTMENT may formulate a management plan that will avoid or mitigate take. Pursuant to Fish and Game Code Section 2090, a State lead agency shall consult with the DEPARTMENT to ensure that projects will not jeopardize the continued existence of any listed species. If appropriate, contact the DEPARTMENT CESA coordinator at (530) 225-2300.

4. To the extent that the provisions of this agreement provide for activities that require OPERATOR to trespass on another owner's property, they are agreed to with the understanding that OPERATOR possesses the legal right to so trespass. In the absence of such right, the agreement is void.

5. To the extent that the provisions of this agreement provide for activities that are subject to the authority of other public agencies, such as county use permits, said activities are agreed to with the understanding that all appropriate permits and authorizations will be obtained prior to commencing agreed activities.

6. All provisions of this agreement remain in force throughout the term of the agreement. Any provision of the agreement may be amended at any time provided such amendment is agreed to in writing by both parties. Mutually approved amendments become part of the original agreement and are subject to all previously negotiated provisions. Title 14, California Code of Regulations, Section 699.5(g) requires the OPERATOR to submit the sum equal to 50% of the fee of the existing agreement to amend an existing agreement.

7. The OPERATOR shall provide a copy of this agreement to all project contractors, subcontractors, agents, employees, and project supervisors. Copies of the agreement must be available at work sites during all periods of active work and must be presented to DEPARTMENT personnel upon demand until the project and/or monitoring period(s) are completed.

8. OPERATOR, contractor, or subcontractor are jointly and severely liable for compliance with the provisions of this agreement. Upon the DEPARTMENT'S determination of a violation of the terms of this Agreement, this Agreement shall be suspended or canceled, at the discretion of the DEPARTMENT and all activity must immediately stop until another agreement is made. Failure to comply with the provisions and requirements of this agreement and with other pertinent Code Sections including but not limited to Fish and Game Code Sections 5650, 5652, 5937, and 5948, may result in prosecution.

9. OPERATOR agrees to provide the DEPARTMENT access to the project site at any time, to ensure compliance with the terms, conditions, and provisions of this agreement.

10. It is understood that the DEPARTMENT enters into this agreement for purposes of establishing protective features for fish and wildlife, in the event that a project is implemented. The decision to proceed with

the project is the sole responsibility of OPERATOR, and is not required by this agreement. It is agreed that all liability and/or incurred costs related to or arising out of OPERATOR's project and the fish and wildlife protective conditions of this agreement, remain the sole responsibility of OPERATOR. OPERATOR agrees to hold harmless and defend the State of California and the DEPARTMENT of Fish and Game against any related claim made by any party or parties for personal injury or other damage.

11. OPERATOR assumes responsibility for the restoration of any fish and wildlife habitat which may be impaired or damaged either directly or, incidental to the project, as a result of failure to properly implement or complete the mitigative features of this agreement, or from activities which were not included in OPERATOR's notification.

12. The DEPARTMENT shall have continuing jurisdiction over the project site until all restoration of the site is complete.

13. The notification, project descriptions, all photos, and drawings submitted with the notification shall become part of this agreement, to define the scope of the proposed project. All work shall be done according to plans submitted to and approved by the DEPARTMENT. The OPERATOR shall notify the DEPARTMENT in writing of any modifications made to the project plans submitted to the DEPARTMENT. Any modification to the plans requires an amendment to this agreement. Changes to the original plans done voluntarily may result in the DEPARTMENT suspending or canceling this agreement. The OPERATOR must then submit a new notification.

14. The following provisions including any additional project features resulting from the above, constitute the limit of activities agreed to and resolved by this agreement. The signing of this agreement does not imply that OPERATOR is precluded from doing other activities, at the site. However, activities not specifically agreed to and resolved by this agreement are subject to separate notification pursuant to Section 1601/03.

15. The OPERATOR shall notify the DEPARTMENT of the dates of commencement and completion of operations, three days prior to such commencement or completion, by telephone message to (530) 841-2557.

16. To the extent that the provisions of this agreement provide for the diversion of water, they are agreed to with the understanding that OPERATOR possesses the legal right to so divert such water. In the absence of such right, the agreement is void.

FEDERAL JURISDICTION

The US Army Corps of Engineers (Corps) has permitting requirements for certain instream projects under Section 404 of the Federal Clean Water Act. If this project exceeds one acre of disturbance within the ordinary high-water mark of the stream and/or the stream's average

3 annual flow exceeds five cubic feet per second, a permit may be required
4 by the Corps. A Corps permit may also be required for the installation
5 of rip rap that exceeds 500 linear feet at or over one cubic yard of
6 material per linear foot. If there is any question regarding the
7 possibility of your project meeting the above limitations, you should
8 contact the Corps prior to beginning work. This Agreement in no way
9 represents permitting requirements by the Corps. It is OPERATOR'S
10 responsibility to contact the U.S. Army Corps of Engineers, and to
11 comply with the provisions any 404 Permit issued, if required by the
12 Corps.

13 For information, contact the US Army Corps of Engineers office in
14 your area: San Francisco District, Eureka Office (707)443-0855.
15

16 OPERATOR may have certain other responsibilities pursuant to the
17 Federal Endangered Species Act resulting in mitigative project features
18 required by the U.S. Fish and Wildlife Service or National Marine
19 Fisheries Service.

20 PROVISIONS

21 Agreed work includes activities associated with the diversion of
22 flows from Stanshaw Creek for irrigation, recreation, domestic, and
23 small hydro-electric use. Construction includes the annual construction
24 of a rock diversion dam (by hand) to entrain flows into the diversion
25 ditch, and maintenance of a culvert/flume crossing on an unnamed
26 ephemeral tributary to Stanshaw Creek. The project area is located in
27 Siskiyou County (SW 1/4 of NE 1/4 of S 33, T 13 N, R 6 E) on property
28 administered by the U.S. Forest Service. The diversion structure existed
29 prior to this agreement.

30 EQUIPMENT AND ACCESS

31 Vehicles shall not be driven or equipment operated in water covered
32 portions of a stream, or where wetland vegetation, riparian vegetation,
33 or aquatic organisms may be destroyed. Except as otherwise provided for
34 in the Agreement, all work shall be performed by hand/hand tools.

35 Access to the work site shall be via existing trails.

36 WATER DIVERSION/STRUCTURES

37 This Agreement does not authorize the construction of any temporary
38 or permanent dam, structure, flow restriction or fill except as
39 described in OPERATOR's notification.

40 An adequate fish passage facility shall be incorporated into any
41 barrier that obstructs fish passage.

Except as otherwise specified in this Agreement, fill material for the annual diversion dam shall consist of only native, clean rock which will cause little or no siltation. If tarps, sand bags, or plastic sheeting are used to seal the diversion structure, the tarps, bags, and/or sheeting shall be removed before high seasonal flows return to prevent littering of the stream.

When any dam or artificial obstruction is being constructed, maintained, or placed in operation in the stream bed, flows to downstream reaches shall be allowed to pass downstream to maintain wildlife, plant life, and aquatic life below the dam in a healthy condition, and to allow fish migration, during all times that the natural stream flow would have supported aquatic life, pursuant to Fish and Game Code section 5937 and 5901.

Structures and associated materials not designed to withstand high seasonal flows shall be removed to areas above the normal high-water mark before the return of such seasonal flows.

No excavation in the live stream is allowed. "Live stream" shall be defined as that portion of the stream bed where flowing water is present or anticipated during the term of this agreement.

In ephemeral streams, all construction will be done while the work site is dry. Excavated material shall be placed outside the stream's normal high-water mark.

A culvert exists in the intersection of the diversion flume/ditch and an ephemeral stream. The culvert shall be maintained so as to resist washout. The up stream and down stream fill slopes shall feature rock slope protection (RSP) from the toe to the top of the fill. A fail soft dip shall be maintained where the fill meets original ground to allow topping flows to remain within the ephemeral stream channel. Rock dissipators shall be placed at the culvert outlet to prevent channel bed/bank scour. Upon the next occasion when the culvert washes out, the pipe alignment shall be corrected to remove the skew (It should be straight within the channel rather than pointing at the bank.).

WATER QUALITY

EROSION, TURBIDITY, AND SILTATION

Mud, silt, or other pollutants from diversion maintenance or other project-related activities shall not be discharged into the flowing stream or be placed in locations where it may be washed into the stream by high flows or precipitation.

Silty/turbid water shall not be discharged into the stream. Such water shall be settled, filtered, or otherwise treated prior to discharge back into the stream channel.

The OPERATOR shall install adequate control devices to ensure that turbidity or siltation resulting from the project related activities does not constitute a threat to aquatic life.

Erosion control measures shall be utilized throughout all phases of operation where sediment runoff from exposed slopes threatens to enter waters of the State. At no time shall silt laden runoff be allowed to enter the stream or directed to where it may enter the stream.

Upon DEPARTMENT determination that turbidity/siltation levels resulting from project related activities constitute a threat to aquatic life, activities associated with the turbidity/siltation shall be halted until effective DEPARTMENT approved control devices are installed, or abatement procedures are initiated.

CHANNEL RESTORATION

FILL AND SPOIL

Rock, gravel, and/or other materials shall not be imported to, taken from or moved within the bed or banks of the stream except as otherwise addressed in this Agreement.

Fill length, width, and height dimensions shall not exceed those of the original diversion dam installation.

Fill shall be limited to the minimal amount necessary to accomplish the agreed activities. Except as otherwise specified in this Agreement, fill construction materials shall consist of native, clean, silt-free gravel or river rock.

No fill material, other than clean river rock/gravel, shall be allowed to enter the live stream.

No castings or spoil from the trenching or ditch cleaning operations shall be placed on the stream side of the ditch where it may be washed by rainfall into the stream.

The OPERATOR shall have readily available plastic sheeting or visquine and will cover exposed spoil piles and exposed areas to prevent these areas from losing loose soil into the stream. These covering materials shall be applied when it is evident rainy conditions threaten to erode loose soils into the stream.

CHANNEL BED STABILIZATION

If a stream channel has been altered during the operations, its low flow channel shall be returned as nearly as possible to pre-project conditions without creating a possible future bank erosion problem or a flat wide channel or sluice-like area. The gradient of the stream bed shall be returned to pre-project grade.

BANK STABILIZATION

Areas of disturbed soils which slope toward a stream, shall be stabilized to reduce erosion potential. The OPERATOR shall plant, seed, and heavily mulch all soils disturbed by the project prior to the return of seasonal rains. The OPERATOR shall consult with the U.S. Forest Service and use the U.S. Forest Service recommended plants, seeds, and mulch.

Where suitable vegetation cannot reasonably be expected to become established, rock slope protection (RSP) materials that will resist wash out shall be used for such stabilization. The bank stabilization material shall extend above the normal high-water mark. Any installation of RSP materials not described in the original project description shall be coordinated with the DEPARTMENT. Coordination may include the negotiation of additional Agreement provisions for this activity.

VEGETATION

Disturbance or removal of vegetation shall not exceed the minimum necessary to complete the authorized operations. The disturbed portions of any stream channel within the high water mark of the stream shall be restored to their original condition under the direction of the DEPARTMENT.

CLEAN-UP

Structures and associated materials not designed to withstand high water flows shall be moved to areas above high water before such flows occur.

Any materials placed in seasonally dry portions of a stream that could be washed downstream or could be deleterious to aquatic life, wildlife, or riparian habitat shall be removed from the project site prior to inundation by high flows.

CONCURRENCE

Douglas T. Cole 4/28/99
(signature) (date)

Douglas T. Cole
Marble Mountain Ranch
OPERATOR

Charles Honval
Ron Presley (date)
California DEPARTMENT of Fish and Game

Don R. Presley
4/30/99

Mar 10 20 02:37p

Eureka Headquarters

(530) 841-2551

P.2

WR-193

cc, 1/10/79

State of California

The Resources Agency

Memorandum

To : Steve Conger

Date: January 4, 1979

From : Department of Fish and Game - Region 1, Eureka

Subject: Stanshaw and Sandy Bar Creeks

Thanks very much for your survey information on the above creeks. I had no information whatsoever on either creek in the Eureka files. Rogers agrees with your analysis, that steelhead probably cannot negotiate the culverts. He also says that there is little or no steelhead habitat above the culverts because of very steep gradient.

This will be of great help at the next Project Development Team meeting with Caltrans about the culvert repairs.

Thanks, again.

Don A. La Faunce
Assoc. Fishery Biologist

DAL:km

cc: Rogers

005385

DEPARTMENT OF FISH AND GAME
FIELD CORRESPONDENCE

FROM: S. L. Conger, Orleans

PLACE: Stanshaw, Sandy Bar Creek

TO: Don La Londe

DATE: 12-30-78

SUBJECT: Surveys of Stanshaw, Sandy Bar Creek, Siskiyou Co.

On this date I made cursory surveys of Stanshaw Cr. and Sandy Bar Cr., from Hwy. 96 culvert downstream to mouth.

Culverts: Stanshaw Cr. - Twin, 6' dia. C.M.P. with concrete lining bottoms.

Culverts approx. 150' long or longer, with dogleg in center.

Sandy Bar Cr. - Twin, 6' dia. C.M.P. with concrete lining bottoms.

Length approx. 50'-75', fairly steep drop.

Riparian vegetation: Both streams well shaded with alder overstory. Sandy Bar Cr. overstory mixed with firs, madrone and alder. Stanshaw Creek had heavy understory of brambles & blackberries.

Fish Life: None observed in either stream. Stanshaw Cr. appears barren in area checked. It is improbable that fish migrate up from Klamath. Mouth of creek bifurcates, drops 8 ft. to Klamath.

Sandy Bar Creek probably has run of steelhead during normal flows. Flows now will impale upstream migrants. It is possible that SH might be able to traverse culvert at Sandy Bar Cr. during "normal" winter flows.

Flows: Stanshaw Cr., 1 c.f.s.; Sandy Bar Cr. - 5-7 c.f.s. Both streams are extremely low, possibly reflecting drought flows.

If flows increase, it is possible that SH will migrate into Sandy Bar Cr. and attempt to spawn in reach upstream from culvert at Hwy. 96.

S. L. C.

RECEIVED
FEB 1 1979
and a note to transmission
center

C.C. - Dave Rogers

CALIFORNIA DIVISION OF FISH AND GAME STREAM SURVEY

FILE FORM

No. _____

NAME Stanshaw CreekCOUNTY SiskiyouSTREAM SECTION FROM Mouth To 1/4 mile upstream LENGTH 0.5 mileTRIBUTARY TO Klamath River Twp. 13N R. 6E Sec. 33OTHER NAMES _____ RIVER SYSTEM Klamath RiverSOURCES OF DATA Stream survey by G. Itano and P. Kalvass, Cal. DFG, 8/4/75.

Observations through entire section surveyed.

EXTENT OF OBSERVATION
 Include Name of Surveyor, Date, Etc.
 LOCATION
 RELATION TO OTHER WATERS
 GENERAL DESCRIPTION
 Watershed
 Immediate Drainage Basin
 Altitude (Range)
 Gradient
 Width
 Depth
 Flow (Range)
 Velocity
 Bottom
 Spawning Areas
 Pools
 Shelter
 Barriers
 Diversions
 Temperature
 Food
 Aquatic Plants
 Winter Conditions
 Pollution
 Springs
 FISHERY PRESENT AND SUCCESS
 OTHER WATERWAYS
 FISHING INTENSITY
 OTHER RECREATIONAL USE
 ACCESSIBILITY
 OWNERSHIP
 POSTED OR OPEN
 EMPLOYMENTS
 FISH STOCKING
 GENERAL ESTIMATE
 RECOMMENDED MANAGEMENT
 SKETCH MAP
 REFERENCES AND MAPS

Altitude: At mouth- 600 feet; Headwaters originate at 4720 feet.

Gradient: 20%

Width: Average of 8 feet, narrowing to 4 feet in upper reaches surveyed.

Depth: To 3 feet in pools; averaging 6- 10 inches.

Flow: Estimated at between 2- 5 cfs.

Velocity profiles: From mouth to 50 feet above culverts under hiway 96 flow is rapid; Velocity becomes cascading further upstream as gradient of stream increases and depth decreases.

Bottom: Much of the stream bed is rubble, with little gravel and some sand in pools.

Spawning areas: Due to a lack of adequate spawning gravels there are few good spawning areas. Occasional gravelly pools observed below culverts, however some of these were silted and inordinately sandy.

Pools: Pool to riffle ratio of about 1:1; many pools of 2- 3 feet deep above hiway 96 culverts; large pool 3 feet deep and 6 feet long below twin culverts under 96.

Shelter: Entire section surveyed densely overgrown with local hardwoods and bushes.

Barriers: Two large U- shaped culverts under hiway 96, approximately 150 feet in length are probable barriers to anadromous salmonid migrations upstream. Gradient of culverts is long and gradual slope with a generally smooth concrete bottom. Stream survey of summer 1964 (Clark and Bugbee) reports that local residents observed steelhead just below culverts but none above them. Approximately 50 feet above culverts area of cascades and shallow water leading to a 5 foot, 50 degree gradient waterfall constitute a possible barrier to migrating fish, though in higher flows fish may be able to bypass waterfall.

Diversions: Many abandoned and inoperative rubber-tube type and steel piping diversions observed above hiway 96 crossing.

Aquatic plants: None observed.

Pollution: None observed.

Food: Caddis, Stone, and Dragon fly observed in larval stages, but not plentiful.

Fishes present: Salmonid fry observed below culverts, probably steelhead smolts, though not numerous. No fry of any type seen above culverts.

Fishing intensity: Light; though inoperative, abandoned dwellings observed near mouth of creek on south side, aptly referred to as the 'Old Man River Lodge'.

Accessibility: State route 96 crosses Stanshaw Creek 1/4 mile upstream from mouth; dirt road from 96 near crossing parallels creek to the mouth at lodge referred to above. Upper section is accessible only by foot due to dense riparian growth, however forestry road 13N12 from 96 crosses headwaters of creek.

Ownership: From State Route 96 to mouth land is privately owned. ^{East} ~~West~~ of hiway is
USFS land.
Posted or open: Open.

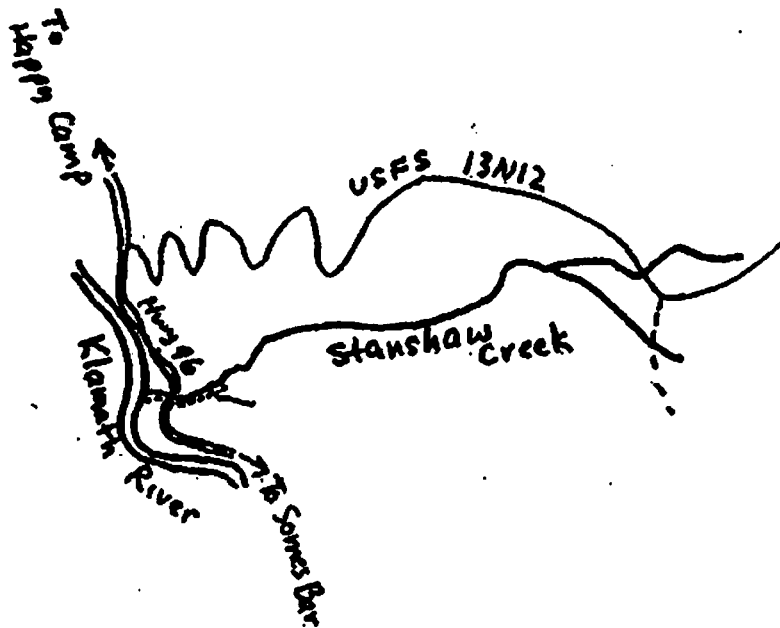
Station Data

Station:	1.	2.
Location:	Mouth.	$\frac{1}{2}$ mile up from mouth.
Width:	8 feet.	8 feet.
Depth:	6 inches.	2 feet.
Bottom:	Rubble to gravel.	Sand, gravel, rubble.
Spawning area:	No.	No.
Flow and velocity:	Rapid, II.	Slow, II.
Stream condition:	Clear.	Clear.
Water temperature:	60F.	62F.
Air temperature:	90F.	82F.
Time:	1430.	1530.
Date:	8/4/75.	8/4/75.
Weather:	Clear.	Clear.
Altitude:	600 feet.	850 feet.

Recommended management: Possible modification of culvert bottoms (ie. baffling, etc.) could open up western section of stream for anadromous salmonids. Due to good canopy over stream, upper reaches above route 96 could be managed for resident rainbow trout, though they would probably have to be introduced. Manage lower section of stream as adequate anadromous salmonid stream.



Stanshaw Creek
Siskiyou County (Orleans & Forks of
Salmon Quadrangle)



Legend

Scale: 1 inch = 2 mile

Portion surveyed - - - - -



REPAIRED BY USFS

FOR A. T. HOBBS - L. H. HOBBS

REPAIRED BY USFS

Stanshaw Creek

October 2⁴, 1969

At mouth @ 1000

51°F

1 cfs

crystal clear

Mouth easily accessible from Klamath River for steelhead; not enough flow for king salmon. First 75 yards of stream flat and sandy-gravel bottom - good steelhead spawning area. A culvert is present under Highway 96 about 250 yards up-stream from its mouth. Steelhead can ascend stream to culvert, but cascades and almost no spawning area make stream past flat delta area unattractive to steelhead.

Culvert is about 70 yards long with flat concrete bottom - impossible for fish to pass. Stream above culvert becomes more steep and bottom changes to mostly boulders.

Rel
Asst. F.B.

Stanshaw Creek

February 2, 1968

at mouth @ 1230

H₂O temperature - 42°F

Estimated flow - 20 cfs

Water clarity - Turbid

Salmon do not enter stream, save possibly for a few silver salmon. Steelhead probably ascend as far as a few hundred yards above Highway 86. Passage under Highway 96 is guaranteed by a unique split culvert, which has for its bottom, the natural stream bottom and for its sides cemented rock. Actually, it is probably more of a budy than a culvert.

Ril

Dist. F.B.

STANSHAW CREEK
Siskiyou County

Aug. 5, 1964

Location of Mouth: R6E, T13N
Tributary To: Klamath River
Stream Section: From the mouth to 3 miles upstream to the forks.
Accessibility: State 96 crosses the stream and there is also a U.S. Forest Service road which leaves 96 between Stanshaw Creek and Sandy Bar Creek and crosses Stanshaw Creek three miles upstream at the Forks.
Ownership: U. S. Forest Service.

DRAINAGE DESCRIPTION

1. Topography - The stream flows for $4\frac{1}{2}$ miles through a steep canyon and is primarily cascading water.
2. Vegetation - The canyon walls exhibited various hardwoods and firs, the stream had vegetation that was mainly berry vines and heavy brush.

STREAM CONDITIONS

1. Depth - Average depth was 6-8 inches.
2. Width - Average width was 3-4 feet.
3. Flow - the estimated flow was 2-3 c.f.s.
4. Pool-riffle ratio - cascading water.
5. Altitude - Headwaters originate at 4720 feet and the mouth is situated at 600 feet above sea level.
6. Gradient - 20%
7. Shape of Stream - The stream bottom is composed of coarse rubble and boulders.

SPAWNING CONDITIONS

1. Anadromous fish would probably be unable to utilize this stream for spawning, however, resident trout apparently do spawn in the upper reaches of the stream.

HABITAT SUITABILITY

1. The insects were scarce, but stone fly and caddis fly were present in small numbers.
2. There is good shelter throughout the stream with low hanging trees and pools.

STREAM OBSTRUCTIONS

1. Due to the steepness of the stream, the chances of anadromous fish getting beyond the culvert on Hwy. 96 are very slim. Local residents report that steelhead do make it up the road, but not beyond.
2. About $1\frac{1}{2}$ miles upstream from the road there is an extremely steep area about 200 yards in length that would have to be considered a definite barrier.

FISHERIES

1. Only three salmonids were observed during the survey. These were located

about $\frac{1}{4}$ mile down from the Flume take-off (see below), fish seen were from 4-6 inches in length, and were assumed to be resident trout.

DIVERSIONS

1. Approximately 1 mile upstream from the road, a flume takes-off from the creek. Average width - 12 inches; average depth 4 inches; its flow was estimated between 0.5 and 1 c.f.s. Its purpose - unknown.
2. Approximately $\frac{1}{4}$ mile upstream, a 4 inch pipe line removes some of the stream flow.

RECOMMENDATIONS

1. Manage the stream for a resident trout population.

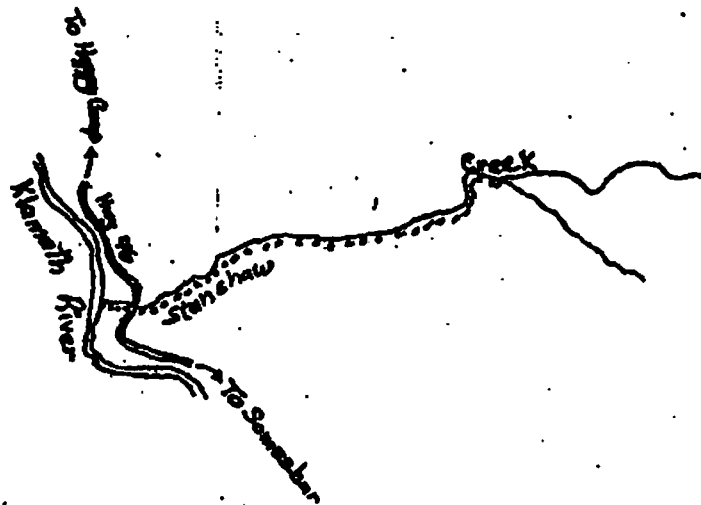
SUMMARY

1. Stanshaw Creek is approximately $4\frac{1}{2}$ miles in length with a flow of 2-3 c.f.s.
2. The stream gradient is 20% with headwaters at 4,720 feet and the mouth at 600 feet above sea level.
3. The stream is primarily cascading water with little or no spawning area for anadromous fish.
4. Three salmonids were observed during the survey.
5. Manage the stream for a resident trout population.

SURVEY CREW: Jack Clark, Steve Bugbee

SURVEY DATE: 8/5/64

Stanshaw Creek
Siskiyou County (Orleans & Forks of Salmon
Quadrangles)



Legend

Scale: 1 inch = 1 mile
Portion surveyed

JKC

NEED COPY

NEED COPY

NEED COPY

NEED COPY

May 25, 1961

STANSHAW CREEK

Tributary to: Klamath River

Mouth Location: T. 13 N., R. 6 E., Section 15, S. W. Quarter

DRAINAGE

Stanshaw Creek, a tributary to the Klamath River, has a drainage area of approximately 3,000 surface acres. The drainage extends in an easterly direction from its mouth for about 4 miles. Seven small tributaries empty into the drainage area.

The drainage is characterized by steep, heavily forested mountains covered primarily with fir, pine, maple, alder and poison oak.

STREAM CONDITIONS

Physical Profile: The average flow of Stanshaw Creek was estimated at 40 cfs. This estimate was made at Highway 96. The average width was about 15 foot and the average depth was 7 inches.

The pool-riffle ratio was estimated at 60:20. The entire stream is a series of pools that cascade down the stream bed. Riffles were observed in limited areas but were more common above the water diversion pipe located about 200 yards above the highway.

The bottom is predominately rubble and boulders although some gravel was observed in areas of less torrential flow.

HABITAT SUITABILITY

Shelter is abundant along Stanshaw Creek in the form of boulders, brush, pools, and logs.

Spawning area is quite limited on Stanshaw Creek especially in the lower and upper portions. The area above the water diversion pipe contains some riffle area suitable for spawning anadromous fish. Some spawning potential is located from the mouth to the highway.

Nursery area is available along the entire stream. Pools with back-eddies are quite common.

STREAM OBSTRUCTIONS

Log Jams: Six partial barriers of debris accumulations were recorded on Stanshaw Creek below the upper limits to anadromous fish. These barriers

contained about 730 cubic feet of material. None of these barriers are a total barrier and at present, removal does not seem to be pressing.

Natural Barriers: A 75 yard long series of high falls creates an impassable barrier to anadromous fish about one mile above the mouth. These falls should be considered as the upper limits to anadromous fish.

FISHERIES

Salmonid fry were observed in many pools along Stanshaw Creek. The fry were too small to make an identification.

A local resident of this area says he used to see steelhead running up Stanshaw Creek although not for several years.

SUMMARY

Stanshaw Creek has a drainage area of about 3,000 surface acres.

The stream has a pool-riffle ratio of about 8:20.

Spawning area is limited on the stream although some areas contain gravel suitable for anadromous fish.

Six partial barriers were located below the upper limits to anadromous fish. The upper limits to anadromous fish is about 1 mile above the mouth and consist of a high series of falls.

RECOMMENDATIONS

1. Remove partial barriers although they are not a pressing problem.
2. Manage lower portions below series of falls as an anadromous fishery.
3. Manage area above falls as a resident trout stream.

Surveyed by: Tom Cawner and Mike Kruse

Surveyed on: May 25, 1961

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 30.3 KFA and Fisher

1. 08-05-09.KFA.Complaint.Chronology
2. 6-24-02.KFA's Attny.Complaint
3. 6-14-01.KFA's Attny.Complaint
4. 3-9-01.KFA's Attny.intent to sue.ESA violation
5. 11-30-01.KFA's Attny.unlawful diversion
6. 3-15-00.Fisher.Protest
7. 8-20-01 JKG Letter to Hary M. Schueller with Attachments re Cole

Complaint against Doug and Heidi Cole
by the Klamath Forest Alliance

Current as of: 8/25/2009

Chronology of Events of the Complaint

On June 18, 2001, the DWR received a complaint against Doug and Heidi Cole, lodged by the attorney representing the Klamath Forest Alliance (KFA). The complaint alleges that the Cole's diversion is illegal, that the diversion adversely impacts public trust resources, and requests that the SWRCB order the Coles to cease and desist their diversion.

Background: Two applications were submitted by the Coles - 29450 and 29449. Of these applications, 29449 for 3 cfs for power generation from Stanshaw Creek, is currently under review by the environmental unit (REM), and 29450 has been cancelled. Protestants for 29449 include: National Marine Fisheries Service, the Dept. of Fish & Game, T. James Fisher, J.W. Fisher Logging Co., Phylis Fisher, Konrad Fisher, the USFS, and the California Sportfishing Protection Alliance.

Prepared letter to Mooney, to be signed by Ed Anton, stating the Division's guidance to close out the complaint in favor of the application and environmental section's processes.

August 19, 2002

Event/Activity	Date
Prepared letter to Mooney, to be signed by Ed Anton, stating the Division's guidance to close out the complaint in favor of the application and environmental section's processes. Comments/revisions noted and made, and the letter given to clerical to final and circulate for surname/signature.	August 15, 2002
Left msg requesting return call from Jan Goldsmith re: status of her representation of Cole. Issue: request for a hearing (most control); or our proposal to close out the complaint - which will likely result in Mooney requesting a hearing.	7/16/2002
Received letter from NMFS, disagreeing with CU staff report. Met with CAR and JK re: response language & procedures. Letter will be for EA's signature; state that we believe the recent letters do not provide convincing evidence; update the disposition of the application (Cole has been diligent); and propose close-out (with the standard caveat of reconsideration if further evidence becomes available).	7/11/2002
Received letter from Don Money, representing KFA, in which the parties dispute the findings and recommendations of the Complaint Unit's May 23, 2002 report.	June 24, 2002
Received telephone request from Don Mooney to submit his comments on Monday. I told him that this would be acceptable. When I asked what I could expect to see, he indicated that there was some disagreement on the biology assessment of our report, and also he questioned that we did not QUANTIFY the appropriative right, and that power generation was NOT incidental. Also notified Jan Goldsmith of the impending submittal, promising to touch base with her and to provide her with a copy if needed. Prepared and distributed 30-day letter, proposing close-out in the absence of substantiating evidence to support further SWRCB action. NLT date for responses - 6/23/02.	June 21, 2002
Spoke with Jane Vorpagel re: DFG's comments. See Contact Report for details.	May 23, 2002 December 13, 2001

Complaint against Doug and Heidi Cole
by the Klamath Forest Alliance

Current as of: 8/25/2009

Received Don Mooney's fax (16 pages dated 11/30/01)). CAR asked me to summarize Mooney's comments, together with those submitted by NMFS and DF&G..	December 3, 2001
Telephoned Jane Vorpagel to see how they came up with 2.5 cfs as a proposed bypass below the culvert. Left message because she's on field duty and on vacation until 12/4/01.	November 27, 2001
Received (but delivered to the Env. Section) original memo from Dept of F&G re: proposed bypass requirements of 2.5 cfs below the culvert. Complaint Unit received on 11/29/01.	November 26, 2001
Received (but delivered to the Env. Section) a letter from NMFS, indicating their findings and protest dismissal terms. Complaint Unit received on 11/29/01.	November 20, 2001
Received fax from DFG. Stated focus is the 1/4 mile stretch of Stanshaw Creek below the culvert under Hwy. 96. Now, based on "field reviews and best professional judgement, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River." However, DFG reserves the right to "require additional bypass" in future if 2.5 is inadequate.	November 20, 2001
Received phone call from Don Mooney, requesting 2 additional weeks in which to provide us with evidence to support KFA's position. After discussing the request with CAR, I left the message to indicate that we would proceed according to the schedule agreed upon during the site visit. Mooney telephoned CAR and received the requested extension.	November 16, 2001
Spoke with Jan Goldsmith. She has <i>not</i> spoken with Don Mooney. I reminded her that we had agreed to entertain stakeholder input up until Wednesday, November 21, 2001.	November 14, 2001
Spoke with Jane Vorpagel re: DFG's input related to the complaint, and also related to the application. She said that she was planning to submit DFG's input, although she did not say exactly what we can expect.	November 13, 2001
Received confirmation from Tim Broadman, NMFS, regarding his participation. In addition, he indicated that he would specifically request that Margaret Tauzer also join us.	October 12, 2001
Received confirmation from Margaret McBride re: Cole's availability and Jan's flight information. Also, received telephone call from Bill Heitler, USFS, to say that his representative (Leslie Gausland Burrows) would attend.	October 11, 2001
Revised coordination for the site visit now scheduled for 10:00 on Wednesday, 10/17. Anticipated participation from: Fish & Game (Dennis Maria, Jane Vorpegel & Ron Presley) and USFS (Bill Heitler or representative). NMFS is not inclined to attend, per Margaret Tauzer today. Also, I am expecting written confirmation for flight plans to get both attorneys there.	October 10, 2001
Prepared notice of scheduled field investigation on 10/17/01. Ms. Goldsmith and the Coles requested that we meet on Tuesday, October 16, 2001 , so coordinated schedules have now confirmed Tuesday rather than Wednesday, as previously noted. Mr. Mooney will get a voice mail and e-mail notice.	September 20, 2001
Telephoned Don Mooney to solicit feedback/reaction to Jan's letter. He told me that he would review the letter, contact his client and provide us with a response. NOTE: He will be on vacation from 9/14 - 30/01.	September 5, 2001

Complaint against Doug and Heidi Cole
by the Klamath Forest Alliance

Current as of: 8/25/2009

Exchanged voice mail with Don Mooney. He indicated that he would be talking with his clients late next week. He did ask me to telephone him. I was unsuccessful because his cell phone was out of range. I left another message asking him to call me when he is able.

August 24, 2001

Received an answer to complaint letter from Janet Goldsmith, attorney for Doug and Heidi Cole.

August 20, 2001

Telephoned Don Mooney's office. Left message re: requested extension.

August 1, 2001

Telephone call from Jan Goldsmith requesting extension for response to 8/20/01.

July 31, 2001

I left a voice mail message for Don Mooney, stating that the application A029450 has been cancelled, and that the application for hydro power is being processed. After we spoke by phone, I faxed the 5/4/99 memo to file from Chris Murray.

July 13, 2001

Received message from Jan Goldsmith, representing Doug & Heidi Cole, requesting a copy of the complaint letter. Besides a copy of the requested letter, I also provided Jan with a copy of a 5/4/99 memo to file from Chris Murray, the engineer assigned to evaluate.

July 13, 2001

Received telephone call from Doug Cole requesting additional time in which to respond.

July 13, 2001

Spoke with Chris Murray by telephone re: complaint against Doug & Heidi Cole. Also received an e-mail regarding same.

July 12, 2001

Received telephone call from Don Mooney, attorney for KFA

July 3, 2001

Our letter to Doug & Heidi Cole notifying them of the complaint against them.

July 2, 2001

Environmental Section's letter to Konrad Fisher regarding the Cole's application to divert 3 cfs from Stanshaw Creek, tributary to the Klamath River.

June 22, 2001

Received a complaint letter against Mr. Doug and Ms. Heidi Cole lodged by the attorney representing the Klamath Forest Alliance (KFA). The complainant alleges that the Cole's diversion is illegal, that the diversion adversely impacts public trust resources, and requests that the SWRCB order the Coles to cease and desist their diversion.

June 18, 2001

E-mail correspondence between REM & Doug Cole. Among other things, it lists project improvements.

April 3, 2001

Contact report completed by REM, referring to the USFS' 10/5/00 letter to Cole.

October 19, 2000

Letter from USFS to Coles, stating that, "Since it appears that your diversion structure and ditch are not authorized, they must be removed within 30 days." Alternatively, the District Ranger requests permits or other documentation that proves that the diversion predates the USFS, warranting a free special use permit.

October 5, 2000

Protest accepted from California Sportfishing Protection Alliance.

September 15, 2000

Environmental Field Report (A29449) prepared by REM.

July 26, 2000



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

WR-193



Gray Davis
Governor

Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5377
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>

In Reply Refer to:
363:MC:262.0(47-40-01); A029449

Klamath Forest Alliance
c/o Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Dear Mr. Mooney:

WATER RIGHTS COMPLAINT OF THE KLAMATH FOREST ALLIANCE AGAINST THE COLES REGARDING DIVERSIONS FROM STANSHAW CREEK IN SISKIYOU COUNTY

Staff of the Division of Water Rights (Division) has completed their review of your letter of June 24, 2002 regarding the subject complaint. You indicate in this letter that you and your client disagree with the conclusions reached by Complaint Unit staff, as expressed in their letter and Staff Report of Investigation dated May 23, 2002. After review of both the Staff Report of Investigation and your letter, I have concluded that further action with respect to your client's complaint is not warranted, and I have directed the Complaint Unit to close this complaint. The supporting rationale for this action is described below.

Unauthorized Diversion of Water – You contend that the Division previously determined that any pre-1914 appropriative right held by the Coles is limited to approximately 0.11 cubic feet per second (cfs). Regardless of past letters sent by the Division containing estimates of what could be diverted pursuant to a pre-1914 appropriative right claim, the Division has no adjudicatory authority to quantify such a claim. Only the courts can make this determination. The most recent evidence submitted by the Coles and their legal counsel indicates that diversion of water from Stanshaw Creek into their ditch, and the subsequent use of this water for irrigation and domestic purposes at the Marble Mountain Ranch, was initiated prior to 1914 using at least as much, if not more, water than is used today. All available evidence suggests that the diversion and use has been maintained in a diligent and continuous fashion ever since. Consequently, we believe that a court would find that the Coles have a valid claim of a pre-1914 appropriative right to divert water for the full irrigation and domestic uses currently maintained, including reasonable conveyance losses.

While the Cole's current diversion of water for power purposes is not technically covered by a permit, this diversion and use has been ongoing for almost 60 years. Diversions prior to a determination regarding issuance of a permit are very common, especially for long-standing diversions such as the Cole's. The State Water Resources Control Board (SWRCB) has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to initiate enforcement against a person who files an application promptly upon notification of the complaint, and then

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."

005401

Klamath Forest Alliance

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diligently pursues the application, complies with all application requirements and requests for information, and cooperates with SWRCB staff. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Potential Injury to Other Uses of Water - Another important factor in considering enforcement is the extent of injury caused by the water diversion. If a complaint investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide *not* to take enforcement action. The SWRCB may also consider the degree of hardship that enforcement action would impose on persons who rely on the diversion of water when it decides whether to take enforcement action in response to a complaint. Based on available evidence and rationale described in the Staff Report of Investigation, Complaint Unit staff concluded that there would be little potential for harm to other diverters or public trust resources if the Coles were allowed to divert water for power purposes, as long as a minimum bypass flow is maintained similar to that occurring during their investigation. You disagree with this conclusion, and make reference to the professional opinions of staff for the National Marine Fisheries Service, Department of Fish and Game, Karuk Tribe, and Humboldt State University. While we have received copies of these opinions, the evidence and logical rationale on which these opinions are based has not been submitted. Consequently, I believe the *prima facie* evidence utilized by Complaint Unit staff is more persuasive. Asking the Coles to terminate their diversion would also cause severe economic hardship on them without providing much if any benefit to the instream resources.

I do agree with you that the Cole's application has been pending for far too long. This application has been noticed and protests received. I doubt the parties will be able to resolve these protests amicably amongst themselves. The next steps in the process would be to complete an environmental review of the project pursuant to the California Environmental Quality Act (CEQA), and then proceed to protest resolution via either a field investigation or formal hearing. I have directed the Division's Environmental Section to give as much priority as possible to this application so that final resolution of the protests can be achieved as soon as feasible. I have also asked the Division's Application and Environmental units to send copies of all correspondence to you so that you will be kept apprised of the progress in this matter.

In the meantime, I expect the Coles to maintain a minimum bypass, as described in the Staff Report of Investigation. Failure to do so could result in a reevaluation of the need for enforcement action prior to a final determination of the Cole's request for a permit.

If there are any questions regarding this matter, please contact Charles Rich, Chief of the Division's Complaint Unit, at (916) 341-5377.

Sincerely,

Edward C. Anton, Chief
Division of Water Rights

cc: See next page.

Klamath Forest Alliance

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cc: Mr. Doug and Mrs. Heidi Cole
c/o Jan Goldsmith
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
Attention Mr. Ron Presley and
Jane Vorpapel
601 Locust Street
Redding, CA 96001

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman and
Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klinge Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556

bcc: Larry Attaway, Ross Swenerton
MContreras\lfischer 8/16/02
U:\Comdrv\MContreras\KFA v Cole appeal rejection letter



Winston H. Hickox
*Secretary for
Environmental
Protection*

State Water Resources Control Board

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5377
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WR-193



Gray Davis
Governor

Memorandum to File

To: File Number 262.0 (47-40-01)

Date:

From: Charles A. Rich, Chief
Complaint Unit

Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 – 200 feet above the terminal

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommends that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

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Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for power purposes in her letter of August 20, 2001, Complaint Unit staff is not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believes that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The SWRCB has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Another weighed factor is the extent of injury caused by the water diversion. If an investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide not to take enforcement action. The SWRCB may also consider the degree of hardship enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phylis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. Pre-1914 appropriative claim of right for domestic / irrigation use. This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. Application A029449 – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. Small Domestic Registration D030945R – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "*innocent until proven guilty*" concept of the law.

- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: "*The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage.*" While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of $\pm 50\%$.

problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of $\frac{1}{2}$ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 – 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of $\frac{1}{2}$ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

CONCLUSIONS

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their 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).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Cole's ditch is **not** allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) if full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.

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June 24, 2002

VIA FACSIMILE

Mr. Michael Contreras
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Water Rights Complaint Submitted by the Klamath Forest Alliance Alleging Unlawful Diversion of Water From Stanshaw Creek*

Dear Mr. Contreras:

The Klamath Forest Alliance ("KFA") disagrees with the Complaint Unit's conclusions and recommendations contained in your letter dated May 23, 2002, regarding Doug and Heidi Cole's unlawful diversion of water from Stanshaw Creek. The Complaint Unit's conclusions and recommendations are not supported by the evidence or by California water law.

I. **THE SWRCB COMPLAINT UNIT'S CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE OR CALIFORNIA WATER LAW**

A. **Response to Conclusion Number 1**

Conclusion Number 1 states that:

A court of competent jurisdiction would most 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

The primary problem with Conclusion Number 1 is that it states that the Coles' have a pre-1914 appropriative water right "for full domestic and irrigation purposes." This statement fails to quantify the pre-1914 appropriative water right and is inconsistent with the SWRCB staff's previous conclusions regarding the Cole's pre-1914 appropriative water right. Moreover, this statement implies that the Coles may increase their pre-1914 appropriative water right so long as it is used for domestic and irrigation purposes. Such a conclusion is in direct conflict with California water law. Additionally, the conclusion contradicts the

Complaint Unit's May 23, 2002, Memorandum to File which states that "[t]his right has not been quantified. . . ." Thus, if the right has not been quantified and the SWRCB does not know the current or historical demand for domestic and irrigation, a conclusion that a court would find that the Coles have a valid right for "full domestic and irrigation purposes" simply cannot be supported by either the evidence or the law.

"The right of priority . . . attaches to the definite quantity of water that the appropriator has put to reasonable beneficial use in consummating his appropriation." (Hutchins, *The California Law of Water Rights*, at p. 132.) The specific quantity of water is one of its most distinctive features. (*Id.*) Therefore, assuming that the Coles' have a pre-1914 appropriative water right for Marble Mountain Ranch, the Coles are only entitled to the quantity of water that has been continuously diverted and put to a reasonable and beneficial use.

The SWRCB staff has concluded on two separate occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1998 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, Land and Water Use in Klamath River Hydrographic Unit, Table 4 at p. 55) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists. Although the Coles questioned the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles failed to provide any evidence to dispute the estimated demand and they provided no alternate estimate of a higher demand.

When the Coles' predecessors sought an application to appropriate water for domestic and irrigation, the SWRCB staff assessed the ranch's overall domestic requirement to be 0.02 cfs, or approximately 14-acre feet per year. (See Letter dated February 4, 1993, from Katherine Mrowka to Robert E. and Mary Judith Young.) The SWRCB staff further concluded that the water demand for irrigation is that which is required to irrigate 7 acres of alfalfa. (*Id.*) Based upon these assessments and utilizing standard conversion equations, the Coles' combined domestic and irrigation water uses can be met with 0.11 cfs.¹

Domestic:	0.02 cfs multiplied by the conversion factor of 1.98 multiplied by 365 days per year equals approximately 14.4 acre feet per day.
Irrigation:	The SWRCB staff has previously determined that 1 cfs for each 80 acres of irrigated area is considered reasonable for Siskiyou county. (See letter dated February 4, 1993, from Katherine Mrowka SWRCB staff, to Robert E. and Mary Judith Young, Coles' predecessors-in-interest.) Using the SWRCB staff's methodology, irrigating 7 acres would requires approximately 0.09 cfs.
Combined:	Combining the irrigation demand of 0.09 cfs with the domestic demand of 0.02 cfs results in an overall demand rate of 0.11 cfs.

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Therefore, if a court of competent jurisdiction held that the Coles had a valid pre-1914 appropriative water right, it would most likely quantify that any such right does not exceed 0.11 cfs. The highest amount that the Coles could show that either they or their predecessors have put to a reasonable and beneficial use.

To the extent the Coles rely solely on the historic Stanshaw pre-1914 appropriative water rights, the Coles rights may be further diminished as the Coles' predecessors did not acquire all of the interests in land and water from Stanshaw. (See Exhibit C to letter dated August 20, 2001, from Janet Goldsmith to Harry M. Schueller.) The Coles only obtained a small portion of the original Stanshaw property. Moreover, the Coles have presented no evidence as to the quantity of Stanshaw's pre-1914 appropriative water right that was used on the property now owned by the Coles, or the quantity of water right that was transferred to the Coles.

Thus, neither the evidence nor California water law supports the Complaint's Unit's Conclusion Number 1. As the Complaint Unit failed to address the quantity of water that may be diverted under a claim to a pre-1914 appropriative water right for irrigation and domestic uses, the subsequent conclusion regarding the incidental use of water for power generation amounts to pure speculation.

B. Response to Conclusion Number 2

KFA agrees with Conclusion Number 2 which states in part that "[e]vidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes . . ."

C. Response to Conclusion Number 3

KFA disagrees with Conclusion Number 3, which states that:

With the current irrigation system, most diversions for power purposes during the low-flow periods of the year are incidental to domestic and irrigation needs.

The primary problem with Conclusion Number 3 stems from the Complaint Unit's Conclusion Number 1, which failed to quantify the pre-1914 appropriative water right. By providing an "open ended right", there is no way to determine or conclude that the diversions for power purposes are incidental to the Coles' domestic and irrigation needs.

Based upon the Coles' Application (A029449), the Coles claim a need for 3 cfs for power production. As the Coles' pre-1914 appropriative water right does

not exceed 0.11 cfs, such power generation cannot be characterized as incidental to the Coles' domestic and irrigation needs. If the Coles' diversion for power purposes were incidental to their diversion for consumptive uses, there would not be the significant "return flow" from the Coles' property into Irving creek that exceeds the amount of water flowing in Stanshaw Creek below the Coles' diversion.

The Coles have indicated that if they limit their diversion from Stanshaw Creek to the amount used only for domestic and irrigation, it is not enough water to operate their hydroelectric generator. This is supported by the fact that on the day of the October 16, 2001, field investigation, the Coles were diverting 50 percent of the stream flow and none of it was being applied towards power generation. Therefore, the evidence simply cannot support a finding that the Coles' purported need for 3 cfs for power generation is incidental to any pre-1914 right they may have for domestic and irrigation uses. In fact, the evidence, and the Coles' own admissions support the conclusion that in order for the Coles to generate power, they must divert water from Stanshaw Creek at a rate substantially higher than any rate they may claim under a pre-1914 appropriative water right for domestic and irrigation purposes.

D. Response to Conclusion Number 4

Klamath Forest Alliance agrees with the Conclusion Number 4. It should be noted, however, that more than just *prima facie* evidence supports the conclusion that lower Stanshaw Creek provides critical habitat. Uncontested expert opinions from the California Department of Fish and Game ("DFG"), the National Marine Fisheries Service ("NMFS"), Toz Soto, a fisheries biologist with the Karuk Tribe, and Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University, support Conclusion Number 4. Despite repeated opportunities, the Coles have submitted no evidence to the contrary.

E. Response to Conclusion Number 5

It is the responsibility of the public agencies to protect public trust resources. (See *National Audubon Society v. Superior Court* (1983) 33 Cal. 419, 426 ("before . . . agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests").) The letter and intent of public trust doctrine cannot, nor was it intended to be upheld only by public agencies demanding proof from the non-profit sector when a public trust resource is in jeopardy of being harmed. A private individual or entity seeking to appropriate a public trust resource must bear the burden of demonstrating compliance with the public trust doctrine.

The SWRCB's complaint unit provides no evidence to support a bypass flow recommendation of .7 cfs, or the assertion that, "Bypass flows on the order of 1/2 to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2-3 cfs." (See May 23, 2002, Memorandum to File from Charles A. Rich and Michael Contreras, at p. 10.) Flow connectivity and the presence of juvenile fish on a given day, do not, in and of themselves, prove that a habitat has not been degraded.

Federal, state, tribal and independent fisheries biologists have indicated that the Coles' current diversion decreases the availability and quality of habitat in Stanshaw Creek. The California Department of Fish and Game, (DFG), recommended a year-round bypass flow of 2.5 cfs to be measured at the culverts below Highway 96. DFG acknowledged that steelhead and coho exist in the portion of the creek below Hwy 96, and stated that factors considered in making their recommendation included a desire to maintain cold temperatures in the creek, and an "adequate channel" for fish to access the creek from the Klamath River. DFG also stated that it, "may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek."

DFG rightfully retained the right to change the bypass flow recommendation because the mouth of Stanshaw Creek naturally forms at least 3 channels before it enters the river. When combined with naturally low flows during dry months, the Coles' diversion would, in the absence of periodic manual channeling of the creek's mouth, prevent salmonids from traveling between Stanshaw Creek and the Klamath River. With unimpeded flows however, fish can access the creek from the Klamath River year-round without manual channeling.

The National Marine Fisheries Service, (NMFS), recommended a minimum bypass flow of 1.5 cfs downstream of the point of diversion, requested that tailwater from the Coles' hydroelectric plant be returned to Stanshaw Creek and reserved the right to modify their recommendation, "when CalTrans provides salmonoid passage through the Highway 96 culvert." NMFS cited the preservation of "Thermal refugia" at the mouth of Stanshaw Creek as a primary concern. NMFS also noted that an 8-inch salmonid was stranded in the Coles' diversion flume during the field investigation and requested that measures be taken to prevent such strandings.

Toz Soto, a Fisheries Biologist for the Karuk Tribe's Department of Natural Resources has addressed several concerns associated with the Coles' diversion. In a November 30, 2001 statement about Stanshaw Creek, Mr. Soto wrote:

Mr. Michael Contreras
June 24, 2002
Page 6

Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for out migrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids.

Mr. Soto went on to address a number of other problems with the diversion. These include, but are not limited to, 1) the possible dewatering of established spawning sites, 2) limited access to the creek for adult and juvenile fish, 3) the entrapment of resident fish in the Coles diversion ditch, 4) reduced flows and stream velocity which limit adult spawning and nest building opportunities in lower Stanshaw Creek, and 5) the release of sediment into Stanshaw Creek from the diversion ditch.

The SWRCB's complaint unit disregarded all of the aforementioned expert input and based its bypass flow recommendations on an arbitrary assessment of the flow sufficient for the movement of juvenile fish below the culverts.

According to Dr. Terry D. Roelofs, a renowned professor of fisheries biology at Humboldt State University, reducing summer flow in the portion of Stanshaw Creek between highway 96 and it's confluence with the Klamath River, "decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species."

The Complaint Unit's conclusion and recommendation for a 0.7-cfs is based upon staff's field observation and completely ignores the evidence and recommendations provided by the agencies responsible for protecting the resources in lower Stanshaw Creek.

The SWRCB's actions allowing the unlawful diversion of water from Stanshaw that results in a take of a protected species constitutes a violation of

take prohibition of section 9 of the Endangered Species Act, 16 U.S.C. § 1538. (See *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997), cert. denied, 119 S.Ct. 81, and cert. denied, 119 S.Ct. 437 (1998) (when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition); (*Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999) (the failure of government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act).) The same rationale that caused the court in *Strahan* to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the Complaint Unit's decision to allow the Coles to continue an unlawful diversion that is likely to result in a take of a listed species.

F. Response to Conclusion Number 6

KFA disagrees with Conclusion Number 6 which states that "[m]easuring flows on a regular basis in Stanshaw Creek is not practical. All the protestants to the Coles' Application to Appropriate water, including NMFS and DFG, have demanded the instillation of a flow-measuring device as a dismissal term. Such devices are inexpensive, and locations such as the culverts under Highway 96 and the rock flumes above and below the Coles' point of diversion are conducive to their use.

G. Response to Conclusion Number 7

KFA agrees that all sides in this dispute would benefit if a physical solution were implemented, but not if the solution entails the frivolous use of hydropower to the detriment of rare and threatened species. KFA proposes that the Coles use water and power more efficiently, and that they adopt a method of power generation that does not adversely impact critical habitat. To this end, the SWRCB should direct the Coles to research the alternatives to the current operation.² If the Coles cannot devise a way to produce hydropower without adversely impact habitat, then the Coles must adopt an alternative to hydropower. The Coles' property is situated in an exposed, south facing location ideal for solar power. Some combination of solar, wind and/or efficient internal combustion generators are all viable alternatives.

² It should be noted that the Coles' could have halved their water consumption by merely utilizing all 400 feet, rather than 200 feet of the drop available between their 1,200 foot point of diversion and the 800 foot low-point on their property.

Whatever the ultimate source of the Coles' water, the Coles must take steps to utilize it more efficiently. Following recommendations from the SWRCB's Complaint Unit, water should be transported by pipe to prevent loss, and to the diversion to be halted when water is not in use. This also permits the use of sprinklers, which are far more efficient than flood irrigation.

One of the most effective ways for people living off the grid to conserve power is to utilize a battery bank to store power when excess is being produced. Peak energy needs can then be met by combining the use of stored power and produced power. This allows residences and businesses to maintain power production facilities that produce a fraction of the watts they need during peak usage. And a large portion of the time, a residence or business can operate exclusively off of a battery bank.

With the exception of the Marble Mountain Ranch, all residences and businesses known to KFA which operate off the grid, utilize most, if not all of the aforementioned power conservation methods. According to NMFS officials, grants are available for reallocation of power generation capacity. Tribal, SWRCB and DFG employees have offered to help the Coles locate and apply for grants to bring their operation into compliance with the law. It appears that many options are available to the Coles if they would pursue them. Considerable benefit would accrue to the public trust resources of Stanshaw Creek if the Coles' implemented an appropriate physical solution.

II. THE COMPLAINT UNIT'S RECOMMENDATIONS ARE NOT SUPPORTED BY EVIDENCE

A. Recommendation Number 1

The Complaint Unit's recommended actions allow the Coles to continue their unlawful diversion of water from Stanshaw Creek unless the Coles maintain a flow in lower Stanshaw Creek below Highway 96 of approximately 0.7 cfs. The 0.7 cfs bypass requirement, however, is not based upon any scientific evaluation of the needs of Stanshaw Creek and the public trust resources that rely upon flow from Stanshaw Creek, including coho salmon, a threatened species. (See 50 C.F.R. § 102(a)(4).) The 0.7 cfs bypass requirement is based solely upon the SWRCB staff's observations of the flows at the time of the field investigation. In contrast, DFG stated that a 2.5-cfs bypass flow must be required in order to maintain existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead. (See November 21, 2001, Memorandum from Donald B. Koch, Regional Manager, to Edward C. Anton, at p. 2.) Additionally, NMFS' investigation resulted in a recommendation that a 1.5 cfs bypass flow be maintained at all times.

Recommendation 1 is also not supported by the evidence as it references a post-1914 appropriative right derived from Application 29449. The Coles have derived no right to divert water from this application as the SWRCB has not approved the application. Prior to approving the application, the SWRCB must make a determination as to whether unappropriated water is available, and whether the diversion would impact public trust resources and/or other vested water rights.

B. Recommendation Number 2

Recommendation 2(a) provides for the Coles to visually estimate the bypass requirement. Not only is the recommended bypass not supported by evidence, but even if it were implemented, a visual estimation of the bypass provides no ability to ensure compliance with the requirement, or any other appropriate bypass requirement. The SWRCB's recommendation does not indicate how the 0.7 cfs would be monitored or enforced. This is a particular concern to KFA and others as the Coles have expressed their disagreement with any bypass requirements. NMFS recommended that the Coles should be required to install and maintain permanent staff gages at the point of diversion. The installation of such gages would also allow for further investigation as to whether the quantity of water diverted for power generation is in fact simply incidental to the Coles' domestic and irrigation needs.

With regards to recommendation 2(b), any diversion, full diversion of the of the Creek into the Coles ditch would have significant impacts to Stanshaw Creek from the point of diversion to Highway 96. Approval of any such diversion facilities must undergo environmental review under CEQA, and may require formal consultation with the U.S. Forest Service under section 7 of the ESA. (16 U.S.C. § 1536.)

C. Recommendation Number 3

Recommendation 3 states that KFA's complaint against the Coles should be closed. For the reasons stated throughout this response, KFA strongly disagrees with this recommendation. As the Complaint Unit's conclusions and recommendations fail to adequately address the issues raised by the SWRCB staff, NMFS, DFG, and KFA, the complaint should not be closed.

III. The SWRCB Has Failed to Rule on the Coles' Pending Application

The Coles' current Application (A029449) was accepted by the SWRCB on March 27, 1989. In 13 years, however, the SWRCB has failed to conduct a hearing on this application or conduct any environmental review pursuant to the California Environmental Quality Act, Public Resources Code, section 21000 *et seq.* Moreover, despite the current controversy regarding the Coles' diversion

and the impacts to a federally listed species, the SWRCB has provided no indication as to when it intends to conduct hearings on the application or release an environmental document for public review. In the meantime, the SWRCB is allowing the Coles to continue diverting water from a watershed that provides critical habitat to a threatened species.

Quite frankly, much of the current controversy surrounding the Coles' unlawful diversion from Stanshaw Creek can be attributed to the SWRCB's delay in processing the Coles' application and the Coles' lack of diligence in pursuing the application and completely any necessary environmental review. Had the SWRCB acted upon this application in a timely fashion, then the environmental impact report would have been prepared and circulated for public review. Instead, the SWRCB's decision to indefinitely allow the Coles' to continue the unlawful diversion amounts to *de facto* approval of the application without any necessary environmental review.

If the SWRCB does not have the financial resources to conduct the necessary environmental impact report for the Coles' application, then the SWRCB should direct the Coles to deposit an appropriate sum of money for the SWRCB to hire an outside consultant to prepare the EIR. If the Coles or the SWRCB decide not to conduct the environmental review, then the application should be immediately dismissed and the Coles directed to cease all unlawful diversions of water from Stanshaw Creek.

IV. CONCLUSION

The Complaint Unit's May 23, 2002, Memorandum to File states in part that:

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion. (Memorandum to File at p. 8.)

Although in the present action, the Coles have a pending application to appropriate water for power generation, the pending application has not been diligently pursued by either the Coles or the SWRCB. The Coles' application has languished for over 13 years, no environmental review has been conducted, no hearings have been conducted, and no hearing date has been set. Additionally, as demonstrated in this response, as well as in KFA's November 30, 2001, letter, and in DFG and NMFS's respective comment letters, *prima facie* evidence exists to support a finding that the Coles' unlawful diversion adversely impacts public

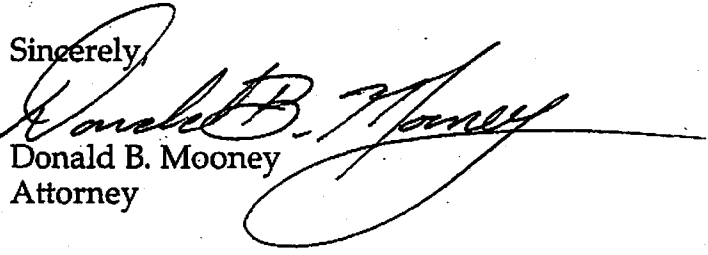
Mr. Michael Contreras

June 24, 2002

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trust resources, including coho salmon, a federally listed species. Moreover, the Complaint Unit's recommendation for a 0.7 cfs bypass is not supported by any evidence, and in fact directly contradicts the evidence and recommendations submitted by DFG and NMFS. Therefore, based upon the foregoing, the SWRCB should direct the Coles to cease and desist all unlawful diversions.

Sincerely,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Doug and Heidi Cole
Ron Prestly, Department of Fish and Game
Tim Broadman, National Marine Fisheries Services
Margaret Tauzer, National Marine Fisheries Services
William M. Heitler, United States Forest Service, Orleans Ranger District
Jim De Pree, Siskiyou County Planning Department
Konrad Fisher
T. James Fisher, Fisher Logging Co.
Toz Soto, Karuk Tribe, Department of Natural Resources
Mr. Edward C. Anton, Chief, SWRCB Division of Water Rights



State Water Resources Control Board

WR-193




Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

JUL 02 2001

Mr. Doug and Ms. Heidi Cole 
92250 Highway 96
Somes Bar, California 95568

Dear Doug and Heidi:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE ALLEGING UNREASONABLE DIVERSION

The State Water Resources Control Board's (SWRCB) Division of Water Rights has received a complaint on behalf of the Klamath Forest Alliance (KFA) regarding your diversion of water from Stanshaw Creek, a tributary to the Klamath River. In a letter from their attorney, your water rights are questioned and it is alleged that your diversion is unreasonable in that it compromises the downstream fishery.

Enclosed for your review is a copy of the June 14, 2001 letter, an "Answer to Complaint" form, and an information pamphlet. Please use the form to respond to the allegations within 15 days from the date of this letter. Upon receipt of your responses, all items submitted by each party will be evaluated to determine whether further action is required by the SWRCB.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,


Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."

005429

DONALD B. MOONEY
Admitted in California and Oregon

129 C Street, Suite 2
Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

June 14, 2001

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

*Re: Unlawful Diversion of Water by Doug and Heidi Cole from
Stanshaw Creek*

Dear Mr. Schueller:

This letter is written on the behalf of the Klamath Forest Alliance ("KFA") regarding the unlawful diversion of water from Stanshaw Creek, a tributary to the Klamath River. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. To that end, KFA requests that without any further delay the State Water Resources Control Board's Division of Water Rights ("SWRCB") issue an order that directs Doug and Heidi Cole to cease and desist their unlawful diversion of water from Stanshaw Creek, as such diversion adversely impacts public trust resources, including but not limited to coho salmon, a federally listed species.

Although the Coles divert up to 3.0 cfs from Stanshaw Creek, the Coles do not possess an appropriative water right to divert this quantity of water. (See letter dated September 15, 1998, from Harry M. Schueller to Doug Cole, Regarding: Unauthorized Diversion - Stanshaw Creek in Siskiyou County ("Schueller Letter")) For your convenience a copy of your letter is attached as Exhibit A to this letter.) To the extent that the Coles divert water based upon a claim to a pre-1914 appropriative water right, California water law limits any such water right to the amount of water put to continuous, reasonable and beneficial use regardless of the original water right. (See Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) According to the SWRCB's Division of Water Rights, any claim the Coles may have to a pre-1914 appropriative water is limited to the Coles' historic domestic and irrigation use. The SWRCB has quantified such use to be 0.11 cfs. (See Schueller Letter p. 1 & 2) This quantity is based on the yet unsubstantiated assumption that the Coles are successors in interest to Sam Stanshaw's water rights as established in a March 25, 1867 letter by Mr. Stanshaw. (See copy of the March 25, 1867, Stanshaw Water Rights Notice attached as Exhibit B to this letter.)

The Coles, however, have failed to provide any evidence to the SWRCB that the Stanshaw Water Right Notice applies to their land. Unless the Coles can substantiate the assumption that Stanshaw Water Rights Notice applies to their property, any diversion of water by the Coles from Stanshaw Creek violates

California Water Code, section 1200 *et seq.* It should be noted that former water diversion ditches and pipes, large rock piles and abandoned mining equipment indicate that large scale mining and water consumption from Stanshaw Creek, took place on the land now owned by the Fisher Family, not the Coles. Furthermore, Stanshaw Creek itself flows through the former and not the latter. If the Coles can prove that they are successors to Stanshaw's water rights, then any diversion of water in excess of a resulting pre-1914 appropriative water right of approximately 0.11 cfs violates Water Code, section 1200 *et seq.* In either event, the Coles do not possess an appropriative water right to support their current water diversion practices and such practices are contrary to law.

As the Coles do not possess a valid water right for their current diversion of water, the Coles filed an application to appropriate water seeking to divert 3 cfs from Stanshaw Creek via a flume which is 12-inches deep, 24-inches wide, and 5,200 feet long then through a penstock of 16-inch diameter, 455 foot long steel pipe from Stanshaw Creek, a tributary to the Klamath River, in Siskiyou County (Application to Appropriate Water No. 29449). According to the Cole's application, the penstock utilizes 200 feet of fall to generate a maximum of 33.9 kilowatts at 80 percent efficiency at a hydroelectric plant above Irving Creek. The water is then released into Irving Creek and then into the Klamath River. Despite the fact that the Coles have not obtained a water rights permit from the SWRCB for the diversion of water, the Coles continue to divert up to 3 cfs from Stanshaw Creek.¹

In the Fall of 2000, the California Department of Fish and Game ("DFG") obtained an injunction against the Coles for violating sections 1603 and 5937 of the Fish and Game Code. The injunction required that the Coles remove portions of the dam that they had constructed in Stanshaw Creek. The Coles used this illegal obstruction to pool water in order to assist their diversion from Stanshaw Creek. It must be noted, however, that the injunction obtained by DFG applies only to the illegal obstruction in Stanshaw Creek and does not address the unlawful diversion of water. It is KFA's understanding that even though the Coles or DFG may have modified the diversion structure as required by the injunction, the Coles continue to divert water in excess of any pre-1914 appropriative water right.

In your September 15, 1998, letter to the Coles, you stated that within 45 days of your letter, the Coles must provide information to the Division of Water Rights substantiating their claims to a pre-1914 appropriative water right for their

¹ On November 15, 1999, the SWRCB granted the Coles' request for the registration of a small domestic use pursuant to Water Code section 1228 *et seq.* (Certificate No. R 480, Application 30945R). The Coles' small domestic use registration limits the Coles' diversion to 10 acre-feet per annum ("afa") and does not allow hydroelectric generation as a purpose of use. The Coles' current water diversion practices far exceed the 10-afa limitation. For instance, at a diversion rate of 2.5 cfs, the Coles' exceed the 10-afa limitation in just 4 days. Additionally, the Small Domestic Use Registration requires that the Coles obtain all necessary federal, state and local approvals which the Coles have failed to do.

current water diversion. If the Coles failed to provide the requested information, the matter would be referred to the Division of Water Rights' Complaint Unit to consider appropriate enforcement action. It is our understanding that although two and one-half years have passed since your letter to the Coles, the Coles have not provided the requested information. Despite the Coles' failure to comply with your request, this matter has not been referred to the Complaints Unit and the Coles continue to unlawfully divert water from Stanshaw Creek.

In many instances the unlawful diversion of water may not have a significant impact to public trust resources and other legal users of water while an application to appropriate is reviewed and considered by the SWRCB. In such instances, it is our understanding that the SWRCB's informal practice is to allow such diversions to continue until the application to appropriate has been denied or approved. In the present situation, however, the Coles' unlawful diversion has significant impacts to public trust resources and may result in a violation of section 9 of the federal Endangered Species Act, 16 U.S.C. § 1538.²

Stanshaw Creek and the Klamath River contain coho salmon (*Oncorhynchus kisutch*) which are in the Southern Oregon/Northern California Coasts ESU and are listed as threatened under the federal ESA. See 50 C.F.R. § 102(a)(4). In a letter dated October 5, 2000, from William M. Heitler, District Ranger to Doug and Heidi Cole, Mr. Heitler stated that the National Marine Fisheries Service ("NMFS") and DFG are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting coho salmon. (A copy of Mr. Heitler's October 5, 2000 letter is attached to this letter as Exhibit C.) Stanshaw Creek also contains steelhead (*Oncorhynchus mykiss*) which are in the Klamath Mountains Province and are listed as candidate species under the ESA and a species of concern to DFG.

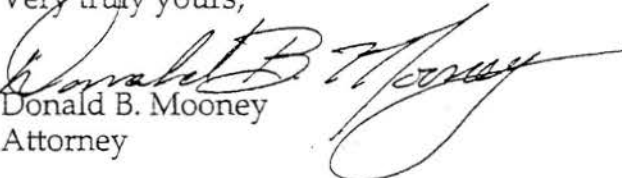
As the Coles' unauthorized diversion of water poses a significant risk to public trust resources in and along Stanshaw Creek and the Klamath River, including but not limited to the impacts to coho salmon, a federally listed species, KFA respectfully requests that the SWRCB follow through on its September 15, 1998, letter and immediately refer this matter to the Complaint Unit. KFA also

² The courts have ruled that when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition. (*Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997), cert. denied, 119 S.Ct. 81, and cert. denied, 119 S.Ct. 437 (1998).) The same rationale that caused the court in *Strahan* to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the SWRCB's decision to allow the Coles to continue diverting water from Stanshaw Creek, even though the SWRCB has concluded that Coles do not possess an appropriative water right. In addition, recent case law confirms that the failure of government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act. (*Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999).)

requests that the SWRCB direct the Coles to cease and desist from any further diversion of water from Stanshaw Creek in excess of an established pre-1914 water right until the SWRCB has the opportunity to review and consider the Coles' Application to Appropriate Water and the associated protests as well as any biological assessment prepared by the United States Forest Service and a biological opinion prepared by NMFS.

Please do not hesitate to contact me if you have any questions regarding this matter. I can be reached at (530) 758-2377.

Very truly yours,


Donald B. Mooney
Attorney

cc: Felice Pace
Robert Miller
Charles Rich
Larry Allen

DONALD B. MOONEY
Admitted in California and Oregon

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Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

March 9, 2001

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

The Honorable Don Evans
Secretary of Commerce
Office of Secretary
U.S. Department of Commerce
14th and Constitution Avenues, NW
Washington D.C. 20230

The Honorable Ann Veneman
Secretary of Agriculture
U.S. Department of Agriculture
14th and Independence, NW
Washington D.C. 20250

Doug and Heidi Cole
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

**Re: 60 day Notice of Intent to Sue for Violations of Section 9 of the
Endangered Species Act relating to the Diversion of Water from
Stanshaw Creek.**

Dear Secretary Evans, Secretary Veneman, and Mr. & Mrs. Cole:

This letter serves as a sixty day notice on behalf of Konrad Fisher and the Klamath Forest Alliance ("KFA") of their intent to sue Doug Cole and Heidi Cole both individually and doing business as Marble Mountain Ranch ("Coles") for violations of Section 9 of the federal Endangered Species Act ("ESA"), 16 U.S.C. § 1538, for actions and inaction related to the damming and diversion of water from Stanshaw Creek, a tributary to the Klamath River in Siskiyou County, California. The Coles' actions have resulted or will result in the illegal take and other harm to steelhead (*Oncorhynchus mykiss*) and coho salmon (*Oncorhynchus kisutch*) which are legally protected. This letter also serves as notice of intent to sue the Department of Commerce, National Marine Fisheries Service ("NMFS"), and the Department of Agriculture, United States Forest Service ("USFS"), for failure to take action to protect steelhead and coho salmon along Stanshaw Creek with regard to the diversion of water and impoundment of water by the Coles and Marble Mountain Ranch.

The Honorable Don Evans
The Honorable Ann Veneman
Doug & Heidi Cole
March 9, 2001
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This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of section 11(g) of the ESA, to the extent such notice is deemed necessary by a court. 16 U.S.C. §1540(g).

A. Project Description

The Coles have constructed a reservoir and are currently diverting water from Stanshaw Creek to supply their hydroelectric facility. Stanshaw Creek, as part of the Klamath River system, has been placed under the California and National Wild and Scenic Rivers Systems to protect its outstanding anadromous fishery values. See 16 U.S.C. § 460ss. The reservoir, diversion structure and conveyance ditch are located primarily on lands within the Klamath National Forest, which is administered by the USFS, an agency of the Department of Agriculture.

The Coles have applied to the State Water Resources Control Board ("SWRCB") to divert 3 cubic feet per second (cfs) via a flume which is 12-inches deep, 24-inches wide, and 5,200 feet long then through penstock of 16-inch diameter, 455 foot long steel pipe from Stanshaw Creek, a tributary to the Klamath River, in Siskiyou County (Application to Appropriate Water No. 29449). According to the Cole's application, the penstock utilizes 200 feet of fall to generate a maximum of 33.9 kilowatts at 80 percent efficiency at a hydroelectric plant just above Irving Creek. After use, the water will be returned to Irving Creek and then to the Klamath River. Despite the fact that the Coles have not obtained a water rights permit from the SWRCB for the diversion of water, the Coles continue to divert up to 3 cfs from Stanshaw Creek.

B. The Coles' Project Impacts Federally Protected Species

Stanshaw Creek contains steelhead (*Oncorhynchus mykiss*) which are in the Klamath Mountains Province and are listed as candidate species under the ESA; they are a species of concern to the California Department of Fish and Game ("DFG"). Stanshaw Creek also contains coho salmon (*Oncorhynchus kisutch*) which are in the Southern Oregon/Northern California Coasts ESU and are listed as threatened under the ESA. See 50 C.F.R. § 102(a)(4). Stanshaw Creek lies within the Klamath River watershed and supports and contributes to the survival of these species.

Additionally, the Coles' diversion of water from Stanshaw Creek may potentially impact macroinvertebrate species and their habitat in Stanshaw Creek. These macroinvertebrates constitute the food base for the anadromous and resident fish populations that are protected by the ESA.

The Honorable Don Evans
 The Honorable Ann Veneman
 Doug & Heidi Cole
 March 9, 2001
 Page 3

C. The Coles' Diversion of Water Violates Section 9 of the Endangered Species Act and NMFS Section 4(d) Regulations

Section 9 of the ESA prohibits any "person" from "taking" an endangered species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31. Pursuant to section 4(d) of the ESA, the Department of Commerce adopted regulations applying the take prohibitions of section 9(a)(1) of the ESA, 16 U.S.C. § 1538(a)(1), to the threatened species of salmonids, including coho salmon. 50 C.F.R. § 223.203.

The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19). The ESA defines "person" to include any "individual, corporation, partnership, trust, association, or any other private entity...." 16 U.S.C. § 1532(13). Thus, the Coles and their associated business are within the definition of person.

Harm is further defined as:

Harm in the definition of "take" in the Act means an act that actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3.

In 1997, the National Marine Fisheries Service ("NMFS") set out additional rules for the take of coho. 62 Fed. Reg. 38479. NMFS' rules identify the following activities that could potentially harm, injure or kill coho salmon in the subject ESU and thus constitute an unlawful take:

[D]estruction or alteration of coho salmon habitat in this ESU, such as removal of large woody debris and "sinker logs" or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flow.

The Coles diversion and damming activities described above have resulted and will continue to result in take of coho and steelhead. These actions and inaction of the Coles are therefore the direct and proximate causes of an illegal take under section 9 of the ESA and NMFS's regulations. 16 U.S.C. § 1538; 50 C.F.R. § 223.203.

Despite numerous warnings, inquiries, protests, and other filed actions, the Coles have refused to conform their actions/inaction to be consistent with all applicable state and federal laws and are thus, knowingly and willfully undertaking activities that

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result in the taking of protected and candidate species. The Coles are therefore in violation of Section 9 of the ESA and can and will be held personally responsible for these violations.

In the present situation, a take of the protected species may only occur pursuant to an ESA Section 10 incidental take permit. No such authorization for take has occurred; thus, all such take is in violation of Section 9 and must immediately cease.

D. The Coles Do Not Have the Right to Divert 3.0 cfs from Stanshaw Creek

Although the Coles divert up to 3.0 cfs from Stanshaw Creek, the Coles do not possess an appropriative water right to divert this quantity of water. To the extent, that the Coles are diverting water based upon a claim to a pre-1914 appropriative water right, such water right must be limited to the amount of water put to continuous, reasonable and beneficial use regardless of the original water right. See Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127. According to a review conducted by the SWRCB's Division of Water Rights, any claim that the Coles may have to a pre-1914 appropriative water right is limited to their domestic and irrigation use which amounts to approximately 0.11 cfs. See letter dated September 15, 1998, from Harry M. Schueller to Doug Cole, Regarding: Unauthorized Diversion – Stanshaw Creek in Siskiyou County). However, the SWRCB's tentative conclusion was based on the assumptions that a 1867 letter by Sam Stanshaw (see notice recorded March 25, 1867 by Sam Stanshaw), proves continuous use of water from before 1914 and that any resulting water right was conveyed along with the property now owned by the Coles. Unless the Coles can substantiate these assumptions, any diversion of water violates California Water Code, sections 1200 *et seq.* If the Coles can substantiate the aforementioned assumptions, any diversion of water in excess of a resulting pre-1914 water right is in violation of California Water Code, sections 1200 *et seq.*

In addition, the Coles' unauthorized diversion of water harms public trust resources in and along Stanshaw Creek, including but not limited to the impacts to coho salmon and steelhead.

E. The Coles Do Not Possess a Special Use Permit from the USFS for the Diversion Facilities on USFS Property

Although the Coles' diversion structure and ditch are located on land belonging to the Klamath National Forest, the Coles have not obtained a Special Use Permit from the United States Forest Service. In order for the Coles to maintain the diversion structure and conveyance ditch, the Coles must first obtain a Special Use Permit. Moreover, prior to issuing a Special Use Permit, or allowing any diversion of water to

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continue, the USFS must comply with the section 7 consultation requirements of the ESA. 16 U.S.C. § 1536. This requires the preparation of a Biological Assessment by the USFS and the issuance of Biological Opinion from NMFS.

USFS must comply with its substantive and procedural obligations under section 7 of the Endangered Species Act, 16 U.S.C. § 1536, and the National Environmental Policy Act. 42 U.S.C. §§ 4321 *et seq.* If USFS allows diversions of water and diversion facilities on land within the Klamath National Forest, such action may result in USFS authorizing a take of coho salmon in violation of the ESA. Moreover, USFS's failure to develop a plan that prevents take of coho salmon may result in USFS's own "take liability" under the ESA. Therefore, in processing a Special Use Permit, or allowing the Coles' diversion of water to continue, USFS must assess the impacts to coho salmon.

Section 7(a)(1) of the ESA also imposes on USFS a duty to conserve which obligates USFS to affirmatively and actively pursue methods to conserve the coho salmon. 16 U.S.C. § 1536(a)(1). Thus, in allowing the diversion of water from and across USFS property, USFS must take affirmative steps to conserve and protect coho salmon.

USFS has the statutory and regulatory authority to regulate the use of land owned by USFS. In allowing the diversion of water, USFS must also take into account its legal obligations to prevent incidental take of sea otters under section 9 of the ESA. 16 U.S.C. § 1538. *See Defenders of Wildlife v. Environmental Protection Agency*, 882 F.2d 1294 (8th Cir. 1989).

F. The Parties Must Correct the ESA Violations Within 60 Days

If the Coles, NMFS and USFS do not act immediately to correct these violations of the ESA the Fishers and KFA may seek immediate relief under section 11(g)(2)(c) of the ESA. 16 U.S.C. § 1540(g)(2)(C). If the Coles, NMFS, and USFS do not act within 60 days to correct these violations of the ESA, the Fishers and KFA will pursue litigation in Federal Court against one or more of the parties named in this letter. The litigation will seek injunctive and declaratory relief, and legal fees and costs against one or more of you regarding these violations.

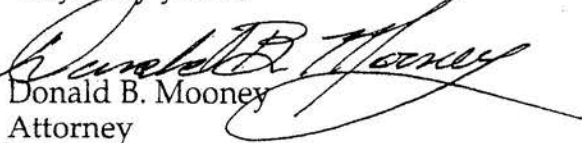
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An appropriate remedy that would prevent litigation would include the following:

1. Guaranteeing optimal year-round stream flows of a quantity in Stanshaw Creek that would repair anadromous fish habitat and to ensure fish survival.
2. Agree to cease diverting water anytime it becomes necessary to ensure optimum stream flows are satisfied.
3. Contribute funds to restore and enhance the Stanshaw Creek anadromous fishery and to assist with the Proposed fish passage project under Highway 96.
4. Document the availability of water in Stanshaw Creek in excess of that needed for instream fishery and existing riparian rights.
5. Removal of all impediments to migrating anadromous fish in Stanshaw Creek.

If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me at (530) 758-2377.

Very truly yours,


 Donald B. Mooney
 Attorney

cc: Konrad Fisher
 Felice Pace, KFA
 Rebecca Lent, Regional Administrator, NMFS
 Margaret Tauzer, National Marine Fisheries Service
 William M. Heitler, District Ranger, United States Forest Service

LAW OFFICES OF DONALD B. MOONEY

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dbmooney@dcn.davis.ca.us

November 30, 2001

VIA FACSIMILE AND
REGULAR MAIL

Charles Rich
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Unlawful Diversion of Water by Doug and Heidi Cole from Stanshaw
Creek, Siskiyou County*

Dear Mr. Rich:

This letter serves as the Klamath Forest Alliance's ("KFA") response to Janet Goldsmith's letter dated August 20, 2001 on behalf of Doug and Heidi Cole, and as a follow-up to the October 17, 2001, site visit to the Marble Mountain Ranch and Stanshaw Creek. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. The Coles' unlawful diversion of water from Stanshaw Creek poses a risk to these public trust resources, primarily coho salmon and steelhead. To this end, KFA requests that the State Water Resources Control Board ("SWRCB") take all appropriate action to curtail the unlawful diversions and to protect the public trust resources that are at risk from the unlawful diversions.

The unauthorized diversion of water subject to appropriation under the provisions of the Water Code is a trespass. (Water Code, § 1052.) Moreover, Water Code, § 1825 provides that "[i]t is the intent of the Legislature that the state should take vigorous action to . . . prevent the unlawful diversion of water. In the present case, the SWRCB staff has already determined that the Coles' diversion of water in excess of 0.11 cfs constitutes an unauthorized diversion of water. Additionally, the SWRCB staff has determined that any diversion of water for the generation of hydroelectric generation requires an appropriative water right permit. Thus, the Coles' current diversion of water from Stanshaw Creek constitutes an unlawful diversion of water.

The Coles' current diversion practices can be separated into two areas. First, the extent of the Coles' pre-1914 appropriative water rights for domestic and irrigation uses and whether their current diversion from Stanshaw Creek and water use exceed any claim to a pre-1914 appropriative water right, and thus constitutes an unlawful diversion. Second, whether the Coles' diversion of water for hydroelectric generation constitutes an unlawful diversion of water. If it does

Mr. Charles Rich
November 30, 2001
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constitute an unlawful diversion of water, then should the SWRCB take action to prevent the unlawful diversion of water as provided for in Water Code sections 1052 and 1825? As discussed below, the Coles' current diversion of water exceeds any pre-1914 appropriative right for domestic and irrigation uses. Additionally, the Coles' do not possess a pre-1914 appropriative water for hydroelectric generation. Finally, and most importantly, the Coles' unlawful diversion harms coho salmon and steelhead.

1. The Coles' Current Diversions for Domestic and Irrigation Exceed Any Claim to a Pre-1914 Appropriative Water Right

Assuming the Coles can establish that they are the successors in interest to the Stanshaw pre-1914 appropriative water right, any pre-1914 appropriative water right is limited to the amount of water put to a reasonable and beneficial use. (Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) The SWRCB staff has concluded on at least two occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1993 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, *Land and Water Use in Klamath River Hydrographic Unit*, Table 4 at p. 55.) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists.

Although the Coles question the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles provide absolutely no evidence to dispute the estimated demand and they provide no alternate estimate of a higher demand. The Coles argue that Mr. Hayes believes that he *may* have underestimated his existing uses because it was based upon a single flow measurement at a time when he was not irrigating. The Coles, however, provide no evidence to support a higher demand rate at that time. Moreover, as indicated in the SWRCB's September 15, 1998, letter, the information contained in DWR Bulletin 94-6 was verified by Marvin Goss, Forest Service hydrologist, who lived on the Coles' property while it was under prior ownership. "Mr. Goss evaluated the capacity of the ditch as well as measuring the actual amount of water put to generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel." (Schueller Letter at p. 1.)

The SWRCB's September 15, 1998, letter indicates that in 1998, the Coles constructed a reservoir upon their property. Any claim the Coles may have to a pre-1914 appropriative water does not support the diversion of water to a reservoir constructed in 1998. Such use constitutes an expansion of the water right for which an application to appropriate water must be filed. Even though the SWRCB brought this matter to the Coles' attention over three years ago, it is KFA's understanding that the Coles continue to use of the reservoir and have not

filed any application to appropriate water for such use. This constitutes an unauthorized diversion of water for which the Coles have made no attempt to remedy. Thus, the SWRCB should direct the Coles to cease and desist from diverting water to this storage facility, unless and until the Coles obtain a permit for such use.

At the site visit on October 16th, the SWRCB staff measured the flow of Stanshaw Creek at the point of diversion ("POD") to be approximately 1.6 cubic feet per second ("cfs"). The Coles were diverting approximately 50 percent of stream flow. At the time, however, the Coles were not generating any power from the diverted water. Thus, the entire diversion was for domestic and irrigation uses. This quantity of diversion exceeds the Coles' pre-1914 appropriative water right for domestic and irrigation purposes. As indicated in the SWRCB's September 15, 1998, letter, the Coles' pre-1914 appropriative water right for domestic and irrigation use is limited to 0.11 cfs. This amount is supported by Katherine Mrowka's February 4, 1993, letter to the Robert and Mary Young, the Coles' predecessors' in interest.

Based upon the substantial evidence, and essentially, uncontested evidence, any quantity of water diverted from Stanshaw Creek used for domestic and irrigation that exceeds 0.11 cfs constitutes a trespass and unlawful diversion of water

2. The Coles' Do Not Possess the Right to Divert Water For Hydroelectric Generation

The Coles' August 20th letter implies that the Coles have a pre-1914 appropriative water right to divert 3.0 cfs from Stanshaw Creek. The substantial evidence, however, indicates that no such water rights exist and that the Coles' current diversions constitute a trespass and unlawful diversion of water. In fact, the evidence submitted by the Coles, as well as Doug Cole's own admissions, demonstrate that hydroelectric generation began after 1945 and has increased since that time. In a letter dated April 9, 2000, from Doug Cole to Konrad Fisher, Mr. Cole stated that:

Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

(A copy of Mr. Coles' April 9, 2000, letter is attached as Exhibit A.)

Mr. Hayes' April 30, 2000, Declaration submitted with the Coles' August 20th letter also supports the conclusion that hydroelectric generation has been expanded over the years. Mr. Hayes' Declaration indicates that in 1945, there existed a 4 kw pelton wheel which was upgraded to a 9 kw pelton wheel, and in

1965, upgraded to a 100 kw pelton wheel. It should be noted also, as discussed above, in 1963, the quantity of water being diverted from Stanshaw Creek was 0.49 cfs and the ditch capacity was only 1.25 cfs.

The evidence supports Mr. Coles' statement that in about 1945, the ranch began hydroelectric generation. Mr. Cole's contention, however that no increase in stream contention that such use did not increase the quantity of water diverted from Stanshaw Creek is not supported by the evidence, in light of the fact that the Coles seek to divert up to 3 cfs for hydroelectric generation: an amount six times greater than previously documented uses from Stanshaw Creek.

The Coles' August 20th letter provides a description of the history of uses in which it describes hydroelectric generation as one of the historical uses of water on the ranch. This discussion, however, fails to state when such hydroelectric uses commenced. The Coles' letter implies that since an old pelton wheel was used for the generation of power, the date power generation commenced can be traced to the age of the pelton wheel. This does not allow for the possibility that when power generation began in 1945 as acknowledged by Doug Cole, that the previous owners used an older pelton wheel. Without some type of corroborating evidence, the mere existence of an old pelton wheel does not establish a pre-1914 appropriative water right. Additionally, the mere existence of a pelton wheel does not establish that any claimed water right has been continuously used since 1914. Finally, the old pelton wheel, along with Mr. Hayes' Declaration does not address the issue that since 1955, the ranch has increased its use of water for the hydroelectric generation. A trend followed by the Coles in their current diversions.

3. The SWRCB Should Direct the Coles to Cease All Unlawful Diversions

The Coles state that KFA failed to provide any factual basis that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. Additionally, the Coles' assert that no specifics are given of just how their unauthorized diversion of the waters of Stanshaw Creek are affecting either coho salmon or steelhead.

These questions were answered unequivocally at the site visit, as well as in the National Marine Fisheries Service's ("NMFS") November 15, 2001, letter to Charles Rich. There is uniform agreement among the fisheries biologists that have visited the Stanshaw Creek and analyzed the impacts of the Coles' diversions that the thermal refugia at the mouth of Stanshaw Creek is an important habitat element. (See NMFS' Letter dated November 15, 2001, Memorandum dated November 29, 2001 from Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University (Exhibit B); and Memorandum dated November 30, 2001, from Toz Soto, Fisheries Biologist, Karuk Tribe, Department of Natural Resources (Exhibit C).) As indicated in NMFS' letter, and by Mr. Soto, the natural flows from Stanshaw Creek provide

the necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek.

Currently there exists no instream flow requirements for Stanshaw Creek. As a result, without any regulatory oversight, the Coles have diverted up to 3.0 cfs from Stanshaw Creek regardless of amount of instream flow remaining in Stanshaw Creek. The United States Forest Service's flow data from September 2000, indicates that the Coles were diverting nearly 3.0 cfs from Stanshaw Creek when there averaged only 3.26 cfs above the point of diversion. Thus, flow at the culvert averaged less than 0.4 cfs. (See Select Middle Klamath Tributary Flow Summary, Table 1: 2000 Low Flow Discharge Rates, Exhibit D)

According to Mr. Soto's review and analysis, "Stanshaw Creek provides important thermal refugia habitat for anadromous salmonids in the Klamath River." (See Exhibit C.) Additionally, "[w]ith proper flow, habitat in Stanshaw Creek is suitable for summer and winter rearing coho salmon." (*Id.*) The Coles' current diversion limits thermal refugia habitat at the mouth of Stanshaw Creek. (*Id.*) In order to maintain a properly functioning thermal refugia habitat at the mouth of Stanshaw Creek, the water diverted from Stanshaw Creek must be returned to Stanshaw. (*Id.*)

In Professor Roelofs' analysis, he concluded that::

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkel) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. (Exhibit B.)

The reduced stream flows also limit access to the creek for adult and juvenile salmonids. (Exhibit C.) The reduced flows and velocity also reduce adult spawning and nest building opportunities in lower Stanshaw Creek. (*Id.*) Another problem with the Coles' current diversion practices is that the diversion intake is not screened and salmonids are being entrained in the diversion ditch. (*Id.*) Finally, the Coles' rock dam has no ability to control or measure the amount of flow diverted from Stanshaw Creek. (*Id.*)

Based upon the foregoing, substantial evidence demonstrates that the Coles' current diversion practices have a direct impact on coho and steelhead, as well as their habitat. The Coles, however, have offered no expert opinion or analysis as to the harm and potential harm resulting from their unlawful

diversions. Such harm to and potential harm to coho salmon and steelhead justify, and in fact mandate, that the SWRCB direct the Coles to cease their unlawful diversions unless and until the Coles obtain an appropriate water right and have taken appropriate steps to ensure that the downstream resources are not harmed by their diversion.

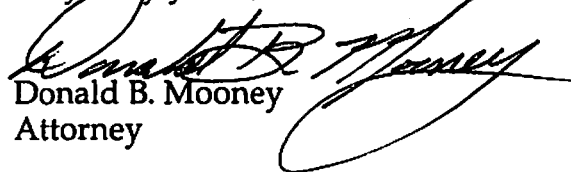
4. Conditions to Protect Public Trust Resources Must Be Imposed Upon Any Future Diversions

If the SWRCB does not direct the Coles to cease their unlawful diversions, then the SWRCB must require that the Coles maintain a minimum instream flow in Stanshaw Creek below the point of diversion and below the Highway 96 culvert.

If the SWRCB allows the Coles to continue their unlawful diversions, then, at an absolute minimum, it must impose the conditions outlined in NMFS' November 15, 2001, letter, in order to reduce any harm to downstream habitat and public trust resources. Such conditions include returning the flows to Stanshaw Creek before creek crosses Highway 96; install a fish screen at the point of diversion, install a diversion structure at point of diversion in order to control and limit the quantity of water diverted, install stream flow measuring device at the point of diversion and the point of return on Stanshaw Creek; provide access to Department of Fish and Game and NMFS for monitoring. Finally, the SWRCB should impose minimum instream flow and bypass requirements as recommended by NMFS.

As any instream flow and bypass requirements at this time would only be interim, pending the SWRCB's consideration of the Coles' application to appropriate water, KFA retains the right to reevaluate the minimum bypass and instream flow recommendations, as well as the point of return to Stanshaw Creek, KFA determines that such activities raise creek temperature and/or harm fish and public trust resources.

Very truly yours,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Felice Pace
Michael Contreras

Attachments

EXHIBIT A

April 9, 2000

Konrad Fisher
1721 Court Street
Redding, California 96001

Dear Mr. Fisher:

We have received a copy of your protest of water rights application #29449 and hereby wish to respond to your concerns.

Our application has resulted from the process of the State's ongoing review of water usage in the State of California and the consequent updating and refining of all water usage permits. We currently operate a sixty-acre, year-round guest ranch which borders on the Klamath River and which lies between Irving Creek to the east and Stanshaw Creek to the west. Water has been continuously diverted from Stanshaw Creek to this property since about 1865. Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

In the second paragraph of the application notice, the wording is such as to suggest that we have the intention of diverting new water from Stanshaw Creek when, in fact, we are not. Apparently, the wording here is standard for all water rights applications, regardless of the specific nature of the project(s) involved. This application is being made for the sole purpose of satisfying a requirement of the State that any hydroelectric generation plant such as ours, regardless of how long it has been in operation, must now be formally permitted.

Approval of this permit application will

- not injure any existing water rights, since no reduction in Stanshaw Creek flow will result.
- not result in any adverse impact on the environment since nothing in the project description calls for any changes in the habitats bordering on the existing project. The power plant in question is situated within a waterway closed to migratory fish by a culvert under highway 96 and cannot, therefore, have any adverse effect on migratory fish. The existing project has been carefully studied by representatives of the State Department Of Fish And Game (Yreka office), the

Federal Department Of Forestry, and the State Water Resources Control Board and ~~no complaints have been registered by any of~~ these agencies regarding the health of the ecosystems adjoining the project.

- ~~not~~ work counter to public interest. In fact, the existance of the water canal along which the generation plant is situated provides for a better year-round flow in Irving ^{tree} Creek, thus aiding fish spawning there. In addition, property immediately to our southwest, owned by a Mr. Neil Tocher, is supplied by water diverted from our system. Mr. Tocher has responded favorably to our permit request. Finally, the operation of our hydroelectric plant eliminates the need for our dependence on over-burdened public utilities. *we want*
- ~~not~~ be contrary to any laws, either county or state. Our current diversion of water from Stanshaw Creek is authorized under a pre-1914 water rights agreement which is on file in the Siskyou County offices. .

Please reconsider your protest of our application to preserve (~~not expand~~) a project which has been in existence for over 55 years and which is essential to our livelihood. If you have any questions or further concerns, please contact us directly at the address or phone number given below.

Sincerely,

Douglas & Heidi Cole

Marble Mountain Ranch
Douglas and Heidi Cole, owners
92520 Hwy 96
Somes Bar, Calif. 95568
(530) 469-3322



Department of Fisheries Biology

29 November 2001

To: Whom It May Concern

Terry D. Roelofs
 From: Terry D. Roelofs, Professor

Subject: Appropriate Water Rights Application 29449 on Stanshaw Creek

Several months ago I was asked by Mr. Konrad Fisher to render an opinion regarding a water rights application to divert water from Stanshaw Creek, a Klamath River tributary in Siskiyou County, California. On 17 November 2001 I inspected the portion of Stanshaw Creek between Highway 96 and the Klamath River. Joining me on this site visit were Dr. Walt Duffy, Leader, California Cooperative Fisheries Research Unit at Humboldt State University, Mr Toz Soto representing the Karuk Tribe of California, and Mr. Michael David Fellows, caretaker of the Fisher Ranch. I have read an Environmental Field Report written by Robert E. Miller of the California State Water Resources Control Board describing a site visit to Stanshaw Creek attended by representatives of the National Marine Fisheries Service, California Department of Fish and Game, Karuk Tribe of California, and several non-agency personnel. I have also reviewed a letter dated 15 November 2001 by James R. Bybee of the National Marine Fisheries Service addressed to Mr. Charles Rich of the California State Water Resources Control Board.

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkle) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. I believe that these concerns should be addressed before Application 29449 is approved.

EXHIBIT C

Karuk Tribe of California

**Department of Natural Resources**

Post Office Box 282
Orleans, CA 95556
(530) 627-3446 Fax (530) 627-3448

Administrative Office

Post Office Box 1016
Happy Camp, CA 96039
(530) 493-5305 Fax (530) 493-5322

Karuk Tribal Health Clinic

Post Office Drawer 249
Orleans, CA 95556
(530) 627-3452 Fax (530) 627-3445

Karuk Department of Natural Resources

November 30, 2001

Comments on the Stanshaw Creek Diversion

Stanshaw creek provides important thermal refugia habitat for anadromous salmonids in the Klamath River. Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for outmigrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids. Spawning and nest building sites for adult coho and steelhead are limited by the diversion. With augmented flows, established spawning sites are at risk of being dewatered.

Problems

1. The current diversion limits thermal refugia habitat associated with cold water input to the Klamath River. Diverted water must be returned to maintain properly functioning thermal refugia habitat at the mouth and in the lower reach of the creek.
2. Access to the creek for adult and juvenile salmonids is limited because of the diversion. Connectivity to the temperature-impaired Klamath River must be maintained to allow migration of cold-water dependant salmonids into Stanshaw Creek.
3. The diversion intake is not screened and salmonids are being entrained in the diversion ditch. A fish screen is needed to keep fish from being trapped and harmed by the hydro generator.
4. Reduced flows and reduced stream velocity limits adult spawning and nest building opportunities in lower Stanshaw Creek.
5. Flow below the diversion intake is not adequate for salmonid migration and rearing.
6. Slope failures associated with overtopping along the diversion ditch are a sediment sources to Stanshaw Creek.
7. The primitive nature of the rock dam type intake has no provision to control the amount of flow diverted.

For questions pertaining to these comments please contact the director of Karuk Department of Natural Resources, Leaf Hillman or fisheries biologist, Toz Soto at (530) 627-3446.

Sincerely,



Toz Soto, Fisheries Biologist

EXHIBIT D

Select Middle Klamath Tributary Flow Summary
Table 1: 2000 Low-Flow Discharge Rates

Stream	Location	Date	Flow #1	Flow #2	Average
Portuguese	above culvert	9/19	1.50	1.84	1.67
Indian	at mouth	9/19	56.71	54.68	55.70
Walker	first bridge	9/19	6.14	5.60	5.87
Grider	near bridge across Grider	9/19	22.15	20.29	21.22
Independence	300' up from mouth	9/20	15.52	13.78	14.65
Oak Flat	under the bridge	9/20	1.49	1.46	1.48
Elk	near mouth, near bridge	9/20	42.61	40.27	41.44
China	near culvert	9/20	1.70	1.66	1.68
Clear	under bridge	9/20	43.66	45.25	44.46
Swillup	400' up from Highway 96 (under hanging water line)	9/21	3.40	3.33	3.37
Coon	300' up from culvert	9/21	1.06	1.08	1.07
Dillon	200' downstream from 96 bridge	9/21	27.00	26.23	26.62
TI	200' upstream from water filling station	9/21	4.91	5.40	5.16
Sandy Bar	300' from mouth	9/21	3.05	2.88	2.97
Irving	at end of foot trail	9/21	7.41	7.59	7.50
Stanshaw	at culvert	9/22	0.35	0.40	0.38
Stanshaw	above water intake	9/27	3.09	3.42	3.26
Rogers	200' from mouth	9/22	4.38	4.71	4.55
Fort Goff	below culvert	9/26	4.27	4.00	4.14
Seiad	*not surveyed				
Thompson	at bridge	9/26	10.56	12.15	11.36
Rock	at mouth	9/27	12.02	11.87	11.95

* not surveyed due to private property
source: USFS Happy Camp Fisheries Dept.

DATE	TIME	LOCATION	WIND	WAVE	SEA
12/1	0800	10N 155E	10	2	1
12/1	0900	10N 155E	10	2	1
12/1	1000	10N 155E	10	2	1
12/1	1100	10N 155E	10	2	1
12/1	1200	10N 155E	10	2	1
12/1	1300	10N 155E	10	2	1
12/1	1400	10N 155E	10	2	1
12/1	1500	10N 155E	10	2	1
12/1	1600	10N 155E	10	2	1
12/1	1700	10N 155E	10	2	1
12/1	1800	10N 155E	10	2	1
12/1	1900	10N 155E	10	2	1
12/1	2000	10N 155E	10	2	1
12/1	2100	10N 155E	10	2	1
12/1	2200	10N 155E	10	2	1
12/1	2300	10N 155E	10	2	1
12/2	0000	10N 155E	10	2	1
12/2	0100	10N 155E	10	2	1
12/2	0200	10N 155E	10	2	1
12/2	0300	10N 155E	10	2	1
12/2	0400	10N 155E	10	2	1
12/2	0500	10N 155E	10	2	1
12/2	0600	10N 155E	10	2	1
12/2	0700	10N 155E	10	2	1
12/2	0800	10N 155E	10	2	1
12/2	0900	10N 155E	10	2	1
12/2	1000	10N 155E	10	2	1
12/2	1100	10N 155E	10	2	1
12/2	1200	10N 155E	10	2	1
12/2	1300	10N 155E	10	2	1
12/2	1400	10N 155E	10	2	1
12/2	1500	10N 155E	10	2	1
12/2	1600	10N 155E	10	2	1
12/2	1700	10N 155E	10	2	1
12/2	1800	10N 155E	10	2	1
12/2	1900	10N 155E	10	2	1
12/2	2000	10N 155E	10	2	1
12/2	2100	10N 155E	10	2	1
12/2	2200	10N 155E	10	2	1
12/2	2300	10N 155E	10	2	1



PROTEST

Based on Prior Filed Application or Injury to Prior Rights
(Protests based on OTHER considerations should be completed on other side of form.)

APPLICATION 29449

- I, (We) T. James Fisher; J.W. Fisher Logging Company; Phylis Fisher
Name of Protestant(s)
of 1721 Court Street, Redding, CA 96001, (530) 244-0909 have read carefully a
Mailing address and zip code of protestant(s) Telephone Number
copy of, or a notice relative to, Application of Doug Cole, Heidi Cole, Norman Cole & Caroline Cole to appropriate from Stanshaw Creek
Name of applicant
at a point 2,500 feet W, 1,500 feet NE Corner 785,300'N, 1,589,300'E Cal Coord. Zone 1
Name of source
(S33 T.13N R. 6E, H.B.M.)
Describe location of applicant's point of diversion
- I, (We) desire to protest against the approval thereof because to the best of our information and belief the proposed appropriation will result in injury to us as follows: (See attachment, Item 2.)
Me or us State the injury which will result
- Protestant claims an interest in the use of water from the source from which applicant proposes to divert which is based upon: Riparian rights
Prior application; appropriative permit or license; notice posted or use began prior to December 18, 1914; riparian claim; etc.
Please provide application, permit, license, or statement of water diversion and use numbers which cover your use of water, or state "none":
None
- Where is your diversion point located? NW 1/4 of SW 1/4 of Section 33, T. 13N, R. 6E, H. B&M
Is your point of diversion downstream from applicant point of diversion? Yes
Yes, No, or at same point
- The extent of present and past use of water by protestant or his predecessors in interest from this source is as follows (leave blank if protest based on prior filed application): Year round uses, including domestic and irrigation.
(a) approximate date first use made unknown
(b) amount used unknown
(c) time of year when diversion is made January 1 - December 31
(d) purpose(s) of use Drinking water, domestic uses, garden and fruit tree irrigation.
- Under what conditions may this protest be disregarded and dismissed? (See Attachment, Item b.)
(Conditions should be of a nature that the applicant can address, such as minimum by-pass flows, measuring devices required, acknowledgement of prior rights, etc.)
- A true copy of this protest has been served upon the applicant's attorney by mail.

Date: March 15, 2000

Notes: Attach supplemental sheets as necessary.

Protests must be filed within the time specified in the notice of application.

Jeffery J. Swanson, Attorney
Protestant(s) or authorized representative sign here
Type or print name and title of representative, if applicable

2515 Park Marina Drive, Suite 102
Street Address

Redding, California 96001
City and State

(530) 225-8773

Telephone Number

COPY

**ATTACHMENT TO PROTEST OF APPLICATION 29449
BY JAMES FISHER AND J.W. FISHER LOGGING
(BASED ON INJURY TO PRIOR RIGHTS)**

ITEM 2:

Applicants' appropriation causes, and will cause, a drastic reduction in the natural flow of Stanshaw Creek, particularly during the dry season. This results in insufficient water for Protestants' domestic and irrigation needs, and causes an aesthetic impact to Protestants' riparian property. The diversion also impacts the Stanshaw Creek anadromous fishery.

Applicants should not be given a water right simply because they have operated an illegal and unlicensed diversion for the past few years.

ITEM 6:

This protest may be dismissed if the applicants (1) guarantee minimum year-round stream flows in Stanshaw Creek to meet Protestants' needs as well as those of the instream fishery, (2) agree to stop diverting water to ensure minimum stream flows are satisfied, (3) acknowledge Protestants' prior rights, (4) contribute funding to restore the Stanshaw Creek fishery and to assist with the fish passage project under Highway 96, (5) submit evidence to show availability of water in Stanshaw Creek in excess of those needed for the instream fishery and existing riparian rights (6) submit evidence to support their claimed pre-1914 water right, including evidence of continuous use.

PROTEST

Based on Environmental Considerations, Public Interest, Public Trust, and Other Issues.

(Protests based on prior rights or prior filed applications should be completed on other side of form.)

APPLICATION 29449

1. I, (We) Konrad Fisher
of 1721 Court Street, Redding, California 96001, (530) 244-0909 have read carefully a
copy of, or a notice relative to, Application of Doug Cole, Heidi Cole, Norman Cole
& Caroline Cole to appropriate from Stanshaw Creek
at a point 2,500 feet W, 1,500 feet NE Corner 785,300'N, 1,589,300'E Cal Coord. Zone 1
(S33 T.13N R. 6E, H.B.M.)

2. I, (We) protest the above application on:

☒ **ENVIRONMENTAL ISSUES, ETC.:**

The appropriation will not best conserve the public interest, will have an adverse environmental impact and/or will adversely affect a public trust use of a navigable waterway.

- (a) Public interest protests should clearly indicate how the appropriation will affect the public.
- (b) Environmental protest should identify specific impacts and provide supporting recitals on issues such as: plants, animals or fish affected, erosion, pollution, aesthetics, etc.
- (c) Public trust protests must identify the navigable waters to be affected and how the project will impact public trust values.*

Protests of a general nature (not project specific) or opposed to constitutional or legislated state policy will not be accepted. A request for information or for studies to be conducted is not a protest.

☐ **OTHER ISSUES:**

The appropriation will be contrary to law, will require access rights, will not be in Board's jurisdiction, or concerns other issues.

Facts and, if applicable, points of law which support the foregoing allegations are as follows: (See Attachment, Item 2.)

3. Under what conditions may this protest be disregarded and dismissed? (See Attachment, Item 3.)
(Conditions should be of a nature that the applicant can address and either accept or submit mitigating measures.)

* For the purpose of filing a protest, navigable waters include streams and lakes that may be seasonally navigable in small recreational watercraft.

Date: March 15, 2000

Notes: Attach supplemental sheets as necessary.

Protests must be filed within the time specified in the notice of application.

Jeffery J. Swanson, Attorney
Type or print name and title of representative, if applicable

2515 Park Marina Drive, Suite 102
Street Address
Redding, California 96001
City and State

(530) 225-8773

Telephone Number

FOR0153P2

WR 10 (3/93)
COPY

005458

**ATTACHMENT TO PROTEST OF APPLICATION 29449
BY KONRAD FISHER
(BASED ON INJURY TO ENVIRONMENTAL CONSIDERATIONS, ETC.)**

ITEM 2:**Relevant facts:**

- 1) Stanshaw Creek is tributary to the Klamath River. During certain times of the year, Stanshaw Creek is navigable by small recreational watercraft. The Klamath River is also navigable by watercraft.
- 2) Protestant has personally observed salmon at the mouth of Stanshaw Creek that were unable to migrate upstream due to low water levels in the creek. Protestant is willing to provide a sworn declaration or to testify in this regard. Applicants' diversions will likely have a negative impact on the Stanshaw Creek fishery.
- 3) Michael David Fellows, caretaker for Protestant's family ranch, has personally observed salmon in Stanshaw Creek between the mouth and the point where the creek passes beneath State Highway 96. The viability of a fishery in that stretch of the creek is affected by Applicants' appropriation in that it reduces creek flows. Mr. Fellows is willing to provide a sworn declaration or to testify in this regard.
- 4) Lucille Albers, a 69 year old Native American who grew up in the vicinity of Stanshaw Creek has personal recollections of salmon in the creek when she was younger. Ms. Albers is willing to provide a sworn declaration or to testify in this regard.
- 5) The California Dept. of Fish & Game is investigating the feasibility of restoring the anadromous fishery in Stanshaw Creek above its intersection with Highway 96. Protestant is informed that DFG has submitted a letter to the SWRCB regarding the proposed project. The application should not be decided until DFG has evaluated the fish passage project and minimum flows required for instream purposes.

Legal Authority: The State Water Resources Control Board has broad authority to establish minimum flows and take other measures needed for protection of fisheries and other public trust resources. That authority is provided by Article X, Section 2 of the California Constitution, Water Code Sections 100 and 275, the public trust doctrine as articulated by the California Supreme Court in *National Audubon Society v. Superior Court*, (1983) 33 Cal.3d 419, 189 Cal. Rptr. 346, and Water Code Sections 1243 and 1253.

ITEM 3 (dismissal conditions):

This protest may be dismissed under the following conditions: (1) guaranteed minimum year-round stream flows in Stanshaw Creek to enhance the anadromous fishery and to ensure fish survival throughout the dry season, (2) Applicants' agreement to stop diverting water at any time to ensure minimum stream flows are satisfied, (3) Applicants' contribution of funds to restore and enhance the Stanshaw Creek anadromous fishery and to assist with the proposed fish passage project under Highway 96, (4) Applicants must submit evidence to show the availability of water in Stanshaw Creek in excess of those needed for the instream fishery and existing riparian rights and (5) Applicants must submit evidence to support their claimed pre-1914 water right, including evidence of continuous use.

**KRONICK
MOSKOVITZ
& TIEDEMANN
& GIRARD**
A PROFESSIONAL CORPORATION**FILE COPY**

JANET K. GOLDSMITH

August 20, 2001

VIA HAND DELIVERY

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, CA 95812-2000

Attn: Michael Contreras

Re: Water Right Complaint Against Douglas and Heidi Cole;
Stanshaw Creek, Siskiyou County

Dear Mr. Schueller:

This letter responds to the letter dated June 14, 2001 from Donald Mooney on behalf of the Klamath Forest Alliance ("KFA") complaining of diversions by Heidi and Douglas Cole from Stanshaw Creek in Siskiyou County. In essence the letter asserts that the Coles have not provided evidence that the pre-1914 water right filing by Samuel Stenshaw pertained to their land, and that their diversions harm coho salmon and steelhead in Stanshaw Creek and the Klamath River. This letter provides the evidence requested concerning the basis of the Coles' claim of pre-1914 water rights. The KFA allegations that the Coles' diversions constitute a "take" of coho or steelhead salmon are unsupported and incorrect. The Coles' diversion is not harming either the coho or steelhead (or any other) fishery in either Stanshaw Creek or the Klamath River.

A. HISTORY OF USE

Attached as Exhibit A to this letter is Patent 186169¹ from the United States to Samuel Stenshaw dated March 27, 1911. Because the handwritten description in the Stenshaw patent is difficult to read, I have verified the property description using the BLM Master Township Plat and Historical Index.² The description of the land patented to Stenshaw includes forty acres of what is now known as Marble Mountain Ranch, owned by the Coles.³

¹ The patent number appears at the bottom of the page, below the signatures.

² The land is described as a patent granted pursuant to a Homestead Entry: "W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, and the N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, and E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T 13 N, R 6 E, Humboldt Meridian. Because

Harry M. Schueller, Chief
 Division of Water Rights
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According to Edwin Gustave Gudde, California Gold Camps (U.C. Berkeley Press, 1975), the Stanshaw Mine was in operation at the turn of the century and was reported in Mining Bureau reports as late as 1935. A mining pit is located on the Marble Mountain Ranch.

Water was also used for domestic purposes and irrigation. The notice of appropriation states that it was in part "for irrigating purposes" and describes the ditch and flume as running "to my upper field." (See Exhibit D, Notice of Appropriation, Liber 1 of Water Rights, page 397, Siskiyou Official Records)

Violet Anderson, who moved to the area shortly after Stanshaw conveyed a portion of his property to Guy and Blanche McMurtry, recalls that she cooked in an old cookhouse on the property for up to two shifts of workers who boarded there, and that the McMurtrys ran a small dairy. (Exhibit E.) She recalls that electricity was already in use at that time in connection with the dairy. Among other purposes, it was used to sterilize the bottles into which milk was transferred for sale.⁴ Minerva Starritt, one of the early schoolteachers at the Irving Creek schoolhouse recalls that when she arrived in 1935, Guy McMurtry was the Superintendent for the State Highway 96 and "had cabins where the state highway workers lived with their families." (The Siskiyou Pioneer (Siskiyou County Historical Society, Vol. 6, No. 2, 1989). (Exhibit F.))

The McMurtrys owned the property until Lue and Agnes Hayes purchased it in 1955. At the time of the purchase, Mr. Hayes recalls that 30 acres were under irrigation and there was an existing 4 KW pelton wheel and an existing 12" main water line on the property. (Exhibit G.) The pelton wheel was described by William M. Heitler of the U.S.F.S. as "the 85-year old pelton wheel" (Exhibit H). Mr. Hayes identified it as "an old C-3 HP generator."⁵ The power generating facilities have since been upgraded several times by Mr. Hayes and successive owners, including the Coles, but the evidence is that power was being generated from a very early date. The engineer retained by the Coles to upgrade the power facilities described the pelton wheel as dating from perhaps the first decade of the last century. The old pelton wheel remains available for inspection at the Ranch.

Domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. The Hayes' use has been described in the 1963 DWR Bulletin 94-6 "Land and Water Use in Klamath River Hydrographic Unit." (Table 4, at p. 55.) Mr. Hayes believes that the demand estimated at that time may have underestimated his existing uses because it was based on a single flow measurement taken in late fall when he was not irrigating. (See Exhibit G.)

the Historical Index page is 24" x 28" it is difficult to reproduce and is not included as an Exhibit to this letter. It is available for your inspection and verification on request.

The patented land was resurveyed by the Bureau of Land Management in 1985 and designated "Tract 48" on that resurvey. A portion of Sheet 1 of 8 of that resurvey is attached as Exhibit B.

³ A copy of the Coles' deed is attached as Exhibit C.

⁴ Personal communication, 8/19/01.

⁵ Personal communication, 8/16/01.

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The Hayes conveyed the Ranch to the Youngs, whose uses are documented in your files. The Youngs conveyed the Ranch to the Coles in 1994. The Coles' residence is the same house originally occupied by Samuel Stenshaw.

While there has been an evolution of uses for the Stanshaw Creek appropriation since the early days of the Stanshaw Mine, it is clear that year-round uses of water were in practice from early in the last century. Mining, domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. While mining may no longer be pursued, changes in purpose of use of pre-1914 appropriations have been permissible so long as no other user is injured. The very long history of the current uses of water on Marble Mountain Ranch belie any assertion that others have been harmed by the shift in purpose of use of this water.

B. CALCULATION OF WATER DUTY

The estimate of water demand for the documented uses on Marble Mountain Ranch, as set forth in the SWRCB letter of February 4, 1993 from Katherine Mwroka (Exhibit I) appears questionable for several reasons.

First, it is based on use *at the point of use*, and therefore does not take into account conveyance losses in the ditch leading from Stanshaw Creek. This ditch is seven tenths of a mile long⁶ and is constructed of flumes and earthen materials. While the Coles have taken steps to improve conveyance efficiency (see Exhibit H), there remain reasonable losses that should be considered in calculating the amount of diversion necessary to satisfy their pre-1914 appropriative right.

Second, the calculation completely ignores water demand for power production. As explained above, power use began early in the last century and has been continuous throughout the history of the Ranch.

Third, the water duty used by Ms. Mwroka for calculating irrigation demand is questionable. Ms. Mwroka based her estimate of irrigation demand on a water duty of one cfs per eighty acres of irrigated land. This is the most conservative water duty proposed in the SWRCB guidelines concerning reasonable use for irrigation. While it may be appropriate for other areas of Siskiyou County, it is not appropriate for calculating irrigation water demand on Marble Mountain Ranch. The porous nature of the soil on the Ranch and the slopes involved suggest that a higher water duty should be used.

C. LACK OF JUSTIFICATION FOR A CEASE AND DESIST ORDER

The complainant fails utterly to provide any factual evidence that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. The sole allegation of adverse impact is a single paragraph in the middle of page 3 of the KFA letter that alleges that the National Marine Fisheries Service ("NMFS") and California Department of Fish and Game ("DFG") "are concerned." No specifics are given of just how the long-standing diversions of the Ranch are affecting either coho salmon or steelhead. No statements of either the DFG or NMFS are attached to the KFA letter.

⁶ DWR Bulletin 94-6, Table 4, p. 55.

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The only evidence offered by KFA is a letter from the U.S. Forest Service District Ranger, William Heitler reporting such "concerns," again without specifics. The USFS letter related to the question whether the Coles had, or needed, a fee permit for the ditch. Subsequently, based on the age of the ditches, it was determined that no fee permit was required. (See Exhibit H.) In a subsequent memo, Mr. Heitler also comments on the responsiveness of the Coles to DFG's direction concerning fish passage at the century-old rock and rubble diversion dam. (*Ibid.*)

In a March 8, 2000 letter concerning the Coles' water right application for 3 cfs diversion for power production, the following *general* concerns were listed by NMFS concerning coho salmon: migration delay, loss of habitat due to dewatering, stranding of fish due to dewatering of the stream, entrainment in poorly screened diversions, and increased water temperatures. None of the issues was raised based on any site specific investigation or concern.

None of the issues mentioned in the NMFS letter are being significantly exacerbated, if at all, by the Coles' diversions under their existing rights. Stanshaw Creek is not a migration or spawning resource for coho salmon, nor is it available for juvenile rearing, since the culverts at Highway 96 prevent passage upstream into the creek. There are no pools in the 600' reach of Stanshaw Creek below the highway to serve as "preferred" rearing habitat for juveniles (according to the NMFS letter). However, coho habitat has been documented in Irving Creek to which the Coles' diverted water is ultimately returned. The addition of flow to that creek may well benefit the coho resource of concern to the KFA.

Temperature at the mouth of Stanshaw Creek was measured at 65° F in the afternoon of August 17, 2001 by Douglas Cole, within the reported range of suitability for coho juveniles and within the range of "best" suitability for the steelhead trout that inhabit the creek (Klamath Resource Information System).

Water in Stanshaw Creek is bypassed through the rock and rubble diversion dam. The diversion is maintained pursuant to a Five Year Maintenance Agreement between the Coles and the California Department of Fish and Game, dated January 21, 1999. There is continuous flow bypassing the Ranch diversion, and fish passage has been observed in both directions. As reported by Mr. Heitler in his April 6, 2001 e-mail memo, "The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction." (Exhibit H.) The flow in Stanshaw Creek extends to the mouth, even in this dry month of a dry year.

The mere fact that coho are a listed species and steelhead are a candidate species is no evidence that the decades-long diversions for the Ranch are harming the fishery. The above data refute the allegation that the current diversions by the Coles violate the Endangered Species Act. The complainants have produced no evidence of harm to protected species from a continuation of diversions.

Beyond the Endangered Species Act, however, the KFA has raised a claim of public trust violation. In any public trust evaluation, the harm to the public trust resource (if any) must be balanced against the reliance on the diversions. In this instance, there is clear evidence of a century of reliance on the water and a good faith belief that the diversions are justified under the pre-1914 appropriation by Samuel Stanshaw. The Coles' water use is reasonable and beneficial, and the Coles and their predecessors have continually improved the efficiency of use. No other water source is available to the Coles, whose entire livelihood depends on the continued availability of water from Stanshaw Creek. This

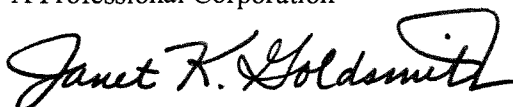
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great reliance, balanced against the lack of any specific allegation or evidence of harm to public trust resources by continuation of diversions pending SWRCB action on the Coles' pending application, should militate against any enforcement action at this time.

Please feel free to contact me if you have further questions.

Sincerely,
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation



Janet K. Goldsmith
Attorneys for Douglas and Heidi Cole,
Marble Mountain Ranch

JKG/mm

Attachments

cc: Douglas Cole
Donald Mooney
Michael Contreras

449

Homestead Certificate No.

Application No. Eureka 01271

To all to whom these presents shall come, Greeting:-

Whereas, There has been deposited in the GENERAL LAND OFFICE of the United States a CERTIFICATE OF THE REGISTER OF THE LAND OFFICE AT Eureka, California, has been deposited in the General Land Office whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of _____ COMPARED

Samuel Stinson here has been established and duly consummated, in conformity to law, for the East half of the East half of the North-east quarter of the the southeast Quarter and the East half of the southeast quarter of the Northeast Quarter of Section Thirty-two and the West half of the Southwest Quarter of the Northwest Quarter, the west half of the Northwest quarter of the Southwest quarter, the southeast quarter of the north-west quarter of the southwest quarter, the southwest quarter of the northeast quarter of the southwest quarter of the North half of the Northwest quarter of the southeast half of the southwest quarter of Section thirty-three in Township five north of Range six east of the 100th Meridian, according to the OFFICIAL PLAT of the Survey of the said Land, returned to the GENERAL LAND OFFICE.

by the SURVEYOR GENERAL:

Now know Ye, That there is, therefore, granted by the United States unto the said claimant
the tract of Land above described
To have and to hold the said tract of Land, with the appurtenances thereof, unto the said claimant
and to the
heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufactur-
ing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may
be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the
right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found
to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the
lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United
States.

In testimony whereof, I, William H. Taft PRESIDENT OF THE
UNITED STATES OF AMERICA, have caused these letters to be made Patent, and the seal of the GENERAL LAND OFFICE to
be hereunto affixed.

GIVEN under my hand, at the CITY OF WASHINGTON, the Twenty-seventh
day of March, in the year of our Lord one thousand nine
hundred and Eleven, and of the Independence of the

[SEAL]

United States the one hundred and thirty-five

BY THE PRESIDENT.....*Wm. H. Taft.*

By Wm. C. Le Roy Secretary

H. H. Jarrett
Recorder of the General Land Office

Patent November 2, 1861
Recorded California, Vol. _____ Page _____

Recorded California, Vol. _____ Page _____
 Recorded at Request of Samuel H. Shaw \$ Police M. J. J. J. J. County Recorder _____

By _____ Deputy Recorder

Sec. 20
1/4 Sec. Cor.
Sec. 29

TRACT 46
Klamath River

TRACT 47

TRACT 48

TRACT 49

TRACT 51

TRACT 51

TRACT 51

TRACT 51

TRACT 51

TRACT 51

TRACT 48

Tract 48 represents the position and form of a 95.00 acre parcel, Patent No. 186169, dated March 2, 1911, under document, Eureka 01271, for Samuel Stenshow, described as the E 1/2 E 1/2 NE 1/4 SE 1/4, E 1/2 SE 1/4 NE 1/4, sec. 32, and the W 1/2 SW 1/4 NW 1/4, W 1/2 NW 1/4 SW 1/4, SE 1/4 NW 1/4 SW 1/4, SW 1/4 NE 1/4 SW 1/4, N 1/2 NW 1/4 SE 1/4 SW 1/4, sec. 33, T. 13 N., R. 6 E., Humboldt Meridian, California, excluding that portion reconveyed to the U.S.A. under document Sacramento 1337.

TRACT 49

Tract 49 represents the position and form of a 30.00 acre parcel, Patent No. 673117, dated April 7, 1919, under documents, Eureka 01742 and 03277, for Frank W. Harley, described as the NE 1/4 SE 1/4 SW 1/4, NW 1/4 NW 1/4 SW 1/4 SE 1/4, S 1/2 NW 1/4 SW 1/4 SE 1/4, NE 1/4 SE 1/4 SE 1/4 SW 1/4, SW 1/4 SW 1/4 SE 1/4, sec. 32, T. 13 N., R. 6 E., Humboldt Meridian, California.



61 260-U

EXHIBIT B

005466

RECORDING REQUESTED
SISKIYOU COUNTY TITLE CO

Recording requested by:

SISKIYOU COUNTY TITLE CO.
AND WHEN RECORDED MAIL THIS DEED AND
UNLESS OTHERWISE SHOWN BELOW, MAIL
TAX STATEMENT TO:

Name: Mr. and Mrs. Doug Cole

Mailing 92520 Hwy. 96
Address:

City/State/Zip Sompas Bar, CA
95568

Order No. 60696-dn

OFFICIAL RECORDS
SISKIYOU COUNTY, CALIF.

Dec 30 . 3 00 PM '94

94018121

David H. [Signature]

\$14.00

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Grant Deed

THE UNDERSIGNED GRANTOR(S) DECLARE(S)

DOCUMENTARY TRANSFER TAX IS \$ 88.00

☒ computed on full value of property conveyed, or☐ computed on full value less value of liens or encumbrances remaining at time of sale.☐ Unincorporated area

City of

, AND

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

ROBERT E. YOUNG and MARY J. YOUNG, husband and wife

hereby GRANT(S) to DOUGLAS T. COLE and HEIDI ANN COLE, husband and wife as
Joint Tenants

the following described real property in the
County of Siskiyou State of California:

EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.
TOGETHER WITH ALL WATER RIGHTS APPURTENANT THERETO.

Dated December 15, 1994

STATE OF CALIFORNIA
COUNTY OF SISKIYOU

On 12/29/94 before me, the undersigned, a
Notary Public in and for said State, personally appeared
Robert E. Young and Mary J. Young

personally, known to me (or proved to me on the basis of
satisfactory evidence) to be the person(s) whose name(s)
is/are subscribed to the within instrument and acknowledged
to me that he/she/they executed the same in his/her/their
authorized capacity(ies), and that by his/her/their signature(s)
on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

Signature

NOTARY PUBLIC IN AND FOR SAID STATE

MAIL TAX STATEMENTS AS DIRECTED ABOVE.

Robert E. Young

Mary J. Young

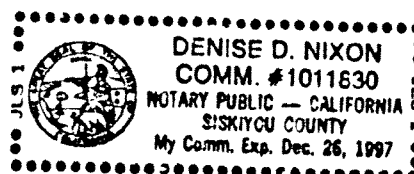


EXHIBIT C

94018121

EXHIBIT "A"

ALL THAT REAL PROPERTY SITUATE IN THE COUNTY OF SISKIYOU, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL I:

The Southeast 1/4 of the Northwest 1/4 of the Southwest 1/4, the Southwest 1/4 of the Northeast 1/4 of the Southwest 1/4, the North 1/2 of the Northwest 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northwest 1/4 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, the South 1/2 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, and the Southwest 1/4 of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Base and Meridian.

EXCEPTING THEREFROM: All that portion of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian described as:

Beginning at the South 1/4 corner of said section; thence East 330 feet to the True Point of Beginning; thence East 330 feet along the South line of said Section to the East boundary of the LUE HAYES property; thence North 330 feet along the East line of said Hayes property; thence West 330 feet; thence South 330 feet to the True Point of Beginning.

FURTHER EXCEPTING those portions of the land in the West 1/2 of the Southwest 1/4 of the Southeast 1/4, and in the Southwest 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian, as conveyed to LUE HAYES et ux, by deed recorded July 1, 1955. In Book 352 at page 253, Official Records of Siskiyou County, lying Southerly of the line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, Humboldt Meridian, and Sections 33 and 34, Township 13 North, Range 6 East, Humboldt Meridian, bears South $80^{\circ} 51' 44''$ East, 1769.19 feet, said point also being Engineer's Station "A" 479177.35 P.O.C., as established from the Department of Public Works 1964 Survey between Scopes Bar and Ti Creek Road 01-Sis-96; thence from a tangent which bears North $47^{\circ} 20' 27''$ West, along a curve to the left, having a radius of 1000.00 feet, through an angle of $07^{\circ} 37' 11''$, a distance of 132.99 feet to Engineer's Station "A" 481110.34 E.C., as established from said survey; thence North $35^{\circ} 02' 22''$ East, 100.00 feet to a point hereinafter referred to as Point "B", thence North, $54^{\circ} 57' 38''$ West 180 feet more or less to the East line of the West 1/2 of the Southwest 1/4 of the Southeast 1/4 of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence, continuing North $54^{\circ} 57' 38''$ West, 610 feet to a point for a total distance of 790.42 feet from said Point "B"; thence South $35^{\circ} 02' 22''$ West, 34.00 feet; thence, from a tangent which bears North $54^{\circ} 57' 38''$ West, along a curve to the left, having a radius of 1266.00 feet, through an angle of $14^{\circ} 29' 35''$, a distance of 320.24 feet to a point hereinafter referred to as Point "C"; thence North $69^{\circ} 27' 13''$ West 520 feet, more or less, to the West line of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33; thence continuing North $69^{\circ} 27' 13''$ West, 290 feet, more or less to the South line of the North

(Continued)

94018121

1/2 of the North 1/2 of the Southeast 1/4 of the Southwest 1/4 of Section 33; thence continuing North $69^{\circ} 27' 13''$ West, 47 feet to a point, hereinbelow referred to as Point "D" for a total distance of 857.37 feet from said Point "C"; thence from a tangent which bears North $69^{\circ} 27' 13''$ West along a curve to the left, having a radius of 5066.00 feet a distance of 355 feet, more or less to the West line of the Southeast 1/4 of the Southwest 1/4 of said Section 33; thence continuing along last said curve, a distance of 335 feet to a point, hereinbelow referred to as Point "E", through a total angle of $07^{\circ} 48' 15''$, and a total distance of 690.03 feet from said Point "D"; thence North $41^{\circ} 41' 14''$ West, 178 feet, more or less, to the South line of the Northwest 1/4 of the Southwest 1/4 of said Section 33; thence continuing North $41^{\circ} 41' 14''$ West 138 feet to a point for a total distance of 316.31 feet from said Point "E"; thence North $76^{\circ} 12' 04''$ West, 128 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the Northwest 1/4 of the Southwest 1/4 of said Section 33.

EXCEPTING THEREFROM that portion thereof lying Southerly of the line described as follows:

Commencing at said Engineer's Station "A" 481110.34 E.C., hereinabove described; thence North $54^{\circ} 57' 38''$ West, 159.66 feet; thence South $35^{\circ} 02' 22''$ West, 225.00 feet to a point hereinbelow referred to as Point "F"; thence North $11^{\circ} 17' 26''$ East, 17 feet, more or less, to the South line of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence continuing North $11^{\circ} 17' 26''$ East, 120 feet to a point for a total distance of 136.57 feet from said Point "F"; thence North $54^{\circ} 57' 38''$ West, 575.76 feet; thence from a tangent which bears North $54^{\circ} 57' 38''$ West, along a curve to the left, having a radius of 1100.00 feet, through an angle of $14^{\circ} 29' 35''$, a distance of 278.25 feet; thence North $69^{\circ} 27' 13''$ West, 115 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33.

ALSO EXCEPTING THEREFROM that portion thereof conveyed to EDWIN T. HAWKINS, et ux, by Deed recorded January 19, 1965 in Book 512 at page 457, Official Records of Siskiyou County.

The bearings used in the above description are on the California Co-ordinate System Zone 1, and the distances are surface.

PARCEL II:

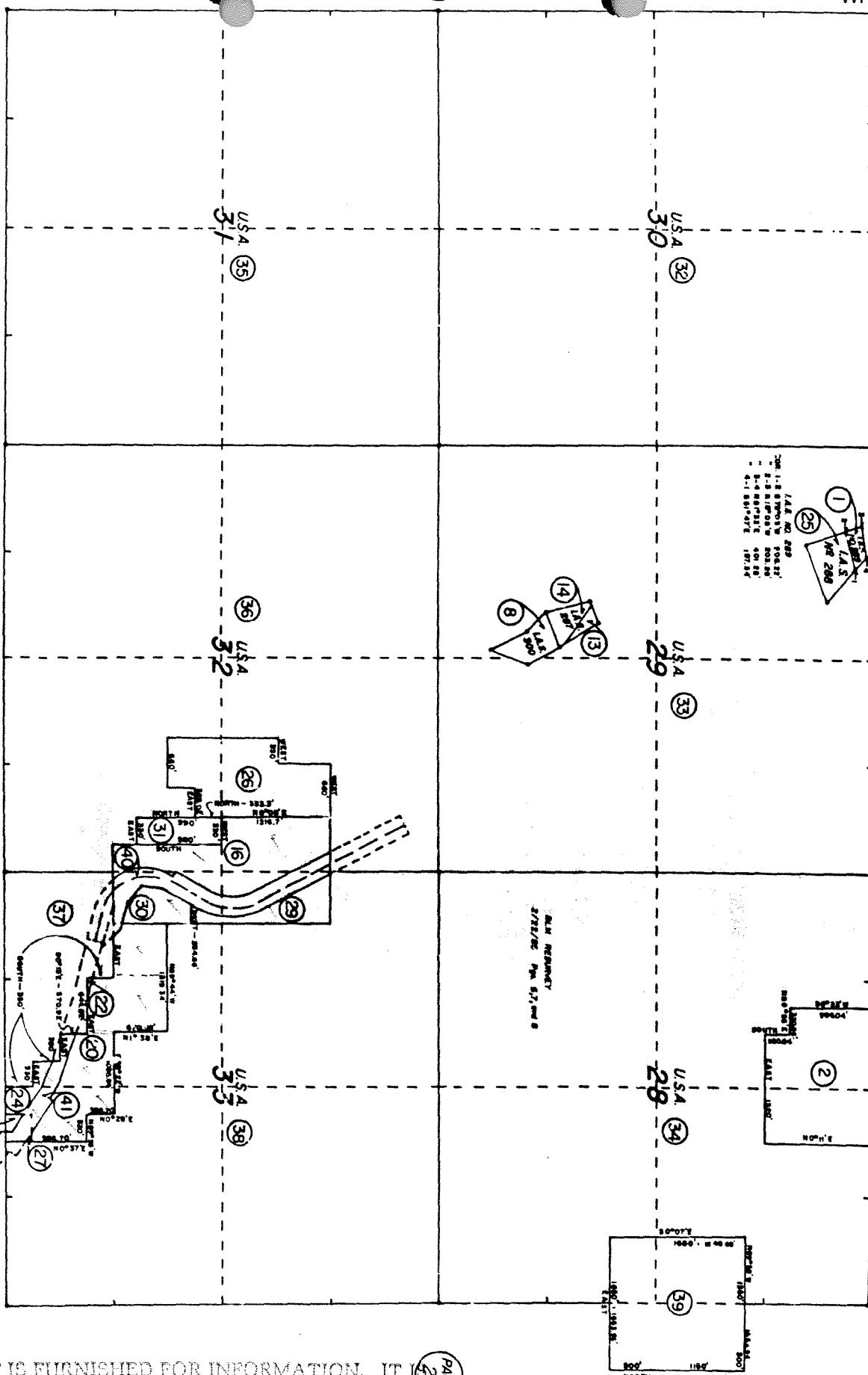
That portion of the lands in the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, H.M., conveyed to the State of California by deed recorded December 15, 1965 in Book 524, Official Records, page 98, Siskiyou County Records, lying Northeasterly of a line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, H.M., and Sections 33 and 34, Township 13 North, Range 6 East, H.M., bears South $88^{\circ} 51' 44''$ East, 1769.19 feet, said point also being Engineer's Station "A" 479177.35 P.O.C., as established from the Department of Public Works 1964 Survey between Sogyes Bar and Ti Creek, Road 01-Sis-96; thence from a tangent that bears North $47^{\circ} 20' 27''$ West, along a curve to the left with a radius of 1000.00 feet, through an angle of $07^{\circ} 37' 11''$, for a distance of 132.99 feet; thence North $35^{\circ} 02' 22''$ East, 100.00 feet; thence North $54^{\circ} 57' 38''$ West, 182 feet, more or less to the Point of Intersection with the East line of said land, last said

94018121

point being the TRUE POINT OF BEGINNING of this parcel thence continuing North 54° 57' 38" West, 117 feet, more or less to the Point of Termination of this line on the North line of said lands.

The bearings used in the above description are on the California Co-ordin



THIS PLAT IS FURNISHED FOR INFORMATION. IT IS
 COMPILED FROM DATA WHICH WE BELIEVE TO BE
 ACCURATE, BUT NO LIABILITY IS ASSUMED BY THE
 COMPANY AS TO THE CORRECTNESS OF SUCH DATA.

SICKLYOU COUNTY TITLE CO.

005471

NOTICE IS HEREBY GIVEN: That I have taken up and hold for mining and irrigating purposes, six hundred inches of the water running in Stenshaw Creek. So called the water so taken being carried first by ditch and flume to and past my dwelling house by ditch and flume running up the Klamath River to my upper field. Said creek being in Dillon's Township, State of California, County of Klamath.

March 25, 1867

E. Stenshaw

RECORDED

JUNE 9, 1880

Liber 1 Water Right, page 397

Seiad Valley Pa
April 25 01

Dear Mr and Mrs Cole:

I read with misgivings
about your trouble with
Pace over your water.

Don't know if theres anything
I know that would help you.

I first moved down there
shortly after Guy and Blanch
McMurry first bought the
place from Sam Stenshaw.
They had built that house
around the old Stenshaws
house. I first lived in an old
store building that was built
over Twining Creek. Later that
was torn down and a school
was built nearby. My children
went to that school when there
were two teachers there.

I cooked for boarders
in an old cookhouse on
your ranch.

The highway was being ~~re~~ rebuilt and there sometimes two shifts. Later after Blanché died and Guy married Mary Lockheart I helped them run the little dairy. Guy then owned both the lower ranch across ^{Irving Cr.} and near the river so we often kept the cows down there. When I first moved down there Dave Drake owned the lower ranch. He had an old sawmill not far from the river on Irving Creek. It was long ago shut down over there. I walked that ditch up to Stenshaw Creek a good many times.

One of Stenshaw's lived in Seiad until just recently. I could probably be able to contact him if they would help.

The residence at the mouth of Stenshaw Creek belonged to a fellow (Russian) Basil Delgas. He operated the mine for the Singer Sewing Machine of New York. Also a group of cabins were built at the mouth of the creek and I can't remember ever hearing of there being any trouble about water.

I have arthritis in my hands and am sorry about this poor writing.

Yours truly
Dwight Anderson

We and all my children have been working against Felix Puce and all he represents so if we can help let us know.

ONE ROOM SCHOOLS ISSUE

COPY

1989

The Siskiyou Pioneer

IN FOLKLORE, FACT AND FICTION



and YEARBOOK

The Siskiyou County Historical Society

Volume 6

Number 2

EXHIBIT F

COPY



Photo courtesy of Leona Bryan

JUNCTION SCHOOL - 1928 — SOMES BAR - Levella Conrad, Pauline Conrad, Caroline Davis, Shan Davis, Henry Davis, Frank Grant, Violet Johnnie, Dave Johnnie, J. Rosy Jerry, Lee Merrill, Sidney McNeal, Georgia McNeal, Gengia Ann Langford, Deane Langford, Miss L. Lewis.

IRVING CREEK

Minerva Starritt

The Irving Creek District was established in 1918. The first school was a log building situated over the creek. The outdoor toilet was also over the creek. In the early days it was a custom on the Klamath River to build toilets over a creek. About 1925 the second school house was built of lumber by Frank Grant. A second classroom, dining room, kitchen and bathrooms were added in the fall of 1935. John Spinks helped build the log school as well as the second building and the addition.

At first, school terms on the Klamath were only six or seven months from spring to early fall because many families lived across the river from school. At high water, children could not get across the river. In the late twenties there were regular school terms starting in the fall.

John Spinks and his wife Lucy lived across the river at Roger Creek, two miles down the river from Irving Creek. They had six children, Roy, May, Chester, Bryon, Ernest and Willard. They were well liked and civic minded citizens. They were most anxious that their children get an education.

Other families living within walking distance wanted a school for their children. They included the Pattersons, Farnums, Johnsons, Drakes, Charleys, McCash, Layman, Toms, Albars, Hickox and others. There were four Patterson children, Willie, John, and their two younger sisters May and Rose. They walked five miles to Irving Creek School taking all the short cuts along the narrow crooked road. The Patterson children never missed a day unless they were sick. The older children in the families took care of their younger sisters and brothers on their way to school. Madeline and Grace Charley lived at T Bar five miles from Irving Creek. They too walked.

COPY

There was money from the Office of Indian Affairs for Indian children, so lunches consisting of milk, soup, sandwiches and cookies were delivered to the school. According to Mary Patterson (Lawe) the older boys would order as many as five sandwiches and eat every one or maybe give them to their white friends, who didn't have as good a lunch. Mary also told me about the boys finding lizard eggs along the ditch that ran along the side of the school. They gathered up the eggs and little lizards and threw them on the floor in front of the teachers desk. Pranks like putting water snakes or a frog in the teachers desk were common. Teachers joined in the fun most of the time with laughing and a little screaming. Ernest Spinks tells of one day before Christmas when the teacher let him and all the boys out of school to get a Christmas tree. They all skipped and didn't return. Ernest got a good spanking from his dad.

Enrollment records no longer exist. A partial list of children attending Irving Creek School from 1918 to 1929 follow:

Roy, Mary, Chester, Byron, Ernest and Willard Spinks; John, Willie, Mary and Rose Patterson; Ella, Anne, Henry and Ulysis McCash; Arthur Layman; Lawrence and Gladys Johnson; Madeline and Grace Charley; Laura, Lottie and Henry (Buster) Farnum; Zona and Betty Drake.

In the fall of 1935, I went to teach at the Irving Creek School. I had been teaching the lower grades at Junction School at Somes Bar down the Klamath River from Irving Creek. It was my seventh year of teaching school on the Klamath: two years at Morek below Martins Ferry, two years at Orleans, and two years at Junction. I was no stranger to the district. I knew the people and the children.

The school building was located at the junction of Highway 96 and Irving Creek on the hillside overlooking the creek. It was one large room approximately 20 by 40 feet with anteroom 10 by 20 feet and a porch across the front. There were outside toilets. The children helped with the janitor work.

Mr. Guy McMurtry was Superintendent for the State Highway 96 and had the Highway Yard on his ranch above the school, now the Young ranch. He had cabins where the highway workers lived with their families.

John Waldner owned the ranch below the road where the school was located. He and his wife boarded some of the highway workers and rented cabins to the other workers,



Photo courtesy of Minerva Starritt

IRVING CREEK SCHOOL — These boys all went to Irving School in the twenties. (L-R) Partly shown, Alvis Johnson, Lawrence Johnson, Henry (Buster) Farnau, Willie Patterson, Chester Spinks (standing), John Patterson, Ernest Spinks. In river, Willard Spinks, taken about 1929.

COPY

their families and the teacher. Waldner also operated a sawmill up Irving Creek. This ranch was once owned by Frank Harley, Halverson, and the Drakes. It is now the Blue Heron Ranch. The first cabin I rented was an old shed full of mice. I put traps everywhere but at night, mice would wake me running across my bed. A bit eerie. I soon rented another cabin.

When school opened in September, I had fifty-two children and all eight grades. Most of the pupils were from families working on the road, and there were several Indian children. Five Indian children belonged to Chester Pepper. They lived at T Bar but never came to school. I had tried to get them to come to Junction without success. The oldest boy was sixteen and was driving an old car. Arrangements were made with Robert Dennis, the County Superintendent of Schools in Siskiyou County to have this boy transport his brothers and sisters and attend school himself to get his eighth grade diploma, beside helping me around the school. The money from the mileage, clothing, and free lunches helped keep these children in school.

One day in late September, Robert Dennis, County Superintendent of Schools in Siskiyou County, arrived to see how I was progressing. We offered him some graham crackers. To our embarrassment kerosene had seeped onto the shelf where the crackers and supplies were stored in the anteroom. We laughed about the entire episode but Robert decided some changes should be made. He said, "It looks to me as if you need some help. I have a friend, Valeria Beym (Lange), who will graduate from Chico State in January. I will try to convince her to come down the river to Irving Creek School with you and teach the lower grades, but arrangements must be made for another classroom, kitchen, dining room and bathrooms". These arrangements were made with the trustees and with John Waldner, who ran the sawmill.

Meanwhile, I continued with my fifty-two children, with the help of members of the community. The hillside was leveled off for a playground. The State road equipment did their part. Tex Hunt's father was an excellent pianist. He came to school twice a week in the afternoons to help with the music for our entertainments. School programs were most important; there was no TV in those days. The entire community far and wide would come to the school plays and games. We were preparing a gala affair for Christmas. I had combined all grades into a history project of North America beginning with stick puppets for the first three grades of cave men, Indians and old miners. String marionettes of U.S. history with President Washington and the revolutionary war, Lincoln and the Civil War were made by the upper grades. Parents were all involved. Santa and all his helpers and the singers were ready. The night arrives for our program. We had built a stage at the end of the room six inches off the floor and put candle foot lights on the stage. I was wearing a long white polkadot dress. In the middle of the program while I was announcing, I was standing too close to one of the footlights and my dress caught fire. Tex Hunt, one of the parents grabbed me and put the fire out. The show went on.



Contributed by Joe Clyburn

BIG HUMBUG SCHOOL - 1917
- located on Klamath River near Jack and Cecil Well's home. Back row: Robert (Bud) Clyburn, Tony Rose, Jim Clyburn; Front row: Tom Clyburn and teacher's children. Teacher Mrs. Desevado.

APRIL 30,2000

TO WHOM THIS MAY CONCERN:

I, LUE H HAYES AND AGNES M HAYES, PURCHASED THE McMURTRY RANCH LOCATED IN SOMES BAR, CA. SISKIYOU COUNTY IN 1955.

THE PURCHASE PRICE INCLUDED 55 ACRES, 4 RESIDENCES, 2 BARNs, ALL OTHER BUILDINGS, EQUIPMENT AND DEEDED WATER RIGHTS TO STANSHAW CREEK.

THE WATER RIGHT, WHICH DATED BACK TO 1867, INCLUDED THE RIGHT TO 600 MINORS INCHES OF WATER AND DITCH. THIS IS RECORDED IN THE ORIGINAL DEED IN THE DILLION MINING DISTRICT. KLAMATH COUNTY, CA.

THE PROPERTY HAD AN EXISTING 12" MAIN WATERLINE AND 4 KW PELTON WHEEL AND 30 ACRES WERE UNDER IRRIGATION.

AFTER OUR PURCHASE IN 1955, WE UPGRADED TO A LARGER 9 KW PELTON WHEEL TO GENERATE MORE NEEDED ELECTRICITY.

IN 1957, SENATOR REEBER, WEAVERVILLE, INTRODUCED A BILL TO THE SENATE OF CALIFORNIA, FOR THE PROTECTION OF NORTH STATE WATER. THE STATE, AT THIS TIME MEASURED THE AMOUNT OF WATER BEING USED ON THE RANCH. ON THE DAY OF THIS MEASUREMENT WE WERE NOT IRRIGATING ALFALFA, SO THE AMOUNT OF WATER DIRECTED INTO THE DITCH WAS REDUCED FROM NORMAL FLOW. THE MEASUREMENT WAS TAKEN BY DROPPING A LEAF INTO THE WATER AND MEASURING HOW FAR IT FLOATED DOWN STREAM IN SO MANY MINUTES. AT OTHER TIMES IN THE YEAR WE WOULD CAPTURE ALL OF STANSHAW FOR OUR USE.

IN 1965, A 100 KW PELTON WHEEL WAS INSTALLED AND WATER WAS STILL BEING USED FOR IRRIGATION.

WATER FROM STANSHAW CREEK WAS IN CONTINUOUS USE BEFORE OUR PURCHASE AND WAS USED CONTINUOUSLY BY US UNTIL THE PROPERTY WAS SOLD IN 1977.

IF WE STILL OWNED THIS PROPERTY, WE WOULD MAINTAIN THAT WE HAD VALID AND COMPLETE FIRST RIGHT TO STANSHAW CREEK, AS STATED IN A VERY OLD AND COMPLETELY LEGAL DEED.

SIGNED:

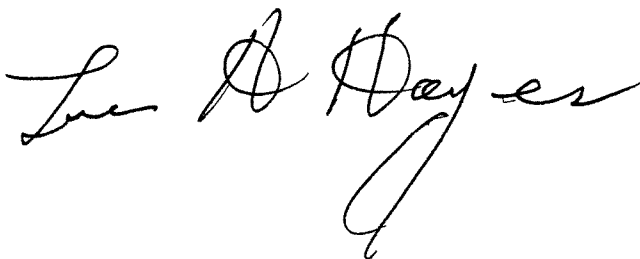
A handwritten signature in cursive script, reading "Lue H Hayes". The signature is written in dark ink and is positioned in the lower right area of the page.

EXHIBIT G

Subject:

Stanshaw Diversion

Date:

Fri, 6 Apr 2001 15:27:50 -0700

From:

"William M Heitler/R5/USDAFS" <wheitler@fs.fed.us>

To:

access@pcweb.net

Doug,

As you requested.

Bill

STANSHAW DIVERSION MEETING
MARCH 22,2001

The purpose of the meeting was to familiarize the landowner, Karuk Tribe of California, and the Forest Service with the diversion and related issues. We meet at the Marble Mountain Ranch at 9:30 AM, March 22,2001. We met to

determine if it was possible to increase flow in Stanshaw Creek while meeting the needs of the Marble Mountain Ranch. Attendees were: Doug Cole,

owner, Marble Mountain Ranch, Toz Soto, Mid-Klamath River Sub-Basin Coordinator, Ron Reed, Karuk Tribal Fisheries, and Bill Heitler, District Ranger, Orleans Ranger District.

Mr. Cole has done a considerable amount of work to improve the efficiency of his hydropower plant. He recently replaced the 85-year-old pelton wheel and military surplus generator with a state of the art unit, and upgraded about 100 feet of the penstock with new PVC pipe. He estimates that about 25% less water will be used to generate the same amount of power as the old system. Water from Stanshaw Creek flows from the generator, is used for irrigation and eventually ends up in Irving Creek. Blue Heron Ranch uses

EXHIBIT H

the water for hydropower and irrigation.

After looking over the hydro plant, we walked the ditch to Stanshaw Creek. The ditch is in good overall condition and shows signs of regular maintenance. Portions have been reinforced with open topped culvert to reduce exfiltration and minimize the chance of a failure. The diversion structure on Stanshaw Creek is rock rubble reinforced with plastic sheeting. The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction. We did not estimate how much water was by passing the diversion. There is a possibility of additional downstream flow if the ditch can be lined or piped. Currently the Cole's do not have the resources to take on a project such as this. Ron explained the tribal position to Doug. The tribe is concerned about coho survival and feels that adequate flows in Stanshaw Creek are critical to providing refugia. I explained that the Forest Service will not require a fee permit for the ditch and diversion structure since use has been continuous prior to the proclamation of the Klamath National Forest. We do need to document the use in a no fee permit. There is also a question as to whether the ditch is a legal easement included in the deed to the property based on a proclamation signed by President Howard

Taft. Toz, in his position as Mid-Klamath River Sub-Basin Coordinator, feels there is a good chance that grants are available to pay for improving the ditch. He will begin looking for funding sources for this project. Ron offered tribal support for the grant.

I left the meeting about 11:00 AM. Ron, Toz and Doug continued the discussion looking for other ways to direct water back into Stanshaw Creek. Ron and Toz will look into the amount of water that is being diverted by other users on the Stanshaw Creek. There may be an opportunity to gain additional water from these users.

Bill Heitler

(916) 657-1951

FAX: (916) 657-2388

In Reply Refer
to:333:KDM:29450

FEBRUARY 04 1993

Robert E. and Mary Judith Young
c/o Thomas W. Birmingham
770 L Street, Suite 1200
Sacramento, CA 95814

Dear Mr. Birmingham:

APPLICATION 29450 OF ROBERT E. AND MARY JUDITH YOUNG--STANSHAW CREEK IN SISKIYOU COUNTY

On July 22, 1992, Division of Water Rights (Division) staff wrote to inform your clients, Robert and Mary Judith Young, that additional information is required before Division staff will be able to complete the initial review of Application 29450. No response was received. The issues which require a response are listed below.

The first issue which must be addressed is the quantities of water which were requested for both domestic and irrigation purposes. The application requests a right to directly divert 0.22 cubic feet per second (cfs) for domestic purposes. 3 residences, 44 recreational vehicle hookups, 11 housekeeping cabins, 14 mobile homes and one lodge will be served. Based on the quantities considered reasonably necessary pursuant to Title 23, California Code of Regulations Section 697, Division of Water Rights (Division) staff calculates the total beneficial use for these facilities to be 0.02 cfs.

Beneficial use was calculated using 75 gallons per day (gpd) per person for the residences, and an average of 4 persons in each house. The recreational vehicles are estimated to use 30 gpd for 2 people. The housekeeping units would require 55 gpd for four people, and the mobile homes would require a similar amount of water. No information was provided about the lodge. Thus, Division staff estimates that 20 people would use the lodge, and each person would require 55 gpd. If any of these estimates are incorrect, please provide information regarding actual occupancy rates and water duties. Based upon these estimates, Division staff recommends that domestic use under Application 29450 be reduced to 0.02 cfs. The 0.02 cfs was calculated by multiplying the number of each type of facility, such as 3 residences, times the estimated daily usage (75 gpd), times the number of persons (4 people), then multiplying by the conversion factor of 1 cfs per 646,317 gpd.

SURNAME
DWR 540 FEB 11 1993

KDM 2-3-93

Kassel 2/3/93

EXHIBIT I

005483

FEBRUARY 04 1993

Robert E. and Mary Judith Young

-2-

Irrigation water duty of 1 cfs for each 80 acres of irrigated area is considered reasonable for Siskiyou county. Thus, irrigation of the 7 acres of alfalfa listed in the application should require 0.09 cfs. The application requests 0.12 cfs. Thus, Division staff recommends that Application 29450 be reduced to 0.09 cfs for irrigation purposes. Please respond and state whether your client concurs with these recommendations.

Additional information is also required to complete the environmental supplement to the application. The following information is required:

Question 4 of Environmental Supplement

Indicate whether or not any permitting agency prepared any environmental documents for the project. If so, please complete the answers to the last part of questions number 4.

Question 7b

Please describe the types of existing vegetation (such as grasslands, pine forest, oak-grass foothills, etc.) at the point of diversion, immediately downstream of the point of diversion, and at the place where the water is to be used. Please be sure to include photographs of these areas with the vegetation types showing in the photographs.

Question 8

Indicate what changes in the project site and surrounding area will occur or are likely to occur because of construction and operation of the project.

Question 16

Indicate whether or not your client is willing to make the changes in the project as recommended by the Department of Fish and Game.

A response is requested within the next 30 days. Please note that failure by an applicant to comply with a written request for information within a reasonable time may be cause for the Division to cancel an application pursuant to Government Code Section 65956(c). Division staff is available to answer any questions you might have. I can be contacted at (916) 657-1951.

Sincerely,

ORIGINAL SIGNED BY

Katherine Mrowka
Associate WRC Engineer
Hearings Unit

cc: Robert E. and Mary Judith Young
Young's Ranch
Somes Bar, CA 95568

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 30.4.1 Docs provided by Barbara Brenner

1. 11-29-12 BB Letter re Supplemental Info for Statement of Water Diversion Use 11-29-2012
2. 10-01-12.BB.Letter re Diversion Rights Stanshaw.App 029449
3. 04-17-12.BB Email re Marble Mtn Ranch. Aerial Photos
4. 08-05-09.BB.Complaint.Chronology
5. 04-19-06.BB.Irving Creek School History and Photos
6. 04-2001.BB.Handwritten Letter to Cole re History of Site
7. 12-04-98.BB.Letter from Bagheban to Cole
8. 11-25-98.BB.Letter from Bagheban to SWRCB
9. 11-05-98.BB.Letter from Squires to SWRCB
10. 07-13-98.BB.Article on Irving Creek school
11. 07-07-98.BB.Testimony of Hayes on Historical Use of Water
12. 06-03-98.BB.Inspection Photos
13. 5-21-97.BB.Dec of Harless on Ditch Use Witnessed by Coles
14. 04-28-97.BB.Forest Service Quitclaim Deed.97005031
15. 06-03-95.BB.grant deed from mcmurtry to hayes.9418
16. 01-04-95.BB.Cole Correctory Grant Deed. 95000070
17. 12-30-94.BB.grant deed 94018121
18. 10-14-94.BB.Parcel Ownership Papers
19. 09-26-94.BB.Buyers Escrow Instructions from Siskiyou Land Title
20. 09-09-94.BB.CA All-purpose Acknowledgment
21. 11-29-77.BB.Grant Deed Joint Tenancy.4094
22. 11-05-77.BB.Certificate of Waiver.Hayes Assign Lease to Young
23. 03-29-73.BB.Dec of Abandonment of Homestead.13097
24. 03-07-72.BB.Voucher for Payment Under Federal Tort Claims Act
25. 02-03-72.BB.Letter to Hayes from English.USFS.6570 Claim
26. 02-04-70.BB.Letter to Hayes from Grainger.USFS.claim
27. 10-22-69.BB.Letter to Hayes from Stokes.USFS

28. 06-30-69.BB.Letter to McMannis from Worthington.USFS
29. 06-23-69.BB.Letter to McMannis from Bizz Johnson.congressman
30. 06-09-69.BB.Letter to Hayes from Kleaver.complaint
31. 05-23-69.BB.Directors Deed
32. 12-22-64.BB.Flood as Reported by Agnes Hayes
33. 11-07-57.BB.Letter to Hayes re Map and Description Surveyor
34. 10-26-48 Order Settling Final Acct of Administrator and Decree of Distribution
35. 11-07-57.BB.Additional Homestead to Cover Land Intended to be Patented
36. 12-12-45.BB.Indenture 3667
37. 05-27-32.BB.Indenture 3890
38. 08-31-31.BB.Indenture
39. 04-10-22.BB.Indenture
40. 6-21-18 BB Certificate of the Register of the Land Office
41. 06-09-1880.BB.Water Notice of Stanshaw.typed
42. 06-09-1880.BB.Water Notice.handwritten
43. 10-24-1870.BB.Klamath Misc Stanshaw.copy
44. 10-24-1870.BB.Klamath Misc Stanshaw
45. 03-25-1867.BB.Exhibit A.handwritten
46. 03-25-1867.BB.Ntc of Mining and Irrigation Stanshaw Recorded
47. 03-25-1867.BB.Ntc of Mining and Irrigation
48. No Date.BB.Letter from Kaye to Hayes.USFS.claim
49. No Date.BB.Letter to Hayes from Kaye.USFS.claim
50. No Date.BB.Dec of Harless re Continued Use of Ditch.Handwritten
51. No Date.BB.Dec of Harless with Notes
52. No Date.BB.Handwritten Letter to Kaye
53. No Date.BB.Questionable Measurements by Goss
54. No Date.BB.Summary of Stanshaw Diversion Rights by Marble Mountain Ranch
55. No Date.BB.Timeline



500 Capitol Mall, Suite 1600
Sacramento, California 95814
main 916.447.0700
fax 916.447.4781
www.stoel.com

November 29, 2012

BARBARA A. BRENNER
Direct (916) 319-4676
babrenner@stoel.com

VIA EMAIL AND REGULAR MAIL

Attn: Mr. Bob Rinker
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

**Re: Supplemental Information for Initial Statement of Water Diversion and Use for
MJM:A029449; Statement No. 15022**

Dear Mr. Bob Rinker:

The purpose of this Initial Statement of Water Diversion and Use is, that in conjunction with a USGS map, to provide the most current information required by the State Water Resources Control Board in order to reactivate Statement No. 15022. Below please find supplemental information to be attached to the Initial Statement of Water Diversion and Use form.

Supplemental Information

E. Place of Use Description

Address: Marble Mountain Ranch, 92520 Hwy 96, Somes Bar, CA 95568
Acreage: Approximately sixty-five (65) acres

F. Purpose of Use Description

The California Department of Fish and Game has indicated that the fishery may benefit from an approximately 1 cfs bypass flow in the stream. When there is adequate flow, Mr. Cole makes every effort to provide this bypass flow.



Attn: Mr. Bob Rinker
November 29, 2012
Page 2

H. Quantity of Water

The 178.5 acre-feet provided for December 2012 is an estimate based on the conversion from the 3 cfs anticipated diversion for that month.

I. Recent Water Use

The Coles have stored water in a pond that is filled with the out fall from their power plant, with a pond outlet that continues across the ranch and ultimately into Irving Creek, and thence to the Klamath. This is a permitted pond and provides for irrigation, fire protection, and recreational beneficial uses.

Within the last five years, the maximum water use is calculated from a maximum rate of diversion of 3 cfs per month, which converts to 178.5 acre-feet per month, for a total of 2,142 acre-feet a year. The minimum water use is calculated using the 3 cfs maximum diversion for 9 months, and then 2 cfs diversion for 3 low flow months for a total minimum water use of 1,963.53 acre-feet a year.

J. Maximum Rate of Diversion

The Coles intend to divert 3 cfs in December 2012. Thus, this is an estimate based on the maximum rate that is generally available at all times except for months of very low flow. December, unlike August and September, is not historically a low flow month and therefore the maximum 3 cfs is typically diverted.

K. Miscellaneous Water Use

Water Conservation – Description of water conservation efforts in current use

1. Upon purchase of the ranch in 1994 the Coles changed the business model from an existing RV/mobile home park with 57 licensed hook-ups to a guest ranch targeting a population of about 30 people. The 57 RVs were each impacting ranch infrastructure and consuming water, generating sewage, and needing the limited power available. The smaller population, full service, guests of a dude ranch generate sufficient income with far less demand on the resources.



Attn: Mr. Bob Rinker
November 29, 2012
Page 3

2. Original flood irrigation of agricultural lands has been upgraded to more efficient sprinkler distribution of water.
3. The original gold rush era cast iron pelton wheel and generator system was upgraded to a more efficient bronze wheel and modern generator system in 1997.
4. Transport of canal water has been continuously improved as the Coles line the canal with 1/2 culverts in leaky/ suspect areas of the canal. This reduces loss of transported water through leakage.
5. An original gold rush era flume has been replaced with a permanent full culvert system also containing a high flow bypass to return excess winter flows to Stanshaw Creek.
6. All Ranch buildings have been upgraded and remodeled with duo pane windows, full insulation, fluorescent light fixtures, modern appliances, and current building technology to reduce the power demands of these buildings.
7. Past grant applications have been made to return unused power plant outflow to the anadromous sections of Stanshaw Creek, and the Coles are currently in grant consideration for on-ground water distribution system upgrades - pending acceptance by California Department of Fish and Game.

Thank you for your continued assistance in this matter. If you have any questions or concerns, please do not hesitate to contact Parissa Ebrahimzadeh (pebrahimzadeh@stoel.com) at (916) 319-4644 or me.

Best Regards,

Barbara A. Brenner

cc: Doug Cole

State Water Resources Control Board
DIVISION OF WATER RIGHTS
INITIAL STATEMENT OF WATER DIVERSION AND USE

NOTE: A Statement is not a Water Right

READ THE ATTACHED INFORMATION AND INSTRUCTION SHEET BEFORE COMPLETING THIS FORM

A. Claimant Information (required)			
Claimant Name(s): DouglasT. Cole, Heidi A. Cole, Norman D. Cole, Carolyn T. Cole			
Mailing Address 92520 Hwy 96		City Somes Bar,	State CA
		Zip 95568	
Phone Number 530-469-3322		Email Address (if available) guestranch@marblemountainranch.com	
Agent Name (if applicable) DouglasT. Cole			
Mailing Address 92520 Hwy 96		City Somes Bar,	State CA
		Zip 95568	
Phone Number 530-469-3322		Email Address (if available) guestranch@marblemountainranch.com	
Land Owner Name (if different from claimant)			
Mailing Address		City	State
		Zip	
B. Type of Claim			
Check the box(es) which describe the type of claim(s) under which you are diverting water.			
<input type="checkbox"/> Riparian <input checked="" type="checkbox"/> Pre-1914 <input type="checkbox"/> Court Decree <input type="checkbox"/> Pending Appropriative Application			
If you checked yes for Court Decree or Pending Appropriative Application, list the decree number or application ID:			
C. Water Course Description (required)			
Source Name at the point of diversion Stanshaw Creek		Tributary to Klamath River	
D. Legal Land Description (required)			
Provide the location of the Point of Diversion using one of the following methods (check one box and enter coordinates, if applicable):			
<input checked="" type="checkbox"/> Latitude/Longitude Measurements: Latitude: 41.472760/Longitude: -123.503764			
<input type="checkbox"/> California Coordinate System (NAD 1983):			
<input checked="" type="checkbox"/> USGS Topographic Map with point of diversion labeled on map (if checked yes, please attach map)			
County (required) Siskiyou		Assessor's Parcel Number(s), if assigned	
Provide Public Land Description to nearest 40 acres (if assigned)			
SW ¼ of the NW ¼ of Section 33, Township 13N, Range 6E, B&M H			
E. Place of Use Description (required)			
Provide a general description of the area in which the water was used. See attached			
Provide an outline of the Place of Use using one or both of the following methods (check box indicating each map attached)			
<input checked="" type="checkbox"/> USGS Topographic map <input type="checkbox"/> County Assessor's parcel map			
F. Purpose of Use Description (required)			
Provide a listing of use types (see instructions for a listing of water uses) Power generation, domestic use, irrigation, stock watering, fire protection, in-stream flow fish passage			
Number of Acres (if applicable) Approx. 65 acres		Persons Served (if applicable) 30 Average. Peak approx. 500 at fire camps	Stock Watered (if applicable) 25 Head

CONTINUE TO PAGE 2

SOURCE/TRIBUTARY Stanshaw CreekDIVERSION WORKS NAME Stanshaw Memorial C

G. Diversion Works Description (required)													
Name of Diversion Works, if named: Stanshaw Memorial Canal										Year in which diversion commenced (or specify nearest known year) 1865			
List any related existing water rights, if applicable (for example, an appropriative right using the same diversion works).													
Type of Diversion Facility (select one) <input type="checkbox"/> Gravity <input type="checkbox"/> Creek Pump <input type="checkbox"/> Well Pump <input type="checkbox"/> Other (please specify): _____													
Method of Measurement: (check one box) <input type="checkbox"/> Weir <input type="checkbox"/> Electric Meter <input type="checkbox"/> Flume <input type="checkbox"/> Estimate <input type="checkbox"/> Inline Flow Meter <input type="checkbox"/> Other (please specify): _____													
Capacity of Diversion Works (specify unit of measure) <u>3</u> <input type="checkbox"/> cfs <input type="checkbox"/> gpm <input type="checkbox"/> gpd										Capacity of Storage Tank or Reservoir (if applicable) <u>10</u> <input type="checkbox"/> Gallons <input type="checkbox"/> Acre-feet			
H. Quantity of Water Diverted (Required - if amounts are available, list below - otherwise check months in which diversion occurred)													
Provide the quantity of water diverted each month in the table below as measured in (check one box) <input type="checkbox"/> Gallons <input type="checkbox"/> Acre-feet													
Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
2012	178.5	178.5	178.5	178.5	178.5	178.5	178.5	119.01	119.01	178.5	178.5	178.5	2023.0
I. Recent Water Use													
Provide the annual water use in recent years: See attached										Maximum <u>2,142</u> <input type="checkbox"/> Gallons <input type="checkbox"/> Acre-feet			
										Minimum <u>1,963.53</u> <input type="checkbox"/> Gallons <input type="checkbox"/> Acre-feet			
J. Maximum Rate of Diversion (if available)													
If available, provide the maximum rate of diversion achieved in each month as measured in (check one box) <input type="checkbox"/> cfs <input type="checkbox"/> gpm <input type="checkbox"/> gpd													
Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec	
2012	3	3	3	3	3	3	3	2	2	3	3	3	
K. Miscellaneous Water Use (answer only sections applicable to your diversion)													
Water Conservation: Are you currently employing any methods of water conservation? <input type="checkbox"/> YES <input type="checkbox"/> NO													
If yes, describe any water conservation efforts in current use. See attached													
Water Quality and Wastewater Reclamation: Are you now or have you been using reclaimed water from a wastewater treatment facility, desalination facility or water polluted by waste to a degree that unreasonably affects such water for other beneficial uses? <input type="checkbox"/> YES <input type="checkbox"/> NO													
Conjunctive use of surface water and groundwater: Are you using groundwater in lieu of surface water? <input type="checkbox"/> YES <input type="checkbox"/> NO													
L. Certification of Statement (required)													
I declare under penalty of perjury that the information in this statement of water diversion and use is true to the best of my knowledge and belief.													
*DATE: <u>1/28/2012</u> at <u>Siskiyou</u> (county), California													
*SIGNATURE: <u>Douglas T. Cole</u>													
*PRINTED NAME: <u>Douglas</u> (first name) <u>T.</u> (middle initial) <u>Cole</u> (last name)													
COMPANY NAME: <u>Marble Mountain Ranch</u>													

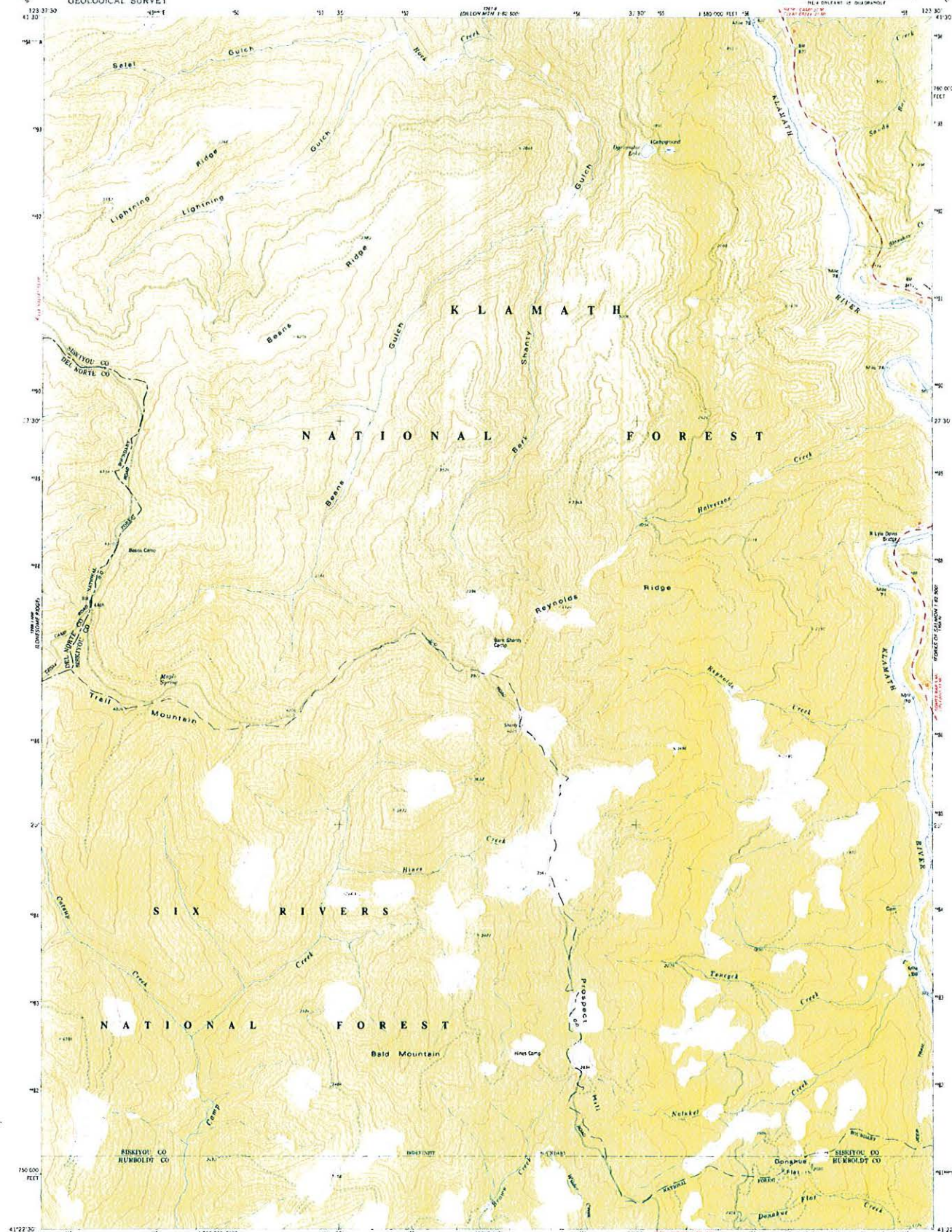
UPON COMPLETION OF THIS STATEMENT, ATTACH ALL SUPPORTING DOCUMENTATION AND MAPS AND MAIL TO:

State Water Resources Control Board
 Division of Water Rights
 PO Box 2000
 Sacramento, CA 95812-2000

Additional copies of this form, instructions on how to complete this form and water right information can be obtained at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/. This form version will expire on 12/31/2012.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

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CALIFORNIA
7.5 MINUTE SERIES (TOPOGRAPHIC)
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photographs taken 1972-73. Field checked 1974.
Projection and 10,000-foot grid ticks. California coordinate
system, zone 1 (Bamberg conformal conic).
1000-meter Universal Transverse Mercator grid ticks,
zone 10, shown in blue. (1927 North American datum.
Land lines are omitted because of insufficient data.

SCALE 1:24,000
CONTOUR INTERVAL 80 FEET
NATIONAL GEODETIC VERTICAL DATUM OF 1929

ROAD CLASSIFICATION:
Primary gravel
Improved road
Secondary highway
Unimproved road
Trail
U.S.F. Route
State Route

Legend:
Light duty road
Improved road
Unimproved road
Trail
U.S.F. Route
State Route

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NAD 83 UTM 11S, W223307.5
1074
AMB 1245 F NE, SERIES V885

3950
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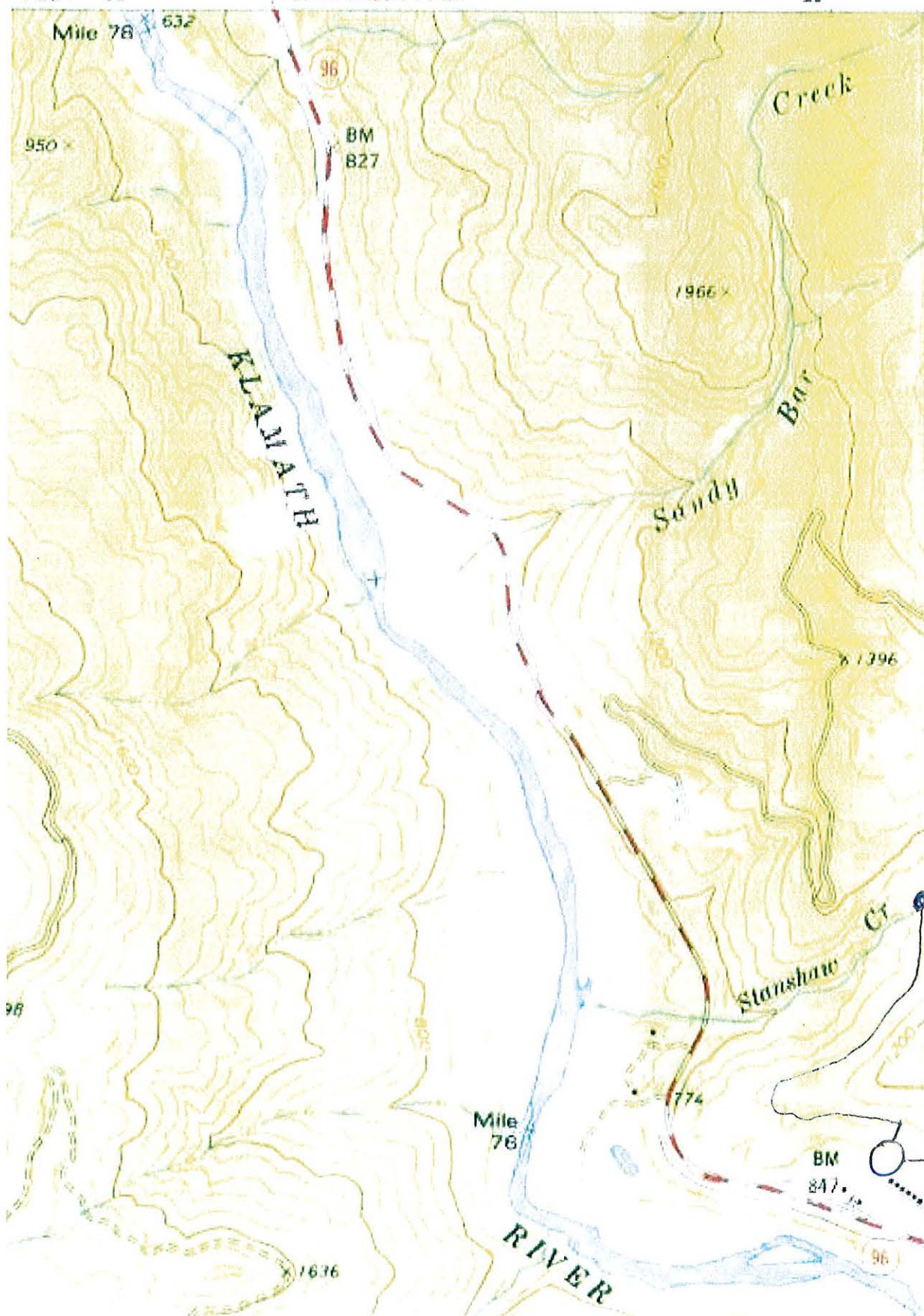
FEET 456

HAPPY CAMP 30 MI
CLEAR CREEK 21 MI

59

123°30'

41°30'



4594

790 000
FEET

4593

4592

POD

41°28'56.9"N

Latitude

123° 29' 45.03" W

longitude

— Mobile Manton Pencil
Pool

4591

005493



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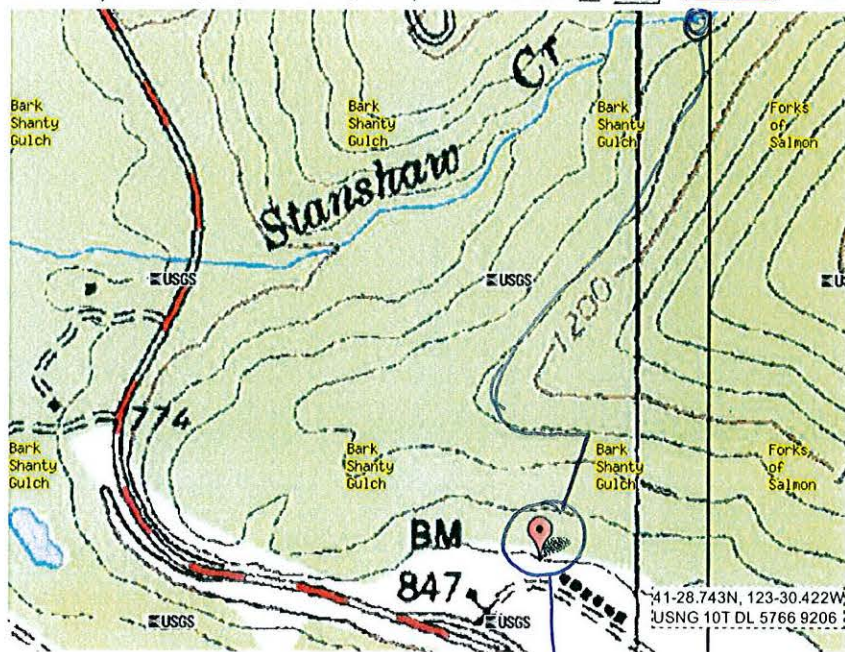
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Page Last Modified: May 17, 2012

POINT OF DIVERSION = 41° 28' 56.9" N
(POD)

Latitude

123° 29' 45.03" W

Longitude

Ross, Tammy

From: Ebrahimzadeh, Parissa
Sent: Thursday, November 29, 2012 2:08 PM
To: rrinker@waterboards.ca.gov
Cc: Brenner, Barbara A.; Douglas Cole
Subject: Requested Information for MJM:A029449 to reactivate Statement No. 15022
Attachments: ReActivation Statement 15022 Application(final).pdf

Dear Mr. Bob Rinker,

Attached please find the pdf version of the information requested (Initial Statement of Water Diversion and Use, and USGS map) for file MJM:A029449 to reactivate Statement No. 15022. A hard copy version has been sent via regular mail as well.

Thank you for your cooperation during this process. We look forward to completing this application with your continued assistance.

Thank you,

Parissa

Parissa Ebrahimzadeh

STOEL RIVES LLP | 500 Capitol Mall, Suite 1600 | Sacramento, CA 95814
Direct: (916) 319-4644 | Mobile: (916) 402-8121 | Fax: (916) 447-4781
pebrahimzadeh@stoel.com | www.stoel.com

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BARBARA A. BRENNER
Direct (916) 319-4676
babrenner@stoel.com

October 1, 2012

VIA E-MAIL AND FIRST-CLASS MAIL

Matt McCarthy
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

**Re: MMcCarthy: A029449/ Diversion Rights in Stanshaw Creek in Siskiyou County:
63:MC:262.0(47-40-01);A029449**

Mr. McCarthy:

Marble Mountain Ranch (the "Ranch"), located in Skiskiyou County, is owned and operated by Douglas and Heidi Cole (the "Coles"). The Coles have diverted water from Stanshaw Creek since purchasing the property in 1994 and continue use the water to support the Ranch. Previously, the Coles have informed staff for the State Water Resources Control Board ("Board") that the right to divert the water is based on their pre-1914 appropriative rights. Accordingly, the Coles are already entitled to divert water from Stanshaw Creek for irrigation and domestic use and hydroelectric production.

Board staff contends that the Coles do not have a valid pre-1914 claim to the water rights because there is insufficient evidence that the diversion of water has been continuously maintained as to the amount diverted since December 19, 1914. (Letter from Board, September 15, 1998.) However, there is no basis for this assertion and the Coles have enclosed evidence of continuous diversion and use of water from Stanshaw Creek since the 1860's.

Moreover, under California Water Code section 1202, the Board has no jurisdiction over Marble Mountain's pre-1914 water rights. Numerous Board water right decisions and orders confirm that the Board has no authority to adjudicate a pre-1914 water right. (See Board Decisions, D934; D1282; D1290; D1324; D1379.) The Board has conceded to this fact in a letter to the Coles dated August 22, 2002, in which Edward C. Anton, Chief of the Division of Water Rights states,



Matt McCarthy
October 1, 2012
Page 2

“Regardless of past letters sent by the Division containing estimates of what could be diverted pursuant to a pre-1914 appropriative right claim, the Division has no adjudicatory authority to quantify such a claim. Only the courts can make this determination. ... All available evidence suggests that the diversion and use has been maintained in a diligent and continuous fashion ever since. Consequently, we believe that a court would find that the Coles have a valid claim of a pre-1914 appropriative right to divert water for the full irrigation and domestic uses currently maintained, including reasonable conveyance losses.”

Accordingly, the Board’s arguments regarding the validity of the Coles pre-1914 appropriative rights are moot and Board staff has no authority to make this determination. Once the claimant of a pre-1914 water rights presents prima facie evidence of the existence of a pre-1914 right, the burden shifts to the petitioner, or in this instance Board staff, to show that the pre-1914 right was lost. Board staff has not met this burden and in fact, the evidence establishes a pre-1914 water right, none of which has been lost or diminished.

Board staff argues that the Coles are limited to 0.49 cubic feet per second (cfs) and relies solely on information obtained in a 1965 bulletin by the Department of Water Resources entitled “Land and Water Use in the Klamath River Hydrographic Unit” (Bulletin No. 94-6). Bulletin 94-6 identifies the total amount diverted for irrigation, domestic, stockwatering, and power production of 362 acre-feet, annually. Board staff further states that the information was confirmed by Mr. Marvin Goss, Forest Service Hydrologist, who lived on the property under prior ownership. Mr. Goss inappropriately claimed the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel and that water had been used at a rate of 0.49 cfs for many years.

There is no sound evidence which demonstrates the Department of Water Resources’ basis for the total amount of diverted water. In addition, the information documented by Mr. Goss is insufficient. His reading was based on a one-time analysis during a relatively dry season, using a leaf to measure the water flow. It is also well-known in the community that Mr. Goss had a contentious relationship with Lue and Agnes Hayes, the owners of the property at the time of Mr. Goss’ reading. That fact, in conjunction with historic canal dimensions and the vast use of water at that time, dispute Mr. Goss’ reading. The enclosed details the history of use which evidence prior use of at least 3.6 cfs from Stanshaw Creek (see Attachment A, “Summary of Continuous Water Use at Marble Mountain Ranch”). Furthermore, the Board has previously determined that



Matt McCarthy
October 1, 2012
Page 3

evidence introduced in support of a pre-1914 water right must be considered in the light most favorable to the claimant. (Board Order No. WR 95-10.)

It is also established in common law that the quantity of water to which an appropriator is entitled is determined by quantifying the maximum amount of water reasonably and beneficially used by the appropriator within the five previous calendar years. (*Smith v. Hawkins* (1898) 120 Cal. 86, 87.) The Coles have presented evidence that their use of water from Stanshaw Creek amounts to 3.6 cfs over the past five years, consistent with the amount of water diverted and put to use under previous Ranch ownership.

On these bases, the Coles have the right to divert water from Stanshaw Creek for all their irrigation and domestic consumption as well as hydroelectric power production at a minimum of 3.6 cfs. If you have any questions please contact me at 916-447-0700.

Best regards,

Barbara A. Brenner
Counsel for Marble Mountain Ranch

BB:jhc
Enclosure

cc: Phillip Crader
Doug and Heidi Cole

Attachment A
Summary of Continuous Water Use
At Marble Mountain Ranch

In 1867, the United States of America granted a parcel located in Dillon's Township, Klamath County, California to Samuel Stanshaw who hired Chinese laborers to dig canals on the parcel of land that measured approximately 3.5 feet deep, 2 feet across the bottom, and 10 feet across the top, creating a cross section of 21 feet. (See Sean Bagheban, P.E.) In 1867, Samuel Stanshaw filed a claim for water rights amounting to 600 inches to be used for a gold mining operation and irrigation purposes on several areas of the Stanshaw property, including what is now known as the Marble Mountain Ranch. (Water Notice recorded March 25, 1867 in Book of Mining Claims 232 at Page 397.) Samuel Stanshaw hired 600 miners to mine for gold and created a community for the miners to work and live on the ranch with their families. In 1870, the mining rights were leased to Bow & Company, certain "Chinamen" to take gold ore from the Stanshaw Mining Company who also mined for gold. A requirement under the mining lease was that Bow & Company purchase their eggs from the ranch operating at the Stanshaw Mining Company. Commencing in 1867 water was diverted from Stanshaw Creek to Marble Mountain for reasonable and beneficial use.

In 1911, Samuel Stanshaw patented his mining claim which granted water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with those water rights. This patent granted him the pre-1914 appropriative water rights that continued to be diverted and put to use at Marble Mountain. Commencing in 1911 approximately 15 cubic feet per second (cfs) of water from Stanshaw Creek was diverted to Marble Mountain.

During this time, the State commenced construction of State Highway 96 and the construction crew lived on the site while the mining, ranching and domestic operations were ongoing. Each of these operations relied on Samuel Stanshaw's appropriative water rights until 1922 when the Stanshaw mine/homestead ranch was sold to Guy McMurtry, a state road engineer. Mr. McMurtry was assigned by the State to complete construction of the last unfinished section of Highway 96, between Orleans and Happy Camp. The water distribution system on Marble Mountain Ranch was utilized to support the construction work and soon, Mr. McMurtry built additional housing for these crew members and their families. The Stanshaw Creek pre-1914 water diversion was continuously relied upon and was the sole source of water for all water demands at the ranch.

The population burst prompted the State to build a school on site to service the children of all the people living on the ranch. The first school was a log building with one classroom, situated over Stanshaw Creek. In 1935 the County Superintendent of Schools in Siskiyou County determined that the one room classroom was insufficient to support the 52 children and made arrangements to construct a supporting school house adjacent to Marble Mountain Ranch. The new school house included bathrooms, a kitchen, dining room, and housing for the two teachers on site.

Meanwhile, Mr. McMurtry operated a dairy farm and provided milk and milk delivery services to the community on the ranch. There is some testimony by past residents and locals of a DC powered light system being used to illuminate/heat the main ranch house and the hen house on the ranch then owned by McMurtry. Further evidence of a DC hydroelectric power system is the remnant abandoned penstock system leading to the current powerhouse location and the knob and post electrical remnants removed from the original ranch house during renovations by the Coles in 2006. A single ditch line carrying approximately 4 cfs provide adequate sufficient water for all domestic and agricultural water uses. Although the original mining operation had ceased, the property still demanded water for the agricultural operations and domestic consumption by the residents and school. At this time the water was also used to generate power and the hydropower was and remains as the sole source of power generation.

The McMurtry's utilized the ditch for domestic consumption, as well as agricultural purposes to raise hay, fetch, vegetable garden, and the dairy farm until 1958 when it was sold to Lue and Agnes Hayes. The Hayes operated a cattle ranch with one hundred cattle from 1958 to 1994. The ranch sustained 16 homes and outbuildings and housed State road workers, United States Forest Service employees and transient recreational fisherman. The ditch lines and foundational domestic/agricultural water lines that are in place today were the same lines that existed when the Hayes' purchased the property. The lines carried approximately 4 cfs and supported all the people living on the ranch at that time, the cattle ranch operation and continued agricultural production.

The Hayes' continued to use the water for domestic consumption to support the many residents on the property. In addition, they irrigated hay and alfalfa pastures by turning out water from the ditch in various places and flooding the pastures. Some of the diverted water was returned to Stanshaw Creek. The dimensions of the ditch remained the same from the time the Hayes' purchased the property to the time the Ranch was sold to the Cole's. The Hayes also operated a pelton wheel generator for electricity, still in use today. The wheel generator was a 4 inch line, then increased to a 14 inch line utilized to create electricity for the occupants on the Ranch.

After diverted water was funneled into the domestic water line and hydropower penstock, remaining flows and power plant effluent continued through the lower elevation canals and were diverted at appropriate spots to flood irrigate alfalfa hay pastures, vegetable gardens, fruit trees, and lawns. Per Lue Hayes, there were times in his ownership that virtually every available bit of Stanshaw Creek water was diverted into the canals and used in power generation and irrigation of crops at the ranch. During the Hayes family occupation, the power plant was upgraded to a facility that produced about 40 KW of AC power that was needed for an increasing ranch residency population.

During these years, the Hayes' family maintained the ditch to ensure that any gravel and silt that settled in the ditch was excavated and the flume was kept in good condition particularly because the wood would deteriorate and branches would clog the flume. The Hayes family removed redwood plank ditch linings that had rotted in various places in the canal system and maintained and replaced a wooden flume section at various times during their occupation of the

ranch. The agricultural uses of the ranch continued through the Hayes family era with flood irrigation as the primary agricultural water distribution system.

The Hayes' measurement of the ditch at that time ranged from 2 -1/2 feet to 5 feet wide and from 2-1/2 feet to 1-1/2 feet deep, depending on the water flow. The abandoned ditch, which has now been inactive for approximately 140 years, is the same size as the original ditch in use today. The ranch was then sold to the Young family in 1972 when the Young's licensed the ranch as a state licensed mobile home/RV park with a permitted capacity of 57 mobile home hook-ups. The continuing rental of the 10 previously constructed cabins and three homes also added to the ranch population. Much of the water use was directed at domestic consumption and power generation to support ranch residents. However, the ranch still sustained alfalfa pastures, fruit and nut orchards, and large vegetable gardens.

The Young's Ranch Resort had a resident population between 100 – 200 persons consuming ranch water and hydroelectric power. Past Young's ranch visitors returning to Marble Mountain ranch recant stories of Young's ranch management needing to patrol the ranch routinely to chastise those ranch residents using more than their allotted share of power and water during low Stanshaw Creek stream flow periods during the summer months. Again, during this period, the original Stanshaw Creek canal system carried water at full capacity during periods of available flow, and carried nearly all of Stanshaw Creek flows during periods of diminished low Summer flows.

When the Cole family purchased the ranch in 1994, the infrastructure load requirements for power production and consumption were beyond the capacity of the ranch in the Cole's estimation. A change in business model was implemented at this time to reduce the ranch residency to a smaller population by targeting short term residents on a full service recreational visit. The target guest population now at Marble Mountain Ranch is 30 – 35 visitors on a full service short term guest ranch visit. Guided rafting, fly fishing, trail rides and other recreational activities along with food/meal service provide higher income returns per resident with fewer residents on location to deplete power and water resources. Additional water distribution improvements have been implemented by switching the agricultural uses from flood irrigation to sprinkler irrigated pastures, drip irrigated gardens and by installing culverts in the canal systems to reduce seepage of captured water. Additionally, the hydroelectric power plant was upgraded in 1997 to allow for more efficient power production with available Stanshaw Creek stream flows. Ongoing efforts to improve efficiency of Stanshaw Creek water and reduce demand include grant applications for canal system piping/culverting, and power plant upgrades.

Marble Mountain Ranch, since the Cole's ownership, has beneficially used approximately 4 cfs maintained by the Marble Mountain Ranch predecessors and current occupants. There has been no 5 year continuous lapse of water transport, or truncated use (despite seasonal variations in flow), that might suggest a diminished capacity. In fact, the historical growth and development of the ranch operations over 150 years speaks to the undeniable maintenance of the canal systems and beneficial use of all water diverted from Stanshaw Creek.

Ross, Tammy

WR-193

From: Brenner, Barbara A.
Sent: Tuesday, April 17, 2012 9:08 PM
To: Ross, Tammy
Subject: Fw: Fwd: Marble Mountain Ranch, Marble Mountain Ranch, Somes Bar, CA - EDR# 3303339.1s -- Part 1 of 2
Attachments: 3303339.1-1.pdf; ATT00001.htm

Please file and I need a copy. What is this?

Thanks-

Barbara A. Brenner

Stoel Rives

From: Douglas Cole [mailto:guestranch@marblemountainranch.com]
Sent: Tuesday, April 17, 2012 09:03 PM
To: Brenner, Barbara A.
Subject: Fwd: Marble Mountain Ranch, Marble Mountain Ranch, Somes Bar, CA - EDR# 3303339.1s -- Part 1 of 2

Begin forwarded message:

From: EDR Order Sending Address <EDR@mail.edrnet.com>
Subject: Marble Mountain Ranch, Marble Mountain Ranch, Somes Bar, CA - EDR# 3303339.1s -- Part 1 of 2
Date: April 17, 2012 5:16:44 PM PDT
To: <guestranch@marblemountainranch.com>

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Marble Mountain Ranch

Marble Mountain Ranch
Somes Bar, CA 95568

Inquiry Number: 3303339.1

April 17, 2012

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Date EDR Searched Historical Sources:

Aerial Photography April 17, 2012

Target Property:

Marble Mountain Ranch

Somes Bar, CA 95568

<u>Year</u>	<u>Scale</u>	<u>Details</u>	<u>Source</u>
1947	Aerial Photograph. Scale: 1"=623'	Flight Year: 1947	USGS
1951	Aerial Photograph. Scale: 1"=561'	Flight Year: 1951	Nasa
1972	Aerial Photograph. Scale: 1"=600'	Flight Year: 1972	USGS
1983	Aerial Photograph. Scale: 1"=690'	Flight Year: 1983	USGS
1998	Aerial Photograph. Scale: 1"=500'	/Composite DOQQ - acquisition dates: 1998	EDR
2005	Aerial Photograph. Scale: 1"=500'	Flight Year: 2005	EDR



INQUIRY #: 3303339.1

YEAR: 1947

| = 623'





INQUIRY #: 3303339.1

YEAR: 1951

| = 561'





INQUIRY #: 3303339.1

YEAR: 1972

| = 600'



WR-193

INQUIRY #: 3303339.1

YEAR: 1983

| = 690'



005509

WFS 193



INQUIRY #: 3303339.1

YEAR: 1998

| = 500'



005510

From: Brenner, Barbara A.
Sent: Tuesday, April 17, 2012 9:08 PM
To: Ross, Tammy
Subject: Fw: Fwd: Marble Mountain Ranch, Marble Mountain Ranch, Somes Bar, CA - EDR# 3303339.1s -- Part 2 of 2
Attachments: 3303339.1-2.pdf; ATT00001.htm

Ditto
Barbara A. Brenner
Stoel Rives

From: Douglas Cole [mailto:guestranch@marblemountainranch.com]
Sent: Tuesday, April 17, 2012 09:04 PM
To: Brenner, Barbara A.
Subject: Fwd: Marble Mountain Ranch, Marble Mountain Ranch, Somes Bar, CA - EDR# 3303339.1s -- Part 2 of 2

Begin forwarded message:

From: EDR Order Sending Address <EDR@mail.edrnet.com>
Subject: Marble Mountain Ranch, Marble Mountain Ranch, Somes Bar, CA - EDR# 3303339.1s -- Part 2 of 2
Date: April 17, 2012 5:16:54 PM PDT
To: <guestranch@marblemountainranch.com>

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INQUIRY #: 3303339.1

YEAR: 2005

| = 500'



Complaint against Doug and Heidi Cole
by the Klamath Forest Alliance

Current as of: 8/25/2009

Chronology of Events of the Complaint

On June 18, 2001, the DWR received a complaint against Doug and Heidi Cole, lodged by the attorney representing the Klamath Forest Alliance (KFA). The complaint alleges that the Cole's diversion is illegal, that the diversion adversely impacts public trust resources, and requests that the SWRCB order the Coles to cease and desist their diversion.

Background: Two applications were submitted by the Coles - 29450 and 29449. Of these applications, 29449 for 3 cfs for power generation from Stanshaw Creek, is currently under review by the environmental unit (REM), and 29450 has been cancelled. Protestants for 29449 include: National Marine Fisheries Service, the Dept. of Fish & Game, T. James Fisher, J.W. Fisher Logging Co., Phyllis Fisher, Konrad Fisher, the USFS, and the California Sportfishing Protection Alliance.

Prepared letter to Mooney, to be signed by Ed Anton, stating the Division's guidance to close out the complaint in favor of the application and environmental section's processes.

August 19, 2002

Event/Activity	Date
Prepared letter to Mooney, to be signed by Ed Anton, stating the Division's guidance to close out the complaint in favor of the application and environmental section's processes. Comments/revisions noted and made, and the letter given to clerical to final and circulate for surname/signature.	August 15, 2002
Left msg requesting return call from Jan Goldsmith re: status of her representation of Cole. Issue: request for a hearing (most control); or our proposal to close out the complaint - which will likely result in Mooney requesting a hearing.	7/16/2002
Received letter from NMFS, disagreeing with CU staff report. Met with CAR and JK re: response language & procedures. Letter will be for EA's signature; state that we believe the recent letters do not provide convincing evidence; update the disposition of the application (Cole has been diligent); and propose close-out (with the standard caveat of reconsideration if further evidence becomes available).	7/11/2002
Received letter from Don Money, representing KFA, in which the parties dispute the findings and recommendations of the Complaint Unit's May 23, 2002 report.	June 24, 2002
Received telephone request from Don Mooney to submit his comments on Monday. I told him that this would be acceptable. When I asked what I could expect to see, he indicated that there was some disagreement on the biology assessment of our report, and also he questioned that we did not QUANTIFY the appropriative right, and that power generation was NOT incidental. Also notified Jan Goldsmith of the impending submittal, promising to touch base with her and to provide her with a copy if needed. Prepared and distributed 30-day letter, proposing close-out in the absence of substantiating evidence to support further SWRCB action. NLT date for responses - 6/23/02.	June 21, 2002
Spoke with Jane Vorpagel re: DFG's comments. See Contact Report for details.	May 23, 2002 December 13, 2001

Complaint against Doug and Heidi Cole
by the Klamath Forest Alliance

Current as of: 8/25/2009

Received Don Mooney's fax (16 pages dated 11/30/01)). CAR asked me to summarize Mooney's comments, together with those submitted by NMFS and DF&G..	December 3, 2001
Telephoned Jane Vorpagel to see how they came up with 2.5 cfs as a proposed bypass below the culvert. Left message because she's on field duty and on vacation until 12/4/01.	November 27, 2001
Received (but delivered to the Env. Section) original memo from Dept of F&G re: proposed bypass requirements of 2.5 cfs below the culvert. Complaint Unit received on 11/29/01.	November 26, 2001
Received (but delivered to the Env. Section) a letter from NMFS, indicating their findings and protest dismissal terms. Complaint Unit received on 11/29/01.	November 20, 2001
Received fax from DFG. Stated focus is the 1/4 mile stretch of Stanshaw Creek below the culvert under Hwy. 96. Now, based on "field reviews and best professional judgement, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River." However, DFG reserves the right to "require additional bypass" in future if 2.5 is inadequate.	November 20, 2001
Received phone call from Don Mooney, requesting 2 additional weeks in which to provide us with evidence to support KFA's position. After discussing the request with CAR, I left the message to indicate that we would proceed according to the schedule agreed upon during the site visit. Mooney telephoned CAR and received the requested extension.	November 16, 2001
Spoke with Jan Goldsmith. She has <i>not</i> spoken with Don Mooney. I reminded her that we had agreed to entertain stakeholder input up until Wednesday, November 21, 2001.	November 14, 2001
Spoke with Jane Vorpagel re: DFG's input related to the complaint, and also related to the application. She said that she was planning to submit DFG's input, although she did not say exactly what we can expect.	November 13, 2001
Received confirmation from Tim Broadman, NMFS, regarding his participation. In addition, he indicated that he would specifically request that Margaret Tauzer also join us.	October 12, 2001
Received confirmation from Margaret McBride re: Cole's availability and Jan's flight information. Also, received telephone call from Bill Heitler, USFS, to say that his representative (Leslie Gausland Burrows) would attend.	October 11, 2001
Revised coordination for the site visit now scheduled for 10:00 on Wednesday, 10/17. Anticipated participation from: Fish & Game (Dennis Maria, Jane Vorpegel & Ron Presley) and USFS (Bill Heitler or representative). NMFS is not inclined to attend, per Margaret Tauzer today. Also, I am expecting written confirmation for flight plans to get both attorneys there.	October 10, 2001
Prepared notice of scheduled field investigation on 10/17/01. Ms. Goldsmith and the Coles requested that we meet on Tuesday, October 16, 2001 , so coordinated schedules have now confirmed Tuesday rather than Wednesday, as previously noted. Mr. Mooney will get a voice mail and e-mail notice.	September 20, 2001
Telephoned Don Mooney to solicit feedback/reaction to Jan's letter. He told me that he would review the letter, contact his client and provide us with a response. NOTE: He will be on vacation from 9/14 - 30/01.	September 5, 2001

Complaint against Doug and Heidi Cole
by the Klamath Forest Alliance

Current as of: 8/25/2009

Exchanged voice mail with Don Mooney. He indicated that he would be talking with his clients late next week. He did ask me to telephone him. I was unsuccessful because his cell phone was out of range. I left another message asking him to call me when he is able.

August 24, 2001

Received an answer to complaint letter from Janet Goldsmith, attorney for Doug and Heidi Cole.

August 20, 2001

Telephoned Don Mooney's office. Left message re: requested extension.

August 1, 2001

Telephone call from Jan Goldsmith requesting extension for response to 8/20/01.

July 31, 2001

I left a voice mail message for Don Mooney, stating that the application A029450 has been cancelled, and that the application for hydro power is being processed. After we spoke by phone, I faxed the 5/4/99 memo to file from Chris Murray.

July 13, 2001

Received message from Jan Goldsmith, representing Doug & Heidi Cole, requesting a copy of the complaint letter. Besides a copy of the requested letter, I also provided Jan with a copy of a 5/4/99 memo to file from Chris Murray, the engineer assigned to evaluate.

July 13, 2001

Received telephone call from Doug Cole requesting additional time in which to respond.

July 13, 2001

Spoke with Chris Murray by telephone re: complaint against Doug & Heidi Cole. Also received an e-mail regarding same.

July 12, 2001

Received telephone call from Don Mooney, attorney for KFA

July 3, 2001

Our letter to Doug & Heidi Cole notifying them of the complaint against them.

July 2, 2001

Environmental Section's letter to Konrad Fisher regarding the Cole's application to divert 3 cfs from Stanshaw Creek, tributary to the Klamath River.

June 22, 2001

Received a complaint letter against Mr. Doug and Ms. Heidi Cole lodged by the attorney representing the Klamath Forest Alliance (KFA). The complainant alleges that the Cole's diversion is illegal, that the diversion adversely impacts public trust resources, and requests that the SWRCB order the Coles to cease and desist their diversion.

June 18, 2001

E-mail correspondence between REM & Doug Cole. Among other things, it lists project improvements.

April 3, 2001

Contact report completed by REM, referring to the USFS' 10/5/00 letter to Cole.

October 19, 2000

Letter from USFS to Coles, stating that, "Since it appears that your diversion structure and ditch are not authorized, they must be removed within 30 days." Alternatively, the District Ranger requests permits or other documentation that proves that the diversion predates the USFS, warranting a free special use permit.

October 5, 2000

Protest accepted from California Sportfishing Protection Alliance.

September 15, 2000

Environmental Field Report (A29449) prepared by REM.

July 26, 2000



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

WR-193



Gray Davis
Governor

Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5377
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>

In Reply Refer to:
363:MC:262.0(47-40-01); A029449

Klamath Forest Alliance
c/o Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Dear Mr. Mooney:

WATER RIGHTS COMPLAINT OF THE KLAMATH FOREST ALLIANCE AGAINST THE COLES REGARDING DIVERSIONS FROM STANSHAW CREEK IN SISKIYOU COUNTY

Staff of the Division of Water Rights (Division) has completed their review of your letter of June 24, 2002 regarding the subject complaint. You indicate in this letter that you and your client disagree with the conclusions reached by Complaint Unit staff, as expressed in their letter and Staff Report of Investigation dated May 23, 2002. After review of both the Staff Report of Investigation and your letter, I have concluded that further action with respect to your client's complaint is not warranted, and I have directed the Complaint Unit to close this complaint. The supporting rationale for this action is described below.

Unauthorized Diversion of Water – You contend that the Division previously determined that any pre-1914 appropriative right held by the Coles is limited to approximately 0.11 cubic feet per second (cfs). Regardless of past letters sent by the Division containing estimates of what could be diverted pursuant to a pre-1914 appropriative right claim, the Division has no adjudicatory authority to quantify such a claim. Only the courts can make this determination. The most recent evidence submitted by the Coles and their legal counsel indicates that diversion of water from Stanshaw Creek into their ditch, and the subsequent use of this water for irrigation and domestic purposes at the Marble Mountain Ranch, was initiated prior to 1914 using at least as much, if not more, water than is used today. All available evidence suggests that the diversion and use has been maintained in a diligent and continuous fashion ever since. Consequently, we believe that a court would find that the Coles have a valid claim of a pre-1914 appropriative right to divert water for the full irrigation and domestic uses currently maintained, including reasonable conveyance losses.

While the Cole's current diversion of water for power purposes is not technically covered by a permit, this diversion and use has been ongoing for almost 60 years. Diversions prior to a determination regarding issuance of a permit are very common, especially for long-standing diversions such as the Cole's. The State Water Resources Control Board (SWRCB) has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to initiate enforcement against a person who files an application promptly upon notification of the complaint, and then

California Environmental Protection Agency

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005516

Klamath Forest Alliance

2

diligently pursues the application, complies with all application requirements and requests for information, and cooperates with SWRCB staff. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Potential Injury to Other Uses of Water - Another important factor in considering enforcement is the extent of injury caused by the water diversion. If a complaint investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide *not* to take enforcement action. The SWRCB may also consider the degree of hardship that enforcement action would impose on persons who rely on the diversion of water when it decides whether to take enforcement action in response to a complaint. Based on available evidence and rationale described in the Staff Report of Investigation, Complaint Unit staff concluded that there would be little potential for harm to other diverters or public trust resources if the Coles were allowed to divert water for power purposes, as long as a minimum bypass flow is maintained similar to that occurring during their investigation. You disagree with this conclusion, and make reference to the professional opinions of staff for the National Marine Fisheries Service, Department of Fish and Game, Karuk Tribe, and Humboldt State University. While we have received copies of these opinions, the evidence and logical rationale on which these opinions are based has not been submitted. Consequently, I believe the *prima facie* evidence utilized by Complaint Unit staff is more persuasive. Asking the Coles to terminate their diversion would also cause severe economic hardship on them without providing much if any benefit to the instream resources.

I do agree with you that the Cole's application has been pending for far too long. This application has been noticed and protests received. I doubt the parties will be able to resolve these protests amicably amongst themselves. The next steps in the process would be to complete an environmental review of the project pursuant to the California Environmental Quality Act (CEQA), and then proceed to protest resolution via either a field investigation or formal hearing. I have directed the Division's Environmental Section to give as much priority as possible to this application so that final resolution of the protests can be achieved as soon as feasible. I have also asked the Division's Application and Environmental units to send copies of all correspondence to you so that you will be kept apprised of the progress in this matter.

In the meantime, I expect the Coles to maintain a minimum bypass, as described in the Staff Report of Investigation. Failure to do so could result in a reevaluation of the need for enforcement action prior to a final determination of the Cole's request for a permit.

If there are any questions regarding this matter, please contact Charles Rich, Chief of the Division's Complaint Unit, at (916) 341-5377.

Sincerely,

Edward C. Anton, Chief
Division of Water Rights

cc: See next page.

Klamath Forest Alliance

3

cc: Mr. Doug and Mrs. Heidi Cole
c/o Jan Goldsmith
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
Attention Mr. Ron Presley and
Jane Vorpapel
601 Locust Street
Redding, CA 96001

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman and
Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klinge Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556

bcc: Larry Attaway, Ross Swenerton
MContreras\lfischer 8/16/02
U:\Comdrv\MContreras\KFA v Cole appeal rejection letter



Winston H. Hickox
*Secretary for
Environmental
Protection*

State Water Resources Control Board

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5377
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

WR-193



Gray Davis
Governor

Memorandum to File

To: File Number 262.0 (47-40-01)

Date:

From: Charles A. Rich, Chief
Complaint Unit

Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 – 200 feet above the terminal

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommends that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

Memo to File

Page 5

May 23, 2002

Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for power purposes in her letter of August 20, 2001, Complaint Unit staff is not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believes that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The SWRCB has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Another weighed factor is the extent of injury caused by the water diversion. If an investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide not to take enforcement action. The SWRCB may also consider the degree of hardship enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phylis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. Pre-1914 appropriative claim of right for domestic / irrigation use. This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. Application A029449 – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. Small Domestic Registration D030945R – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "*innocent until proven guilty*" concept of the law.

- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: "*The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage.*" While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of $\pm 50\%$.

problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of $\frac{1}{2}$ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 – 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of $\frac{1}{2}$ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

CONCLUSIONS

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their 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).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Cole's ditch is **not** allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) if full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.

[||SCOE Homepage||](#)[IMC Homepage||](#)[School History Homepage||](#)[School Lists||](#)

Irving Creek School History and/or Photographs

Scroll [UP](#), [DOWN](#), [LEFT](#), [RIGHT](#) in order to view all images.

IRVING CREEK SCHOOL DISTRICT

The Irving Creek District was established in 1918. The School was located at the junction of Highway 96 and Irving Creek south of Happy Camp. It stood on a hillside overlooking the Creek. Highway 96 now runs through the school former grounds.

The first teacher at Irving Creek was Benjamin D. Spaudling.

The school house was torn down after the district was lapsed and joined to the Junction District in 1949.

Reference in Board of Supervisors minutes:

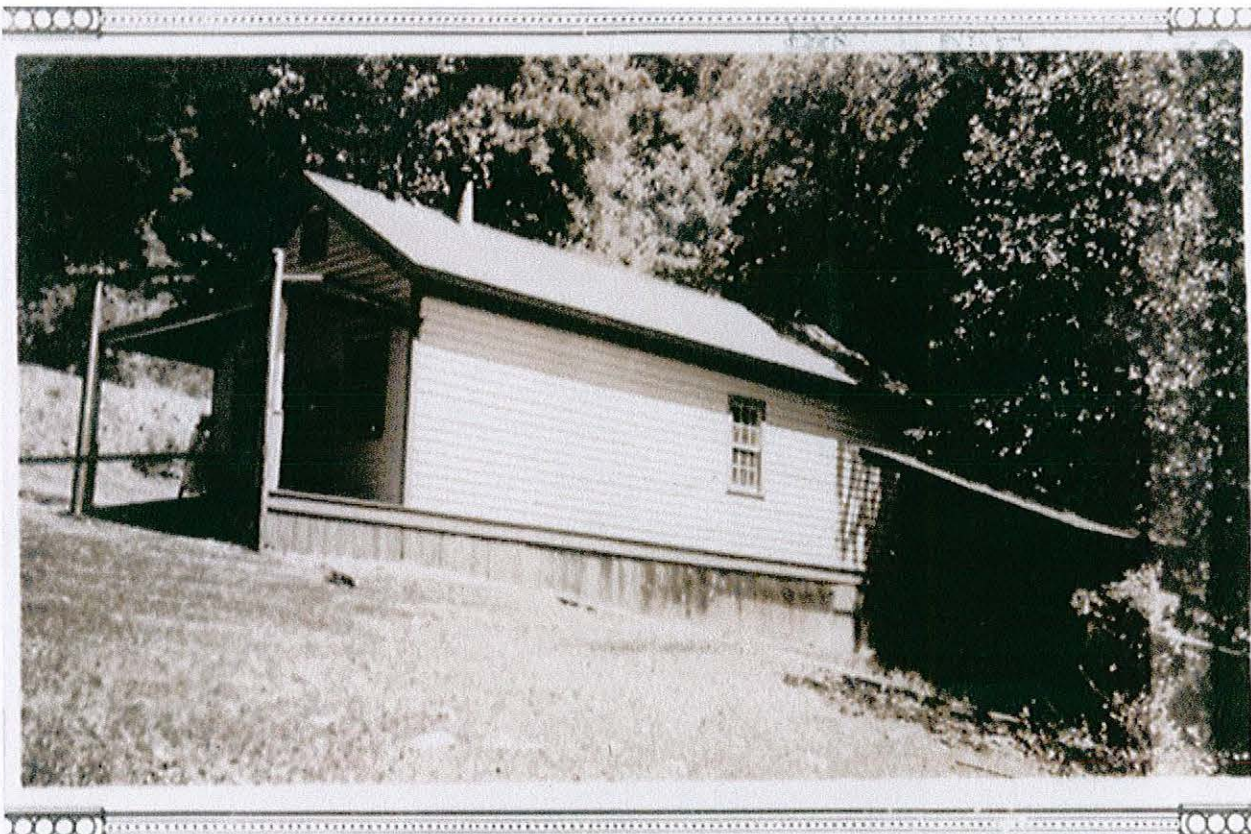
Established: February 4, 1918 — Territory taken from Junction and Dillon. Boundary described. (11-211)

August 5, 1946 — Lapsed. Amended November 4, 1946. (20-151)

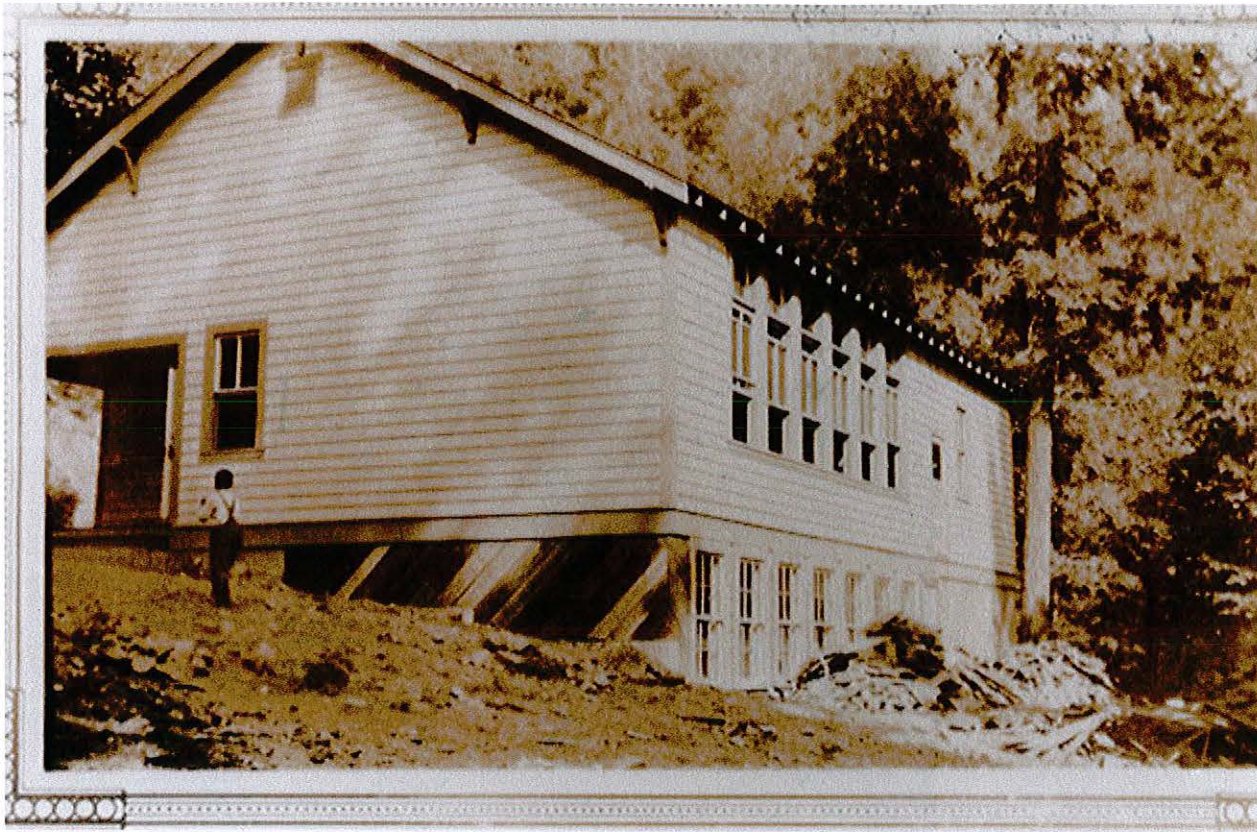
November 4, 1946 — Suspended (20-188)

July 21, 1947 — Declared lapsed and merged with Junction (20-291)

September 18, 1951 — Request to consolidate Ti Bar, Irvy (Irving) Creek. No Action Taken. (22-23)



The "old" school, ca. 1935. Photo by Bob Dennis, from the collection of Bob Dais.



The "new" school, ca. 1935. Photo by Bob Dennis, from the collection of Bob Dais.



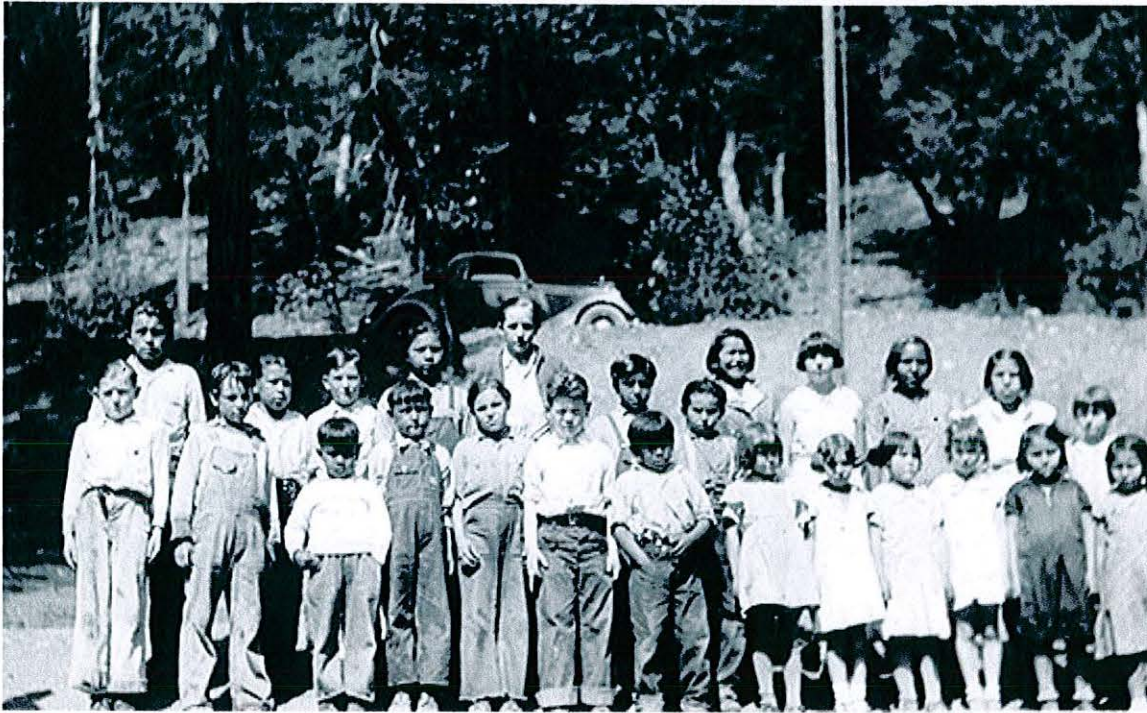
ca. 1939. Siskiyou County Office of Education School History Collection.



ca. 1939. Photo by Mildred Grant, donated by Roderick and Larry Grant.



ca. 1940. Siskiyou County Office of Education School History Collection.



date unknown. Negative by Charles S. Graves, loaned by the Siskiyou County Public Library.

Seed Valley Pa
April 2001
WR 193

Dear Mr and Mrs Cole:

I read with misgivings
about your trouble with
Pace over your water.

Don't know if theres anything
I know that would help you.

I first moved down there
shortly after Guy and Blanch
McMurry first bought the
place from Sam Stenshaw.
They had built that house
around the old Stenshaws
house. I first lived in an old
store building that was built
over Irving Creek. Later that
was torn down and a school
was built nearby. My children
went to that school when there
were two teachers there.

I cooked for boarders
in an old cookhouse on
your ranch.

The highway was being ~~re~~ rebuilt and there sometimes two shifts. Later after Blanch died and Guy married Mary Lockheart I helped them run the little dairy. Guy then owned both the lower ranch across ^{Irving Crk} and near the river so we often kept the cows down there, when I first moved down there Dave Drake owned the lower ranch. He had an old sawmill not far from the river on Irving Creek. It was long ago shut down even then. I walked that ditch up to Stenshaw Creek a good many times.

One of Stenshaw's lived in Seaid until just recently. I could probably be able to contact him if they would help.

The residence at the mouth of Stenshaw Creek belonged to a fellow (Russian) Basil Delgas. He operated the mine for the Singer Sewing Machine of New York. Also a group of cabins were built at the mouth of the creek and I can't remember ever hearing of there being any trouble about water.

I have arthritis in my hands and am sorry about this poor writing—

Yours truly
Dorothy Anderson

We and all my children have been working against Felice Pace and all he represents so if we can help let us know.

Violet
Anderson
Thompson week

Mr + Mrs (b)(4)

496-3373

December 4, 1998

Mr. Douglas Cole
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

This letter is to update you regarding the latest actions I have taken as your authorized agent, concerning water rights for the Marble Mountain Ranch.

On December 1, 1998, I met with Mr. Murray to discuss the water rights issues of your property. I filed a request for cancellation of application 29450 and filed a Statement of Water Diversion and Use based on your pre-1914 rights. I also filed a Registration of Small Domestic Use Appropriation to cover your pond. Mr. Murray will resume processing application 29449, which is almost ready for noticing.

I have also been in contact with Mr. Presley of Department of Fish and Game (DFG). We need to file a notification with the DFG to fulfill the requirements of Section 1603 of the Fish and Game Code. I am waiting for a package that Mr. Presely has sent out for this purpose.

I will schedule a site visit in the near future to meet with you personally and ensure that no details pertaining to your project and water right application is overlooked. The Application-Permit-License process for water appropriation is generally long and tedious; however, by working closely with all involved parties, I will try to make it as short as possible. I would like to thank you in advance for your cooperation and patience. Please do not hesitate to contact me if you have any questions or concerns. I can be reached by telephone at (916) 612-3539.

Sincerely,

Original signed and mailed on 12/4/98

SEAN BAGHEBAN, P.E.

AQUA ENGINEERING & CONSULTING**Water Rights • Bay Delta • Modeling • Design**

November 25, 1998

Mr. Chris Murray
State Water Resources Control Board
Division of Water Rights
901 P Street
Sacramento, CA 95814

Subject: 332:CM:29449,29450

Dear Mr. Murray:

This letter is to inform you that I will be representing Mr. Douglas Cole concerning water rights for the Marble Mountain Ranch. Mr. Cole has retained my services and notified the State Water Resources Control Board (Board) in his November 18, 1998 letter. My clients and I are committed to working diligently with the Board staff to reach an equitable solution.

Also, per our telephone conversations on November 17 and 25, 1998, and considering the letter from the Board to my clients, dated September 15, 1998, I am taking the actions that are outlined below.

- Filing a Registration of Small Domestic Use Appropriation;
- Filing a Request for Cancellation of Application 29450, and a Statement of Water Diversion and Use;
- Working closely with Board staff to modify and process application 29449.

I would like to thank you in advance for your professional cooperation and understanding. Please do not hesitate to contact me if you have any questions or concerns. I can be reached by telephone at (916) 612-3539.

Sincerely,

ORIGINAL SIGNED BY

SEAN BAGHEBAN, P.E.

cc: Mr. Douglas Cole
92520 Highway 96
Somes Bar, CA 95568

Mr. Ron Prestly
Department of Fish and Game
Environmental Services
601 Locust Street
Redding, CA 96001

Chris Murray
State Water Resources Board
Division Of Water Rights
P.O. Box 2000
Sacramento, Calif. 95812-2000

November 5, 1998 ^{WR-193}

Dear Mr. Murray:

I have been ask by my daughter and son-in-law, Heidi and Doug Cole, to assist in the resolution of the water rights issue pertaining to their Marble Mountain Ranch in western Siskyou County. They are currently struggling with preparations for an IRS audit and both are working practically around the clock to provide for the basic needs of their young family. Two nights ago, Doug provided me with a stack of letters which have come to him from your Division office and from his attorney, Nancy Smith, over the past year or so. In digesting this material, I have begun to be a little educated about water rights , about the apparently extensive communication which has gone on between you and Nancy, and about an upcoming deadline of November 30, 1998 for getting this matter resolved.

I believe you and I met on one of your visits to the Ranch and, although I feel quite comfortable speaking with you directly, I decided to write to you so that I might more thoroughly present my questions and concerns regarding the water rights issue as well as provide information and observations which I feel should be considered in the final resolution of the matter. It is my hope that after you have had an opportunity to look over what I have written here we can meet again somewhere to further discuss and finalize details. I trust that you are anxious to get an early settlement to this issue and so I am prepared to work with you in any way necessary to expedite matters.

In a letter from Nancy Smith to Doug, dated October 7, 1997, Ms. Smith stated, "If you [Doug] proceed by way of permit, the State is prepared to give you a permit for 3 cfs." Assuming this option is still open to him, I am certain that Doug would now agree to accept this flow rate as long as he has assurance that his future right to divert water from Stanshaw Creek (irrespective of flow rate), as set forth in the pre-1914 grant signed by President Taft, will not be compromised.

Yesterday, I measured the flow rate in an eighteen-foot section of half-culvert which is a part of the canal carrying water to the Ranch. The inside diameter of this culvert is 29 inches. A small piece of cork was dropped into the center of the stream and it took 15 seconds for it to traverse the 18 feet of culvert. This latter velocity measurement was confirmed by repeated trials. From these measurements, I calculated the flow rate to be 2.75 cfs. Since this flow rate is just slightly in excess of what is necessary for the operation of our hydroelectric plant, I am perplexed over the variety of much lower, past estimates quoted in the various reports and letters available to me. I believe there is sufficient evidence to show that the carrying capacity of the canal has not been altered since its construction in the 1800's. A flow rate of at least 2.75 would have been necessary to support an intensive hydraulic mining operation and, later, to support the documented multiplicity of uses for water delivered to the Ranch, including the irrigation of pasturage supporting 100 head of cattle (as attested to by a former owner, Lue Hayes). I find it preposterous that the State would expect us to come up with numerical data to validate water flow rates during a period of time when such rates were not actually measured and, indeed, when there existed no water rights laws to cause concern to anyone.

Perhaps you would agree that many laws, including those pertaining to water rights, were and are written and passed without sufficient attention to or provision for special circumstances. I believe there is a very special circumstance, directly relating to the current issue of water rights for the Ranch, but which seems not to have entered into any of the documents I have read. The special circumstance I allude to is that neither electric power nor potable water has been made available to the Ranch by any public utilities company and therefor we are totally dependent upon an adequate flow of water in the Stanshaw canal for our basic living requirements. Should any agency impose a reduction of our current water flow, which flow by all accounts of former owners and residents has not changed significantly for well over one hundred years, our resident families would be uprooted, our sole source of income wiped out, and a tremendous (if not total) loss of financial resources essential to our future sustenance be incurred. Such action on the part of a government agency would, in my estimation, not only fail to meet the test of reasonableness, but would seem to violate our constitutional rights relating to our pursuit of life and happiness.

It is clear to me that inherent in the establishment of State water rights laws is a concern for providing adequate water for possible future users downstream. In our circumstance, there is just one downstream user. His property is situated at the mouth of Stanshaw Creek and there is virtually no likelihood of a change in the use of his property which would require a change in the current rate of water supply to our ranch.

In a recent letter signed by Harry Schueller and dated September 15, 1998, there is reference to a "recently-constructed reservoir" on the ranch. What was actually done was an enlargement of a long-time existing pond. Enlargement of the pond came about as a result of an arrangement which Doug made with Cal-Trans to dump material from a massive slide which occurred about four miles upriver from the ranch this past winter. The dumping of this material on the ranch resulted in a savings of thousands of dollars to the State. The enlargement of the pond does not affect the flow rate in the canal, nor would it ever, and should therefore not be made a part of the current water rights settlement; it is a non-issue.

May I once again suggest that, in view of the history of this matter and of the many circumstances surrounding the diversion of water to the ranch, we consider proceeding with the formulation of a water rights document for the Marble Mountain Ranch which will assure 1) a continued recognition of the pre-1914 right to appropriate water from Stanshaw Creek for use on the Ranch, and 2) a maximum flow rate in the canal of 3 cfs.

I trust that a satisfactory resolution can be reached soon but that you will be so kind as to extend the existing deadline, if needed, to provide sufficient time for the transfer of essential information between us. I remain

Respectfully yours,

R. Gary Squires
92520 Hwy. 96
Somes Bar, Calif. 95568
(530) 469-3437

P.S. If you wish, we could speed things up a bit by conversing via E-mail. My address is:
GARINGSQ@PCWEB.NET

7-13-'98

Dear Mr. Cole,

I hope you enjoy the article.

There was a page about Secor as I
just left it.I will be happy to answer
any questions about the Gray Ranch
but I use only those a little
over a year when Mr. Starnitt and
I went to Alaska -The museum has records that
you might be interested in because
they have done a great deal of research.

Yours truly,

Maurice E. Starnitt



Photo courtesy of Leona Bryan

JUNCTION SCHOOL - 1928 — SOMES BAR - Levella Conrad, Pauline Conrad, Caroline Davis, Shan Davis, Henry Davis, Frank Grant, Violet Johnnie, Dave Johnnie, J. Rosy Jerry, Lee Merrill, Sidney McNeal, Georgia McNeal, Gengia Ann Langford, Deane Langford, Miss L. Lewis.

IRVING CREEK

AT IRVING CREEK 1935-36 Minerva Starritt

The Irving Creek District was established in 1918. The first school was a log building situated over the creek. The outdoor toilet was also over the creek. In the early days it was a custom on the Klamath River to build toilets over a creek. About 1925 the second school house was built of lumber by Frank Grant. A second classroom, dining room, kitchen and bathrooms were added in the fall of 1935. John Spinks helped build the log school as well as the second building and the addition.

At first, school terms on the Klamath were only six or seven months from spring to early fall because many families lived across the river from school. At high water, children could not get across the river. In the late twenties there were regular school terms starting in the fall.

John Spinks and his wife Lucy lived across the river at Roger Creek, two miles down the river from Irving Creek. They had six children, Roy, May, Chester, Bryon, Ernest and Willard. They were well liked and civic minded citizens. They were most anxious that their children get an education.

Other families living within walking distance wanted a school for their children. They included the Pattersons, Farnums, Johnsons, Drakes, Charleys, McCash, Layman, Toms, Albars, Hickox and others. There were four Patterson children, Willie, John, and their two younger sisters May and Rose. They walked five miles to Irving Creek School taking all the short cuts along the narrow crooked road. The Patterson children never missed a day unless they were sick. The older children in the families took care of their younger sisters and brothers on their way to school. Madeline and Grace Charley lived at T Bar five miles from Irving Creek. They too walked.

There was money from the Office of Indian Affairs for Indian children, so lunches consisting of milk, soup, sandwiches and cookies were delivered to the school. According to Mary Patterson (Lawe) the older boys would order as many as five sandwiches and eat every one or maybe give them to their white friends, who didn't have as good a lunch. Mary also told me about the boys finding lizard eggs along the ditch that ran along the side of the school. They gathered up the eggs and little lizards and threw them on the floor in front of the teachers desk. Pranks like putting water snakes or a frog in the teachers desk were common. Teachers joined in the fun most of the time with laughing and a little screaming. Ernest Spinks tells of one day before Christmas when the teacher let him and all the boys out of school to get a Christmas tree. They all skipped and didn't return. Ernest got a good spanking from his dad.

Enrollment records no longer exist. A partial list of children attending Irving Creek School from 1918 to 1929 follow:

Roy, Mary, Chester, Byron, Ernest and Willard Spinks; John, Willie, Mary and Rose Patterson; Ella, Anne, Henry and Ulysis McCash; Arthur Layman; Lawrence and Gladys Johnson; Madeline and Grace Charley; Laura, Lottie and Henry (Buster) Farnum; Zona and Betty Drake.

In the fall of 1935, I went to teach at the Irving Creek School. I had been teaching the lower grades at Junction School at Somes Bar down the Klamath River from Irving Creek. It was my seventh year of teaching school on the Klamath: two years at Morek below Martins Ferry, two years at Orleans, and two years at Junction. I was no stranger to the district. I knew the people and the children.

The school building was located at the junction of Highway 96 and Irving Creek on the hillside overlooking the creek. It was one large room approximately 20 by 40 feet with anteroom 10 by 20 feet and a porch across the front. There were outside toilets. The children helped with the janitor work.

Mr. Guy McMurtry was Superintendent for the State Highway 96 and had the Highway Yard on his ranch above the school, now the Young ranch. He had cabins where the highway workers lived with their families.

John Waldner owned the ranch below the road where the school was located. He and his wife boarded some of the highway workers and rented cabins to the other workers,



Photo courtesy of Minerva Starritt

IRVING CREEK SCHOOL — These boys all went to Irving School in the twenties. (L-R) Partly shown, Alvis Johnson, Lawrence Johnson, Henry (Buster) Farnau, Willie Patterson, Chester Spinks (standing), John Patterson, Ernest Spinks. In river, Willard Spinks, taken about 1929.

SEIAD VALLEY

Willie Grider Adams

their families and the teacher. Waldner also operated a sawmill up Irving Creek. This ranch was once owned by Frank Harley, Halverson, and the Drakes. It is now the Blue Heron Ranch. The first cabin I rented was an old shed full of mice. I put traps everywhere but at night, mice would wake me running across my bed. A bit eerie. I soon rented another cabin.

When school opened in September, I had fifty-two children and all eight grades. Most of the pupils were from families working on the road, and there were several Indian children. Five Indian children belonged to Chester Pepper. They lived at T Bar but never came to school. I had tried to get them to come to Junction without success. The oldest boy was sixteen and was driving an old car. Arrangements were made with Robert Dennis, the County Superintendent of Schools in Siskiyou County to have this boy transport his brothers and sisters and attend school himself to get his eighth grade diploma, beside helping me around the school. The money from the mileage, clothing, and free lunches helped keep these children in school.

One day in late September, Robert Dennis, County Superintendent of Schools in Siskiyou County, arrived to see how I was progressing. We offered him some graham crackers. To our embarrassment kerosene had seeped onto the shelf where the crackers and supplies were stored in the anteroom. We laughed about the entire episode but Robert decided some changes should be made. He said, "It looks to me as if you need some help. I have a friend, Valeria Beym (Lange), who will graduate from Chico State in January. I will try to convince her to come down the river to Irving Creek School with you and teach the lower grades, but arrangements must be made for another classroom, kitchen, dining room and bathrooms". These arrangements were made with the trustees and with John Waldner, who ran the sawmill.

Meanwhile, I continued with my fifty-two children, with the help of members of the community. The hillside was leveled off for a playground. The State road equipment did their part. Tex Hunt's father was an excellent pianist. He came to school twice a week in the afternoons to help with the music for our entertainments. School programs were most important; there was no TV in those days. The entire community far and wide would come to the school plays and games. We were preparing a gala affair for Christmas. I had combined all grades into a history project of North America beginning with stick puppets for the first three grades of cave men, Indians and old miners. String marionettes of U.S. history with President Washington and the revolutionary war, Lincoln and the Civil War were made by the upper grades. Parents were all involved. Santa and all his helpers and the singers were ready. The night arrives for our program. We had built a stage at the end of the room six inches off the floor and put candle foot lights on the stage. I was wearing a long white polkadot dress. In the middle of the program while I was announcing, I was standing too close to one of the footlights and my dress caught fire. Tex Hunt, one of the parents grabbed me and put the fire out. The show went on.



Contributed by Joe Clyburn

BIG HUMBUG SCHOOL - 1917
- located on Klamath River near Jack and Cecil Well's home. Back row: Robert (Bud) Clyburn, Tony Rose, Jim Clyburn; Front row: Tom Clyburn and teacher's children. Teacher Mrs. Desevado.

The first schoolhouse in Seiad Valley was erected in the summer of 1914. In those days, state law required an average daily attendance of seven pupils for a school, and when that number was reached, the men of the community got together and built the one-room schoolhouse. It was located in Seiad, under a huge live oak tree, by Grant Lowdens ranch, and there was a small creek about fifty yards from it. Now that schoolhouse is gone and a larger one is built in Seiad near the old Ariel Lowden ranch. The first two years that I went to school before ours was built, I went to Hamburg and stayed with the Johnston family, and that was also a one-room schoolhouse.

The fall of 1914, we happily started in our own school, with Mrs. Massey as the teacher. She stayed with us, the Tobe and Minnie Grider family. We lived on Grider Creek across the river from the school, and each day, dad would take us across the river and home again at night in a skiff. We (my sister Dorothy, Mrs. Massey and I) would walk about a mile and a half from home to the river. There were several times during the winter that the river would rise during the day and it was too dangerous to cross, so we would stay all night with the Ariel Lowdens. That was in the days before the Copco Dam was built, so there was no flood control. Johnnie Nutson lived alone with his father up the river, and walked a distance of four miles each way everyday, and he rarely missed a day of school. Pupils that started in the first year were Mabel Ladd; Johnnie Nutson; Audrey, Clayton and Avis Lowden; Dorothy and Willie Grider. One of the reasons I think we enjoyed school so much was the comradeship of other children as we all lived so far apart that we rarely had anyone to play with.

The size of the building was adequate. A large window on each side of the room, and front door. There was a small area partitioned off for our coats and shoes in the winter time. We would wear knee gumboots in bad weather and change to our shoes at school, where we left them at night. In the cloak room was a small table on which was placed a bucket of water, wash basin, bar of soap, towel, and a cup to drink from, which we all used. We took turns going to the creek for a pail of water. In spite of the fact all of us used the same utensils, the only diseases we caught from one another were chicken pox and measles.

In front of the teacher's desk was a long bench. When a class was called upon to recite, we marched up and sat on the bench and stood up and recited when we were called upon to do so. It was a great honor for us to be called to the little blackboard to write or work an arithmetic example. Of course, when one of us recited, the rest of the room were all "ears" and so we learned from each other. Each night the teacher appointed one of us to clean the erasers after school - a chore we didn't like.

We had two recesses a day, one in the morning and one in the afternoon. That was a great time to play games; hop scotch, jump rope, hide the stick, marbles, and tops. In the spring we tried to play a little baseball. There was a large madrone tree in back of the schoolhouse and we peeled the bark off and made belts to wear, which stained our clothes, only to go home and get a good scolding. Nevertheless, we didn't seem to stop.

Three of us graduated in the first class in June 1921; Mabel Ladd, Johnnie Nutson and myself. Our teacher was Gladys Westlein. In those days the schoolhouse served many purposes. Elections were there, general community picnics and community activities. I have many fond memories of the times I spent in grammar school, and it served as a sound background for me to further my education.

1. We (Lue and Agnes Hayes) offer the following testimony regarding the historical use of water taken from Stanshaw Creek for the ranch now known as Marble Mountain Ranch.
2. I, Lue Hayes, declare:
I am a resident of the State of California. My birthdate is 3/26/22. I reside at 38 Third Ave., Happy Camp California. I was the owner of the real property located at 92520 Hwy 96, Somes Bar, Ca. from April 1955 to August 1970. I have personal knowledge of all of the facts stated in this declaration. If called as a witness I could, and would competently testify to these facts.
3. I first came to know about the ranch when I was logging in the area and also looking for a steer to buy. I discovered the McMurtry place (now Marble Mountain Ranch) when I saw a herd of cows (owned by Albers) near the ranch. I asked Mrs. McMurtry about the cows and she said they were not hers. At that time she told me her ranch was for sale for \$25,000. We were living in Eureka at the time but I was logging in Orleans with my partner Hank Lambert. I later asked Agnes, my wife, if she wanted to live in the country, and she thought that it would be a better place to raise the kids than in the city. I came back about 6 months later and looked again at the ranch and the water canal and all the ranch belongings. We moved onto the ranch with our family and lived there for about a year before we bought it.
4. In 1955 I obtained the ranch from Mary McMurtry, the widow of California State road engineer Guy McMurtry. McMurtry bought the ranch and the accompanying water rights from a Mr. Hardy or Harding, who bought them from Sam Stanshaw. Our deed to the ranch includes the "ditch and water" and states we have the right to use it for any beneficial purpose. That original water right was for 100 miners inches and was given by the United States Government in a document signed by President Taft. Sam Stanshaw got the original water rights to Stanshaw Creek so that they could hydraulic mine the gold there. He hired Chinese laborers to dig the ditches for him and set up the monitors to wash away the overburden. Those ditches ran all over the ranch and mountains behind the ranch and even the abandoned stretches are still there in good shape.

5. At the time of our purchase the ditch was used for domestic water consumption and agricultural uses. The ditch provided our only source of water, and at that time we had approximately 16 homes and outbuildings, 100 head of cattle at times, and irrigated hay and alfalfa pastures. In addition to my immediate family, we rented to state road workers, U.S.F.S. employees, and transient recreational fishermen. We used every drop of water carried by the ditch to service the families living on the ranch and irrigate our gardens and agricultural lands. Our primary method of irrigation was to turn out the water from the ditch in various places and flood our pastures.
6. The soil at the ranch is very absorbent, and the water just dissipated into the soil. In rainy seasons or times that we consumed less water, the excess would either flow down the ditch to the back of the ranch and enter Irving Creek, or we would leave it fully diverted onto the ranch and let any excess flow accross the highway and directly down to the river. When the State of California built Hwy 96, the portion of water that flowed toward the highway during times of less use was a concern to them, so they paid for and built us two drop inlets and pipes at different points in the ranch. This way, when we flooded our pastures and had excess water, the water would flow under the highway and not damage the road and cause a sink. Those drop inlets are still there and still belong to the ranch for use in carrying excess irrigation water under the highway. All of the water we diverted from Stanshaw Creek ended up back in the river one way or the other. It either percolated through the ground and seeped into the ground water running to the river, or it traveled in a ditch or culvert to the river.
7. During the rainy winter seasons, there was an excess of water running in Stanshaw creek and we only caught a portion of the water available. During the summer months, we were catching most all of the water flowing in Stanshaw creek. Our usage changed on a daily basis according to our farming needs.
8. The dimensions of the ditch remained the same from the day we purchased the ditch to the day we sold the ranch and ditch. When we first moved to the ranch, the upper stretches of the ditch were still lined with the original redwood planking that the Chinese used to

catch Stanshaw Creek. They were pretty rotten at that time and the big floods that happened in 64-65 caused a big slide that took out what was left of the flume lining. We had to all go up and move dirt by wheel barrow and shovel to restore the upper section of the ditch. Trees would fall in the storms and either land in the ditch or the root balls would pull out the berm. It was a lot of hard work in bad conditions for my family to keep that ditch in good repair. In order to maintain the ditch in it's proper carrying capacity we also needed to excavate the gravel and silt periodically as it filled in, and maintain the flume. The flume often needed repair as the wood deteriorated, as piers settled, or if a tree dropped a branch onto it. We had to entirely replace the flume twice during our ownership.

9. The ditch dimensions had not been altered since it's original construction in 1867 by Chinese immigrants hired by the Stanshaw mining company. The ditch varies in size according to the gradient of flow at various points and ranges from two and a half feet to five feet wide and from two and a half feet to one and a half foot in depth. I have examined the ditch in 1997 with Doug Cole and found it to be the same in size and location as when we owned it. You can also show the size and capacity of the original ditch by looking at the abandoned ditch runs that havent been used for 140 years. They are the same size as the ditch run that was maintained for the ranch.
10. The Forest Service began logging and road building in the Stanshaw drainage during 1967. Since Stanshaw creek has a high capacity to carry sediment, a lot of the gravel put into the river by those activities began to fill our ditch. We had a lot of trouble keeping the ditch from silting and graveling in and we installed a settling tank at the upper end to catch some of the debris. We wrote complaints to the Forest Service and our Congressman and after a long 5 year battle, the Forest service paid us for the damages incurred to our ditch. We still have some of the letters written during the settling of this claim, although they still would not admit guilt while handing me the check. It was a federal level act signed by President Taft in 1911 that gave us our permanent water rights, and the federal government still recognized those rights when they gave us a \$15,000 check for damages to our ditch in 1972.
11. During our ownership of the ranch we changed some of our uses of

the water. At first, all the houses and cabins were rented to California State Road workers who were building the highway and were maintaining a large construction yard on the ranch. We had a large community on the ranch that was complete with a school teacher residence. But the steelhead fishermen were needing places to stay with their R.V.s and campers and we got a lot of traffic with the improved highway and the good fishing. Since McMurtry had all the houses and cabins rented to the state workers as permanent residents, we built R.V. sites and 10 additional new cabins on the ranch and began to serve the fishermen that would come to catch the steelhead and salmon.

12. We also put in a pelton wheel generator that gave us electricity. Our first penstock was a 4" line and it barely gave us enough power to keep the lights and refrigerators on. Later we increased to a 14" pipe and a larger pelton wheel that is still in use today. As my boys grew up we all worked that ditch at any hour of the night and in the middle of storms to keep it running. Jerry Hayes got so he could run up the hill to the ditch in about 5 minutes if we lost power. I could sleep with one eye open and watch the lights to know if the ditch was still running. During this time, we began to rely more on the rentals and the fishermen for business, but we still used every drop the ditch could carry, and we often needed more than was available in Stanshaw Creek to catch during summer season.
13. When California began to do a long range water plan to determine how much water could be shipped South, the state began an inventory of all the existing water rights and users in the North. They had to determine how much water had to be left in the North to meet those needs. In the fall of about 1958, a state employee came to our ranch once for this inventory. When we walked the ditch, he approximated the volume of water in the ditch at that time by dropping a leaf in the ditch and timing it as it flowed down the flume. He promised me that that measurement would never be used as a tool against me. It bugs me that somebody now has the document with this man's water flow measurement, and is now trying to use it to show reduced flows then. He came once and took one measurement during a season of lower flow, and he did his work by dropping a leaf!

14. There are many others besides me who have worked on the ditch to help us and the other owners keep it running. Ernie Spinks was around then. He is still living and has a house across from Al's garage. He can verify the continued use and size of the ditch. My old logging partner Hank Lambert used to help me keep the ditch. He still lives in Orleans and he can tell you about it's size and use. And of course, my boys can tell you anything you want to know about the ditch and how we used the water.

15. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 7th day of July, 1998, at Somes Bar, California.

Signed:  declarant.

27449

~~27449~~

6-3-98

INSPECTION PHOTOS

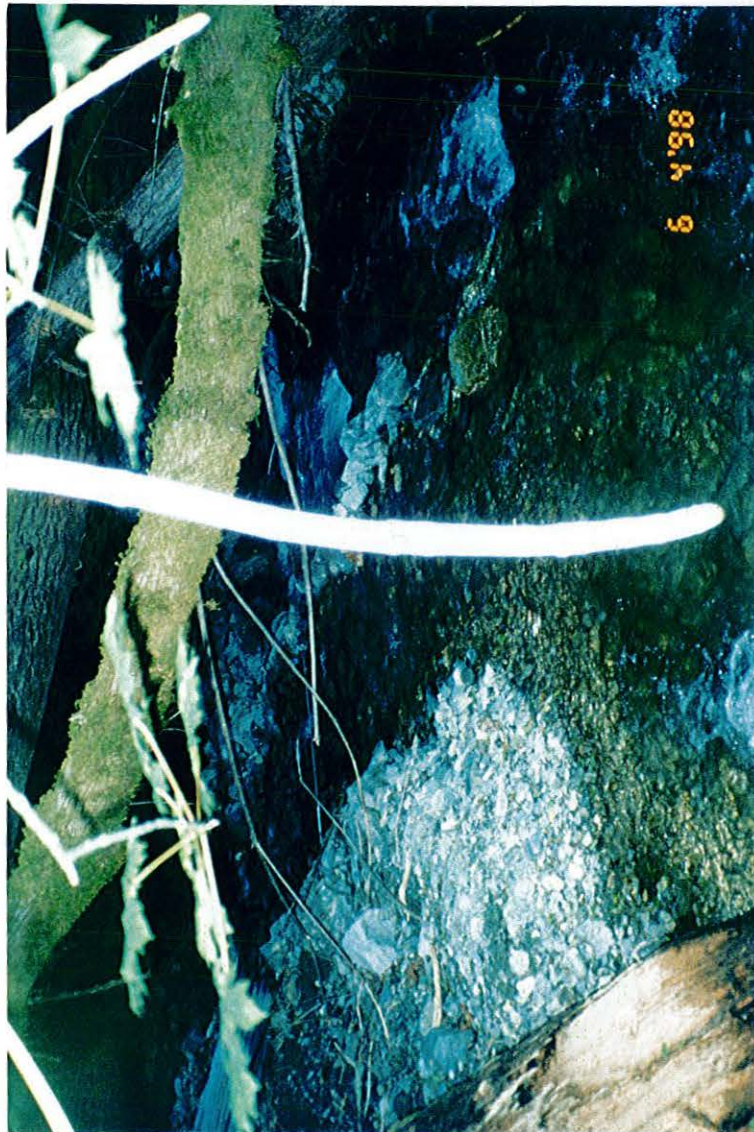


Photo 1

Stanshaw Creek POD. Diversion ditch takes off to the left, Stanshaw Creek flows to the right. Headworks is constantly maintained and repaired with cobbles and gravel.



Photo 2

Stanshaw Creek POD Closeup. Ditch headworks shown with GS Rod (4'10") lain across ditch. Water is approximately ½ foot in depth.



Photo 3

Stanshaw Creek POD showing ditch contouring the hillside to the left and Stanshaw Creek dropping down to the Klamath.



Photo 4

Stanshaw Creek POD looking upstream at diversion point.



Photo 5

Diversion ditch near POD.



Photo 6

Diversion ditch near sediment trap.



Photo 7

Diversion Ditch and flora.



Photo 8

Diversion ditch where it crosses a slide. Note the structure to the right of the photo which appear to have supported a flume at one time.



Photo 9

GS rod marks location of flow measurement. This photo is downstream of the slide, looking upstream.

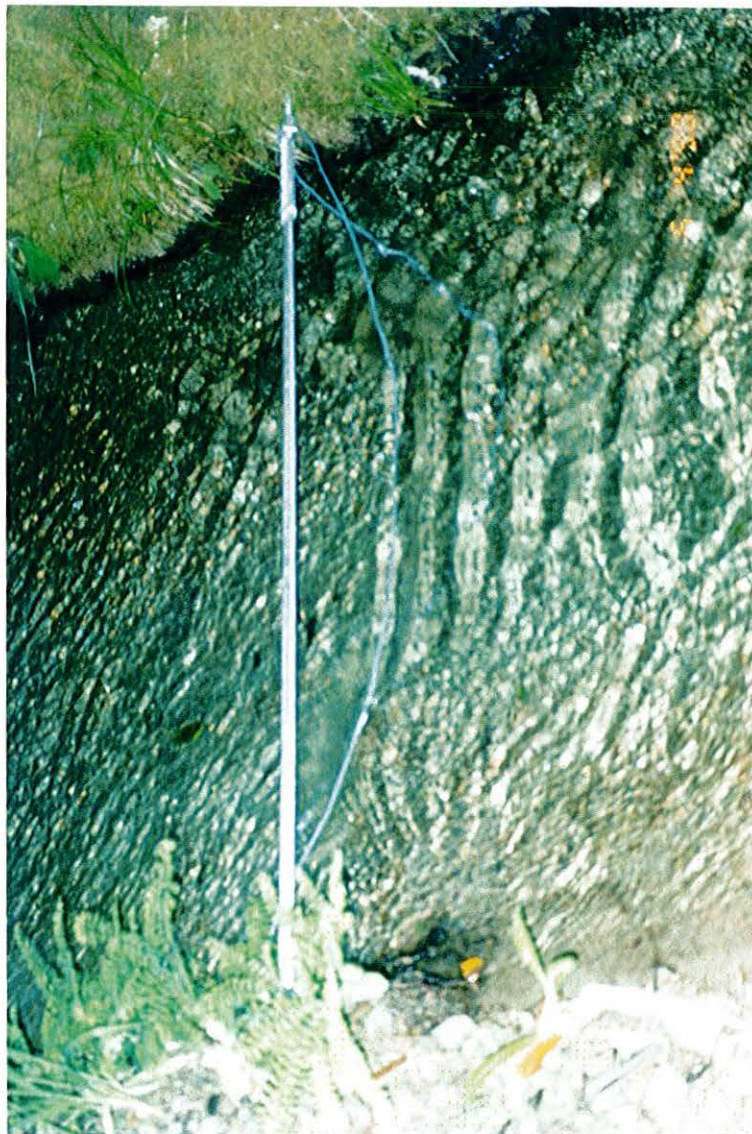




Photo 10

Location of flow measurement.

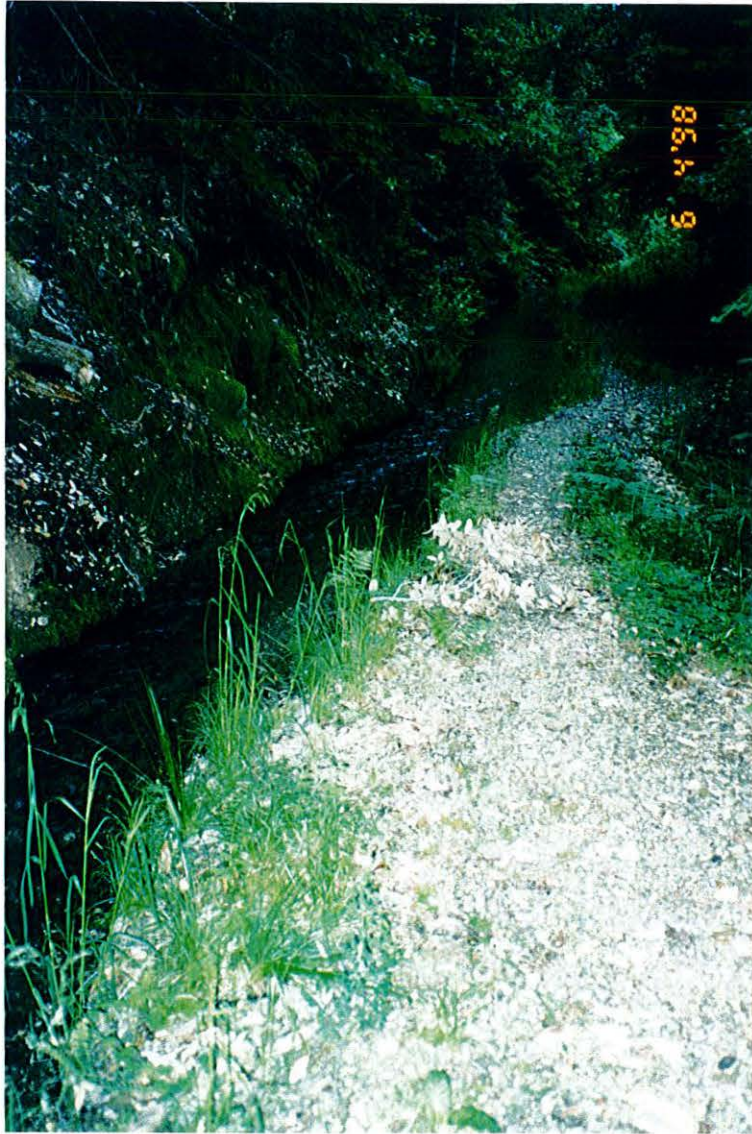


Photo 11

Diversion ditch.

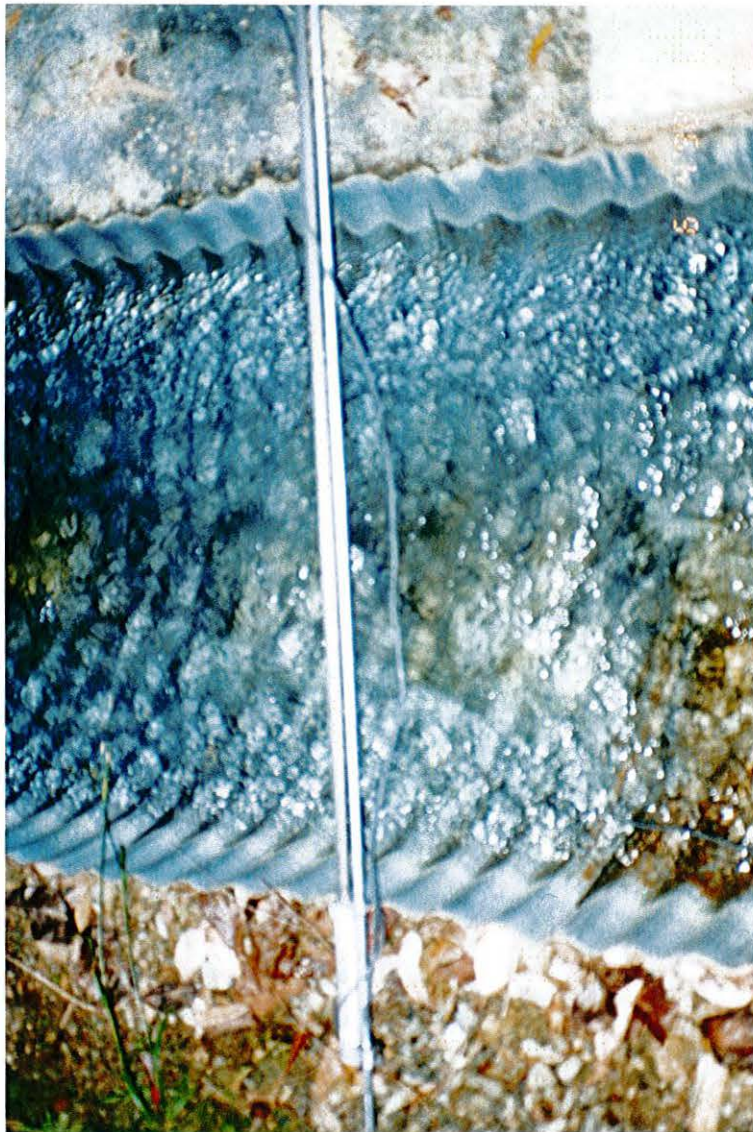


Photo 12

Corrugated metal flume. 2 ½ feet wide at top
flowing 0.75 feet deep.



Photo 13

Diversion ditch and flora.



Photo 14

Diversion ditch and flora



Photo 15

Terminus of ditch. All water is diverted into the flume shown, which flows into a tank and then the penstock.



Photo 16

Photo taken from the water tank looking up the flume at the terminus of the ditch. Debris screen is visible in foreground.



Photo 17

Photo is taken from terminus of the ditch looking down the flume at the tank. Notice the penstock emerging from the right side of the tank. The water in the flume disappears through the leaf screen into the tank.



Photo 18

Penstock is taking all the water.



Photo 19

Tank is full and no excess water is bypassing the penstock.

Ken Harless
4876 Hilo St.
Fremont, Ca. 94538
510-656-6869

I (Ken Harless) lived at what is now Marble Mountain Ranch from 1947 to 1948. At that time the ranch was owned by Mary McMurtry.

I was responsible for the maintenance of the ditch carrying water from Stanshaw creek to the ranch. At that time the water from the ditch was used for domestic consumption and agricultural purposes (raising hay, fetch, gardening, etc.)

To the best of my memory, I understand that the ditch had been in continual use for the same purposes since it's original construction by the Stanshaw Mining Company in the late 1880s.

Signed: *Kenneth J. Harless*

Date: *5/21/97*

Ken Harless

Witnessed by: *Doug Cole 5/21/97*
Heidi A. Cox 5/21/97

merica
25 PM '97
5030

RECORDED & INDEXED
USFS

DATE
SISKIYOU COUNTY, CALIF.

May 5 1 21 PM '97

RECORDING REQUESTED BY:
Klamath National Forest
1312 Fairlane Road
Yreka, CA 96097

AND WHEN RECORDED MAIL TO:
Harry Frey
Klamath National Forest
1312 Fairlane Road
Yreka, CA 96097

97005031

\$11.00

REAL PROPERTY TRANSFER TAX \$ 1.10

USFS by: *Shirley E. Marante*

DECLARED:
BY AND FOR: U. S. Forest Service

UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE

QUITCLAIM DEED

THIS QUITCLAIM DEED, made this 28 day of April, 1997, between the UNITED STATES OF AMERICA, acting by and through the Forest Service, Department of Agriculture, hereinafter called Grantor, and DOUGLAS T. COLE AND HEIDI ANN COLE, husband and wife, as Joint Tenants, hereinafter called Grantee.

WITNESSETH: The Grantor is authorized to convey certain National Forest System lands by the Act of January 12, 1983 [96 Stat. 2535; 16 U.S.C. 521c].

NOW THEREFORE, the Grantor, for and in consideration of the sum of SEVEN HUNDRED FORTY ONE AND NO/100 DOLLARS [\$741.00], the receipt whereof is hereby duly acknowledged, does hereby remise, release, and quitclaim unto the Grantee, its successors and assigns, all its right, title, interest, and claim, in and to the real property situated in the County of Siskiyou, State of California, described as follows:

A parcel of land lying in Section 33, Township 13 North, Range 6 East, Humboldt Meridian, Siskiyou County, California, described as follows:

Beginning at AP 8 of Tract 48, on the line between Tracts 48 and 49, thence S 0° 13' E, 120.00 feet along the west line of Tract 49 to a witness point, which is a standard USDA Forest Service aluminum post with an aluminum cap; thence continuing S 0° 13' E, 13.38 feet; thence leaving the west line of Tract 49, N 70° 25' 29" W, 328.87 feet along the right-of-way line of California State Route 96, to a tangent curve, concave to the southwest, having a radius of 5066.00 feet and a central angle of 0° 47' 55"; thence along said curve and the right-of-way line, 70.61 feet to a point on line 7-8 of Tract 48, which is West along said line 376.05 feet from AP 8; thence East along said line 7-8, 376.05 feet to the Point of Beginning.

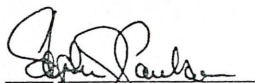
97005031

Containing 0.57 acres, more or less.

This quitclaim deed is subject to all valid and existing rights and interests of whatsoever nature.

IN WITNESS WHEREOF, the Grantor, by its duly authorized representative has executed this quitclaim deed pursuant to the delegation of authority promulgated in Title 7 CFR 2.42 and 49 F.R. 34283, August 29, 1984.

UNITED STATES OF AMERICA

By: 
STEPHEN J. PAULSON
Director, Natural Resource Management
Pacific Southwest Region
Forest Service
United States Department of Agriculture

State of _
County of _

On Apr
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his authoriz
which the p
WITNESS r
Signature

SISKIYOU COUNTY ABSTRACT COMPANY

YREKA, CALIFORNIA
Title Insurance - Escrows

9418 GRANT DEED (JOINT TENANCY)

For value received MARY McMURTRY, a widow

GRANT S. to RUE HAYES and AGNES M. HAYES, his wife,

as JOINT TENANTS, with the right of survivorship, all that real property situate in the
County of Siskiyou, State of California, described as follows:

The Southeast quarter of the Northwest quarter of the Southwest quarter;
the Southwest quarter of the Northeast quarter of the Southwest quarter;
the North half of the Northwest quarter of the Southeast quarter of the
Southwest quarter; the Northeast quarter of the Southeast quarter of the
Southwest quarter; the Northeast quarter of the Southeast quarter of
the Southeast quarter of the Southwest quarter; the Northwest quarter of
the Northwest quarter of the Southwest quarter of the Southeast quarter;
the South half of the Northwest quarter of the Southwest quarter of the
Southeast quarter and the Southwest quarter of the Southwest quarter of
the Southeast quarter of Section Thirty-three (33) Township 13 North, Range
6 East, Humboldt Base and Meridian.

Together with all water rights, and water ditches thereunto belonging or
in anywise appertaining or used in connection with the above described
property.

WITNESS my hand this third day of June, 1955.

FOR RECORDER'S USE ONLY
"RECORDED AT REQUEST
OF.
SISKIYOU CO. ABSTRACT CO.

1955 JUN 31 AM 8:39
OFFICIAL RECORDS
VOL. 352 PAGE 253
SISKIYOU COUNTY, CALIF.
ERNEST T. JOHNSON
RECORDED FEE \$ 2.00 paid

STATE OF CALIFORNIA
County of Siskiyou ss.
On June 3, 1955
before me, Margaret Wintering
a Notary Public, in and for said County,
personally appeared Mary McMurry
known to me to be the
person whose name is subscribed to the within instrument,
and acknowledged to me that she executed the same.
Margaret Wintering
Notary Public
My commission expires August 27, 1958.

GRANT DEED (INDIVIDUAL) (JOINT TENANCY)

Recording requested by:
SISKIYOU COUNTY TITLE CO.
AND WHEN RECORDED MAIL THIS DEED AND
UNLESS OTHERWISE SHOWN BELOW, MAIL
TAX STATEMENT TO:

Name: Mr. & Mrs. Norman Cole

Mailing P.O. Box 128
Address:

City/State/Zip Knights Landing, CA
95645

Order No.

OFFICIAL RECORDS
SISKIYOU COUNTY, CALIF.

JAN 4 10 37 AM '95
95000071

David W. Ellinger

Fee \$14.00 Pd.

SPACE ABOVE THIS LINE FOR RECORDER'S USE

CORRECTORY Grant Deed

THE UNDERSIGNED GRANTOR(S) DECLARE(S)

DOCUMENTARY TRANSFER TAX IS \$ NONE

- ☐ computed on full value of property conveyed, or
☐ computed on full value less value of liens or encumbrances remaining at
time of sale.
☐ unincorporated area ☐ city of , AND

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

ROBERT E. YOUNG and MARY J. YOUNG, husband and wife

hereby GRANT(S) to NORMAN D. COLE and CAROLYN T. COLE, husband and wife as
Joint Tenants

the following described real property in the
County of Siskiyou , State of California:
an undivided 86.67% interest in and to the following:
SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

TOGETHER WITH ALL WATER RIGHTS APPURTENANT THERETO.
THIS DEED IS BEING RECORDED TO INCLUDE WATER RIGHTS.

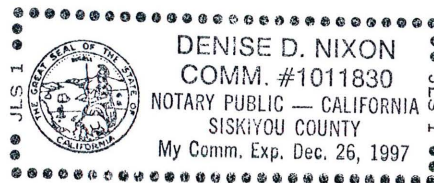
Dated December 9, 19 94

STATE OF CALIFORNIA)
COUNTY OF Siskiyou)
On 12/29/94 before me, the undersigned, a
Notary Public in and for said State, personally appeared

ROBERT E. YOUNG and MARY J. YOUNG
personally, known to me (or ~~proved to me on the basis of~~
~~satisfactory evidence~~) to be the person(s) whose name(s)
is/are subscribed to the within instrument and acknowledged
to me that he/she/they executed the same in his/her/their
authorized capacity(ies), and that by his/her/their signature(s)
on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

Signature Denise D. Nixon
NOTARY PUBLIC IN AND FOR SAID STATE

Robert E. Young
Mary J. Young
Mary J. Young



MAIL TAX STATEMENTS AS DIRECTED ABOVE.

95000071

EXHIBIT "A"

ALL THAT REAL PROPERTY SITUATE IN THE COUNTY OF SISKIYOU, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL I: - An undivided 86.67% interest in and to the following:

The Southeast 1/4 of the Northwest 1/4 of the Southwest 1/4, the Southwest 1/4 of the Northeast 1/4 of the Southwest 1/4, the North 1/2 of the Northwest 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northwest 1/4 of the Southeast 1/4 of the Southwest 1/4 of the Southwest 1/4, the South 1/2 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, and the Southwest 1/4 of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Base and Meridian.

EXCEPTING THEREFROM: All that portion of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian described as:

Beginning at the South 1/4 corner of said section; thence East 330 feet to the True Point of Beginning; thence East 330 feet along the South line of said Section to the East boundary of the LUE HAYES property; thence North 330 feet along the East line of said Hayes property; thence West 330 feet; thence South 330 feet to the True Point of Beginning.

FURTHER EXCEPTING those portions of the land in the West 1/2 of the Southwest 1/4 of the Southeast 1/4, and in the Southwest 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian, as conveyed to LUE HAYES et ux, by deed recorded July 1, 1955, in Book 352 at page 253, Official Records of Siskiyou County, lying Southerly of the line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, Humboldt Meridian, and Sections 33 and 34, Township 13 North, Range 6 East, Humboldt Meridian, bears South 88° 51' 44" East, 1769.19 feet, said point also being Engineer's Station "A" 479+77.35 P.O.C., as established from the Department of Public Works 1964 Survey between Soges Bar and Ti Creek Road 01-Sis-96; thence from a tangent which bears North 47° 20' 27" West, along a curve to the left, having a radius of 1000.00 feet, through an angle of 07° 37' 11", a distance of 132.99 feet to Engineer's Station "A" 481+10.34 E.C., as established from said survey; thence North 35° 02' 22" East, 100.00 feet to a point hereinbelow referred to as Point "B", thence North, 54° 57' 38" West 180 feet more or less to the East line of the West 1/2 of the Southwest 1/4 of the Southeast 1/4 of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence, continuing North 54° 57' 38" West, 610 feet to a point for a total distance of 790.42 feet from said Point "B"; thence South 35° 02' 22" West, 34.00 feet; thence, from a tangent which bears North 54° 57' 38" West, along a curve to the left, having a radius of 1266.00 feet, through an angle of 14° 29' 35", a distance of 320.24 feet to a point hereinbelow referred to as Point "C"; thence North 69° 27' 13" West 520 feet, more or less, to the West line of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33; thence continuing North 69° 27' 13" West, 290 feet, more or less to the South line of the North

(Continued)

95000071

1/2 of the North 1/2 of the Southeast 1/4 of the Southwest 1/4 of Section 33; thence continuing North $69^{\circ} 27' 13''$ West, 47 feet to a point, hereinbelow referred to as Point "D" for a total distance of 857.37 feet from said Point "C"; thence from a tangent which bears North $69^{\circ} 27' 13''$ West along a curve to the left, having a radius of 5066.00 feet a distance of 355 feet, more or less to the West line of the Southeast 1/4 of the Southwest 1/4 of said Section 33; thence continuing along last said curve, a distance of 335 feet to a point, hereinbelow referred to as Point "E", through a total angle of $07^{\circ} 48' 15''$, and a total distance of 690.03 feet from said Point "D"; thence North $41^{\circ} 41' 14''$ West, 178 feet, more or less, to the South line of the Northwest 1/4 of the Southwest 1/4 of said Section 33; thence continuing North $41^{\circ} 41' 14''$ West 138 feet to a point for a total distance of 316.31 feet from said Point "E"; thence North $76^{\circ} 12' 04''$ West, 128 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the Northwest 1/4 of the Southwest 1/4 of said Section 33.

EXCEPTING THEREFROM that portion thereof lying Southerly of the line described as follows:

Commencing at said Engineer's Station "A" 481+10.34 E.C., hereinabove described; thence North $54^{\circ} 57' 38''$ West, 159.66 feet; thence South $35^{\circ} 02' 22''$ West, 225.00 feet to a point hereinbelow referred to as Point "F"; thence North $11^{\circ} 17' 26''$ East, 17 feet, more or less, to the South line of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence continuing North $11^{\circ} 17' 26''$ East, 120 feet to a point for a total distance of 136.57 feet from said Point "F"; thence North $54^{\circ} 57' 38''$ West, 575.76 feet; thence from a tangent which bears North $54^{\circ} 57' 38''$ West, along a curve to the left, having a radius of 1100.00 feet, through an angle of $14^{\circ} 29' 35''$, a distance of 278.25 feet; thence North $69^{\circ} 27' 13''$ West, 115 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33.

ALSO EXCEPTING THEREFROM that portion thereof conveyed to EDWIN T. McMANNIS, et ux, by Deed recorded January 19, 1965 in Book 512 at page 457, Official Records of Siskiyou County.

The bearings used in the above description are on the California Co-ordinate System Zone 1, and the distances are surface.

PARCEL II:

That portion of the lands in the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, H.M., conveyed to the State of California by deed recorded December 15, 1965 in Book 524, Official Records, page 98, Siskiyou County Records, lying Northeasterly of a line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, H.M., and Sections 33 and 34, Township 13 North, Range 6 East, H.M., bears South $88^{\circ} 51' 44''$ East, 1769.19 feet, said point also being Engineer's Station "A" 479+77.35 P.O.C., as established from the Department of Public Works 1964 Survey between Somes Bar and Ti Creek, Road 01-Sis-96; thence from a tangent that bears North $47^{\circ} 20' 27''$ West, along a curve to the left with a radius of 1000.00 feet, through an angle of $07^{\circ} 37' 11''$, for a distance of 132.99 feet; thence North $35^{\circ} 02' 22''$ East, 100.00 feet; thence North $54^{\circ} 57' 38''$ West, 182 feet, more or less to the Point of Intersection with the East line of said land, last said

(Continued)

point being the TRUE POINT OF BEGINNING of this parcel thence continuing North 54° 57' 38" West, 117 feet, more or less to the Point of Termination of this line on the North line of said lands.

The bearings used in the above description are on the California Co-ordin

EXHIBIT C

RECORDED AT REQUEST OF
SISKIYOU COUNTY TITLE CO. 1993

Recording requested by:

SISKIYOU COUNTY TITLE CO.
AND WHEN RECORDED MAIL THIS DEED AND
UNLESS OTHERWISE SHOWN BELOW, MAIL
TAX STATEMENT TO:

Name: Mr. and Mrs. Doug Cole

Mailing Address: 92520 Hwy. 96

City/State/Zip: Somes Bar, CA
95568

Order No. 60696-dn

OFFICIAL RECORDS
SISKIYOU COUNTY, CALIF.

DEC 30 . 3 00 PM '94

94018121

David H. Ellinger

\$14.00

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Grant Deed

THE UNDERSIGNED GRANTOR(S) DECLARE(S)

DOCUMENTARY TRANSFER TAX IS \$ 88.00

☒ computed on full value of property conveyed, or

☐ computed on full value less value of liens or encumbrances remaining at
time of sale.

☐ unincorporated area

☐ city of

, AND

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

ROBERT E. YOUNG and MARY J. YOUNG, husband and wife

hereby GRANT(S) to DOUGLAS T. COLE and HEIDI ANN COLE, husband and wife as
Joint Tenants

the following described real property in the
County of Siskiyou, State of California:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.
TOGETHER WITH ALL WATER RIGHTS APPURTENANT THERETO.

Dated December 15, 19 94

STATE OF CALIFORNIA

COUNTY OF SISKIYOU

On 12/29/94 before me, the undersigned, a

Notary Public in and for said State, personally appeared

Robert E. Young and Mary J. Young

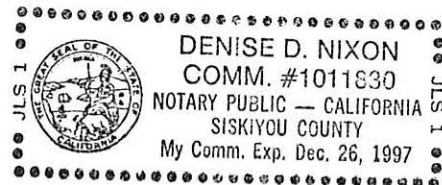
personally, known to me (or proved to me on the basis of
satisfactory evidence) to be the person(s) whose name(s)
is/are subscribed to the within instrument and acknowledged
to me that he/she/they executed the same in his/her/their
authorized capacity(ies), and that by his/her/their signature(s)
on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature Denise D. Nixon
NOTARY PUBLIC IN AND FOR SAID STATE

MAIL TAX STATEMENTS AS DIRECTED ABOVE.

Robert E. Young
Robert E. Young
Mary J. Young
Mary J. Young



005600

EXHIBIT "A"

ALL THAT REAL PROPERTY SITUATE IN THE COUNTY OF SISKIYOU, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL I:

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EXCEPTING THEREFROM: All that portion of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian described as:

Beginning at the South 1/4 corner of said section; thence East 330 feet to the True Point of Beginning; thence East 330 feet along the South line of said Section to the East boundary of the LUE HAYES property; thence North 330 feet along the East line of said Hayes property; thence West 330 feet; thence South 330 feet to the True Point of Beginning.

FURTHER EXCEPTING those portions of the land in the West 1/2 of the Southwest 1/4 of the Southeast 1/4, and in the Southwest 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian, as conveyed to LUE HAYES et ux, by deed recorded July 1, 1955, in Book 352 at page 253, Official Records of Siskiyou County, lying Southerly of the line described as follows:

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(Continued)

94018121

1/2 of the North 1/2 of the Southeast 1/4 of the Southwest 1/4 of Section 33; thence continuing North $69^{\circ} 27' 13''$ West, 47 feet to a point, hereinbelow referred to as Point "D" for a total distance of 857.37 feet from said Point "C"; thence from a tangent which bears North $69^{\circ} 27' 13''$ West along a curve to the left, having a radius of 5066.00 feet a distance of 355 feet, more or less to the West line of the Southeast 1/4 of the Southwest 1/4 of said Section 33; thence continuing along last said curve, a distance of 335 feet to a point, hereinbelow referred to as Point "E", through a total angle of $07^{\circ} 48' 15''$, and a total distance of 690.03 feet from said Point "D"; thence North $41^{\circ} 41' 14''$ West, 178 feet, more or less, to the South line of the Northwest 1/4 of the Southwest 1/4 of said Section 33; thence continuing North $41^{\circ} 41' 14''$ West 138 feet to a point for a total distance of 316.31 feet from said Point "E"; thence North $76^{\circ} 12' 04''$ West, 128 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the Northwest 1/4 of the Southwest 1/4 of said Section 33.

EXCEPTING THEREFROM that portion thereof lying Southerly of the line described as follows:

Commencing at said Engineer's Station "A" 481+10.34 E.C., hereinabove described; thence North $54^{\circ} 57' 38''$ West, 159.66 feet; thence South $35^{\circ} 02' 22''$ West, 225.00 feet to a point hereinbelow referred to as Point "F"; thence North $11^{\circ} 17' 26''$ East, 17 feet, more or less, to the South line of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence continuing North $11^{\circ} 17' 26''$ East, 120 feet to a point for a total distance of 136.57 feet from said Point "F"; thence North $54^{\circ} 57' 38''$ West, 575.76 feet; thence from a tangent which bears North $54^{\circ} 57' 38''$ West, along a curve to the left, having a radius of 1100.00 feet, through an angle of $14^{\circ} 29' 35''$, a distance of 278.25 feet; thence North $69^{\circ} 27' 13''$ West, 115 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33.

ALSO EXCEPTING THEREFROM that portion thereof conveyed to EDWIN T. McMANIS, et ux, by Deed recorded January 19, 1965 in Book 512 at page 457, Official Records of Siskiyou County.

The bearings used in the above description are on the California Co-ordinate System Zone 1, and the distances are surface.

PARCEL II:

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Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, H.M., and Sections 33 and 34, Township 13 North, Range 6 East, H.M., bears South $88^{\circ} 51' 44''$ East, 1769.19 feet, said point also being Engineer's Station "A" 479+77.35 P.O.C., as established from the Department of Public Works 1964 Survey between Soyes Bar and Ti Creek, Road 01-Sis-96; thence from a tangent that bears North $47^{\circ} 20' 27''$ West, along a curve to the left with a radius of 1000.00 feet, through an angle of $07^{\circ} 37' 11''$, for a distance of 132.99 feet; thence North $35^{\circ} 02' 22''$ East, 100.00 feet; thence North $54^{\circ} 57' 38''$ West, 182 feet, more or less to the Point of Intersection with the East line of said land, last said

(Continued)

point being the TRUE POINT OF BEGINNING of this parcel thence continuing North 54° 57' 38" West, 117 feet, more or less to the Point of Termination of this line on the North line of said lands.

The bearings used in the above description are on the California Co-ordin

026-290-190	OWNER	085-00	3	ADDRESS	0002-0	DATE	TRANS. NO.
1	CALIFORNIA, STATE OF, (DIVISION OF HIGHWAYS)					12/15/65	521-98

PARCEL NO.	TAX AREA CODE	ACRES		
026-290-270	085-00	0		
OWNER	DOC. DATE	REC. DATE	TYPE OF DOC.	VOL. - PG.
HAYES, LUE & AGNES M.	05-23-69	06-20-69	DIR DEED	0577-529
	3/29/73	3/29/73	ABND UNSTD	684-809
YOUNG, ROBERT E & MARY J	JT 8/11/77	8/29/77	GD	791-616
	11/29/78	1/26/79	GD	845-706
COLE, NORMAN D. & CAROLYN T. etal 86.67%	86.67% Ten. in com.	9/21/94	10/14/94	GD 9401-4896

OWNER	ADDRESS	DATE	TRANS. NO.
026-290-110			
HAYES, LUE & AGNES M.	SOMESBAR, CALIF. 95568	6/31/55	352-253

PARCEL NO.	TAX AREA CODE	ACRES		
026-290-200	085-00	0042.6		
OWNER	DOC. DATE	REC. DATE	TYPE OF DOC.	VOL. - PG.
HAYES, LUE & AGNES M		3/29/73		684-809
YOUNG, ROBERT E & MARY J		6/31/55		352-253
YOUNG, ROBERT E & MARY J	8/11/77	8/29/77	GD	791-616
	11/29/78	1/26/79	GD	845-706
COLE, NORMAN D. & CAROLYN T. etal 86.67%	9/21/94	10/14/94	GD	9401-4896

[illegible]

Siskiyou County Title Co.



Title Insurance Escrows
P.O. Box 189, Yreka, California 96097
916-842-1211 FAX NO. 916-842-3335

Deed # 9401-4896

WR-193

04/04 # 9401-8121

45

9500 0070

71

corrective deeds

842-8065 co: recorder
assessor

SISKIYOU COUNTY TITLE COMPANY
206 FOURTH STREET, P.O. BOX 189
YREKA CA 96097
(916) 842-1211

DATE: SEPTEMBER 26, 1994
ESCROW NO: 60334-B
ORDER NO: 60334-B
DENISE D. NIXON
ESCROW OFFICER

BUYER'S ESCROW INSTRUCTIONS

TO: SISKIYOU COUNTY TITLE COMPANY
I/We hand you herewith:

(X) Grant Deed from ROBERT E. YOUNG and MARY J. YOUNG in favor of NORMAN D. COLE and CAROLYN T. COLE, as to an undivided 86.67% interest, covering property located at Assessor's Parcel Nos. 26-290-200, 26-290-240 and 26-290-270, SISKIYOU COUNTY, CA All of which you may deliver and/or record when you obtain for my/our account a Deed to the real property described in First American Title Insurance Companies preliminary report no. 26745 dated 08/08/94, a copy of which I/we have read and hereby approve. And when they can issue their CLTA Form Title Insurance Policy (and ALTA Policy if required by Buyer's Lender) with liability not to exceed the purchase price, as indicated on the attached estimated settlement statement, a portion of which pertains to the real property described as: 842 W. EL DORADO DRIVE, WOODLAND, CALIFORNIA,

and showing title vested in the undersigned in the following manner:

ROBERT E. YOUNG AND MARY J. YOUNG, HUSBAND AND WIFE AS

PLEASE CHOOSE ONE: () Joint Tenants, () Tenants in Commn, () Other _____

SUBJECT TO:

1. Printed exceptions and conditions and stipulations in said policy.
2. General and Special taxes for fiscal year 1994-95 A LIEN NOT YET DUE OR PAYABLE.
3. Assessments and/or bonds not delinquent.
4. Exceptions numbered: 1 THROUGH 4
as shown in the Preliminary Title Report referenced above, a copy of which has been read and hereby approved, and:
5. 1st Deed of Trust in favor of GERALD A. CORSI, D.D.S., MICHAEL F. HOEY, D.D.S. AND JAMES K. PEARSON, D.D.S., Trustees

Upon consummation of this escrow, you are authorized to disburse in accordance with the attached statement. You are to prorate YOLO COUNTY TAXES as of AUGUST 27, 1994 on the basis of a 30 day month, (Taxes based on latest available figures). You are authorized to adjust all estimated amounts designated "EST" herein.

Buyers and Sellers herein are aware that there are to be no pro-rations through escrow other than those indicated above.

Buyers and Sellers herein are aware that insurance is to be handled outside of escrow and escrow holder is not to be concerned with, nor held liable for same.

THE BUYERS HEREIN ARE AWARE AND HEREBY ACKNOWLEDGE AND APPROVE OF THE CONCURRENT TRANSACTION BETWEEN NORMAN D. COLE AND CAROLYN T. COLE AND ASSET PRESERVATION IN ORDER TO CREATE A TAX DEFERRED 1031 EXCHANGE ON THE FOLLOWING DESCRIBED PROPERTY: 842 W. EL DORADO DRIVE, WOODLAND, CA (Escrow No. 60334-B-E-I). SISKIYOU COUNTY TITLE CO. IS NOT TO BE CONCERNED, NOR HELD LIABLE OR RESPONSIBLE FOR ANY MATTERS CONCERNING SAID EXCHANGE OTHER THAN TO FOLLOW INSTRUCTIONS CONTAINED HEREIN.

The closing of the sale escrow is subject to the concurrent closing of the exchange escrow recording concurrently herewith (Escrow No. 60334-B-E-I).

See Additional Instructions attached hereto and made a part hereof.

SEE IMPORTANT FUNDING INFORMATION ATTACHED HERETO AND MADE A PART HEREOF.
BUYER'S ESTIMATED STATEMENT OF CHARGES ATTACHED HERETO AND MADE A PART HEREOF.

THESE INSTRUCTIONS ARE EFFECTIVE UNTIL 10/03/94 AND THEREAFTER UNLESS REVOKED BY WRITTEN DEMAND AND AUTHORIZATION SATISFACTORY TO YOU. AT CLOSE OF ESCROW YOU ARE TO MAIL ALL DOCUMENTS, STATEMENTS, CHECKS AND OTHER MATERIAL TO WHICH THE UNDERSIGNED IS/ARE ENTITLED TO THE ADDRESS SET FORTH HEREIN. INCORPORATED HEREIN AND MADE A PART HEREOF BY REFERENCE ARE THE "GENERAL PROVISIONS" AND ANY ADDITIONAL INSTRUCTIONS ATTACHED HERETO.

Robert E. Young

Mary J. Young

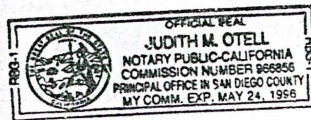
94014896

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

No 5907

State of CaliforniaCounty of San DiegoOn Sept. 9, 1994 before me, Judith M. Otell, Notary Publicpersonally appeared Robert E. Young and Mary J. Young

☐ personally known to me - OR - ☒ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) ~~are~~ are subscribed to the within instrument and acknowledged to me that ~~he~~ they executed the same in ~~his~~ their authorized capacity(ies), and that by ~~his~~ their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Judith M. Otell
SIGNATURE OF NOTARY

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

CAPACITY CLAIMED BY SIGNER

- ☒ INDIVIDUAL
☐ CORPORATE OFFICER

TITLE(S)

- ☐ PARTNER(S) ☐ LIMITED
☐ GENERAL

- ☐ ATTORNEY-IN-FACT
☐ TRUSTEE(S)
☐ GUARDIAN/CONSERVATOR
☐ OTHER: _____

SIGNER IS REPRESENTING:
NAME OF PERSON(S) OR ENTITY(IES)

DESCRIPTION OF ATTACHED DOCUMENT

Grant Deed
TITLE OR TYPE OF DOCUMENT

1 page with 2 pages exhibits
NUMBER OF PAGES

DATE OF DOCUMENT

SIGNER(S) OTHER THAN NAMED ABOVE

Recorded in the request of

Return of and mail tax statements to
Mr. and Mrs. Robert E. Young
1237 Greenbrook Drive
Danville, California 94526

RECORDED BY
SISKIYOU COUNTY TITLE CO.

1100 29 3 1977

Vol. 791, Page 616

RECEIVED FEE \$6.00 PAID

41025

4094

SPACE ABOVE THIS LINE FOR RECORDER'S USE

GRANT DEED (Joint Tenancy)

For value received

LUE HAYES and AGNES M. HAYES, his wife

GRANT to

ROBERT E. YOUNG and MARY J. YOUNG, his wife

as JOINT TENANTS all that real property situate in the

County of Siskiyou

, State of California, described as follows:

PER EXHIBIT "A" ATTACHED HEREIN AND MADE A PART HEREOF

DOCUMENTARY TRANSFER TAX - 50¢ PER \$500
BY COMPUTED ON FULL VALUE OF PROPERTY CO.
COMPUTED ON FULL VALUE LESS LENS & ENCUM.
REMAINING THEREON AT TIME OF SALE
SISKIYOU COUNTY TITLE CO.
1100 29 3 1977

Lue Hayes
LUE HAYES

Agnes M. Hayes
AGNES M. HAYES

STATE OF CALIFORNIA

known to me to be the persons M. who name M. subscribed to the within instrument, and acknowledged to me that he executed the same.

OFFICIAL SEAL
SISKIYOU COUNTY

My Commission Expires December 19, 1978

Title Insurance

SISKIYOU COUNTY TITLE CO.

TITLE BUILDING
YREKA, CALIFORNIA

Enrolled

VOL 791 PAGE 616 005608

total distance of 857.37 feet from said Point "C"; thence from a tangent which bears North 69°27'13" West along a curve to the left, having a radius of 1000.00 feet, a distance of 355 feet, more or less, to the West line of the Southeast 1/4 of the Southwest 1/4 of said Section 33; thence continuing along said curve, a distance of 315 feet to a point, hereinafter referred to as Point "A", through a total angle of 14°29'35", and a total distance of 690.03 feet from said Point "D"; thence North 41°41'14" West, 178 feet, more or less, to the South line of the Northwest 1/4 of the Southwest 1/4 of said Section 33; thence continuing North 41°41'14" West 138 feet to a point for a total distance of 316.31 feet from said Point "E"; thence North 76°12'04" West, 128 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the Northwest 1/4 of the Southwest 1/4 of said Section 33.

EXCEPTING THEREFROM that portion thereof lying Southwesterly of the line described as follows:

Commencing at said Engineer's Station "A" 481+10.34 P.C., bearing North 87°17'33" West, 159.66 feet; thence South 35°02'22" West, 225.00 feet to a point hereinafter referred to as Point "F"; thence North 11°17'26" East, 17 feet, more or less, to the South line of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence continuing North 11°17'26" East, 120 feet to a point for a total distance of 136.57 feet from said Point "F"; thence North 54°57'38" West, 575.76 feet; thence from a tangent which bears North 54°57'38" West, along a curve to the left, having a radius of 1100.00 feet, through an angle of 14°29'35", a distance of 278.23 feet; thence North 69°27'13" West, 115 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the Northwest 1/4 of the Southwest 1/4 of said Section 33.

ALSO EXCEPTING THEREFROM that portion thereof conveyed to EDWIN F. McMANIS, et ux, by deed recorded January 19, 1965, in Book 512 at page 457, Official Records of Stanislaus County.

The parcel herein described contains 5.22 acres, more or less, in addition to 0.52 acres, more or less, lying within the existing public way.

The bearings used in the above description are on the California Co-ordinate System, Zone 1, and the distances are in feet.

That portion of the land in the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, N.M., conveyed to the State of California, by deed recorded December 15, 1961, in Book 524 of Official Records, at page 98, Stanislaus County Records, lying Northeasterly of a line described as follows:

Commencing at a point on the East line of said Section 33, from which the corner common to Sections 2 and 4, Township 12 North, Range 6 East, N.M., and Sections 33 and 34, Township 13 North, Range 6 East, N.M. is located, bearing South 55°51'44" East, 1769.19 feet, said point also being Engineer's Station 47+33.21 P.O.B., as established from the Department of Public Works 194 Survey of Road 100000000 and 11 Creek, Road 01-318 06- thence from a tangent that bears North 47°13'14" East, along a curve to the right, having a radius of 1000.00 feet, through an angle of 14°29'35", for a distance of 132.99 feet;

vol 791 pg 618

PAID
(continued)

Bearing North 75°02'27" East 100.00 feet to the Point of Intersection of the line of said 1/4 section with the line of said 1/4 section, to the Point of Intersection of the line of said 1/4 section with the line of said 1/4 section, the true point of intersection of the line of said 1/4 section with the line of said 1/4 section.

Containing 0.07 acres, more or less.

The bearings used in the above description are on the California State Map, Sheet 1, and the distances are surficial.

*For rent for
Pods*

RE: LEASE NO. 39-5272

CERTIFICATE OF WAIVER

KNOW ALL MEN BY THESE PRESENTS THAT I (WE) Lou Hayes

dba Hayes Ranch

HEREBY ASSIGN ALL MY (OUR) INTEREST IN LEASE NO. 39-5272

APPROXIMATELY 1.47 ~~ACRES~~ ~~ACRES~~ OF SPACE INCLUDING 6 TRAILER PADS

BUILDING, LOCATED AT YOUNG'S RANCH ~~SECRET~~, SOMES BAR

CALIFORNIA 95568

(CITY)

, TO BOB YOUNG dba YOUNG'S RANCH
(STATE)

WHOSE ADDRESS IS YOUNG'S RANCH ~~SECRET~~, SOMES BAR
(CITY)

~~CALIFORNIA 95568~~, AND I (WE) HEREBY WAIVE ANY AND ALL RIGHTS
I (WE) MAY HAVE AGAINST THE UNITED STATES GOVERNMENT UNDER SAID
LEASE EFFECTIVE November 1, 19 77

IN WITNESS WHEREOF, I (WE) HAVE HEREUNTO SET MY (OUR) HAND

THIS 11/5/77 DAY OF November 19 77

Lou Hayes
Agnes M. Hayes

WITNESS:

Bob Young
Somes Bar Ca. 95568
(ADDRESS)

NOTE: IF A CORPORATION ADD CORPORATE CERTIFICATE.

*Lease of 6 trailer
pads + 1.47 acres
To U.S.F.S.
- Lease #395272*

RECORDED AT REQUEST OF
~~Friedman & Pau~~
 OFFICIAL RECORDS
 SISKIYOU COUNTY, CALIF. Attys.

13097

MAR 29 3 03 PM '73

Vol. 684 Page 809

81253

RECORDER

FEE \$3.00 pd
declare:

DECLARATION OF ABANDONMENT OF HOMESTEAD

WE, LUE H. HAYES and AGNES M. HAYES, husband and wife,

We are husband and wife;

We hereby abandon the homestead heretofore declared

by Agnes M. Hayes on October 21, 1959, on those premises known
 and described as follows:

The Southeast quarter of the Northwest quarter
 of the Southwest quarter; The Southwest quarter of
 the Northeast quarter of the Southwest quarter;
 The North half of the Northwest quarter of the South-
 east quarter of the Southwest quarter; The Northeast
 quarter of the Southeast quarter of the Southwest
 quarter; the Northeast quarter of the Southeast quarter
 of the Southeast quarter of the Southwest quarter;
 the Northwest quarter of the Northwest quarter of the
 Southwest quarter of the Southeast quarter; the South-
 half of the Northwest quarter of the Southwest quarter
 of the Southeast quarter and the Southwest quarter of
 the Southwest quarter of the Southeast quarter of
 Section 33 (thirty-three) Township 13 North, Range 6
 East, Humboldt Base and Meridian.

the declaration of which homestead was recorded on October 27,
 1929, in Book 431, Page 4, of the Official Records of Siskiyou
 County, California.

Dated: March 29, 1973.

Lue H. Hayes
 Lue H. Hayes

Agnes M. Hayes
 Agnes M. Hayes

STATE OF CALIFORNIA)
) ss
 County of Siskiyou)

On March 29, 1973, before me, the undersigned, a
 Notary Public in and for the said County and State, residing
 therein, duly commissioned and sworn, personally appeared Lue H.
 Hayes and Agnes M. Hayes, known to me to be the persons whose
 names are subscribed to the within instrument, and acknowledged
 to me that they executed the same.



Meribeth Messner
 Notary Public in and for said
 County and State

**VOUCHER FOR PAYMENT
UNDER FEDERAL TORT CLAIMS ACT**

Voucher No. _____

Claim No. 2-2472468

PAID BY

U. S. Department of Agriculture (Forest Service)

(Department, bureau, or establishment)

Voucher prepared at Washington, D. C. 20250

(Give place and date)

THE UNITED STATES, Dr.,

To Lue H. Hayes and Agnes M. Hayes

(Payee)

Address Somesbar, California 95568

TO ACCOMPANY CHECK

Amount claimed, \$ 15,492.73 Date claim accrued September, 1967

Amount of award, compromise, or settlement \$15,492.73 \$ _____

BRIEF DESCRIPTION OF CLAIM: (See attachments for further explanation in detail.)

**Damages to claimants' water supply system from Forest Service
timber and road building operations.**

Date claim filed: August 5, 1968

MEMORANDUM

15,492.73

Charles W. Bucy

JAN 24 1972

**Assistant
General Counsel**

CLAIMANT'S COPY
MAIL WITH CHECK

Settlement made by

U. S. General Accounting Office
D. C. 20548

ACCOUNTING CLASSIFICATION (Appropriation Symbol must be shown; other classification optional)

20X1752

I certify there is due and payable
from the appropriation(s) indicated

the amount of \$ 15,492.73

J. P. GIBBONS

For the Director, Claims Division
U. S. General Accounting Office

MAR - 7 1972

Paid by Check No. _____

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

WO

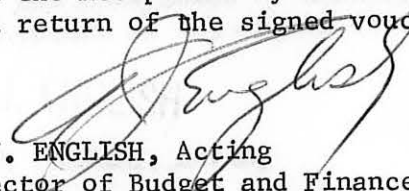
REPLY TO: 6570 Claims

FEB 3 1972

SUBJECT: Lue H. Hayes and Agnes M. Hayes
Damage to Water System - \$15,492.73TO: Lou H. and Agnes M. Hayes
Somesbar, California 95568

Enclosed is an original voucher for payment under the Federal Tort Claims Act approving in full your claim for \$15,492.73.

Please return the voucher to this office after you both sign the Acceptance by Claimant. Payment will be scheduled upon return of the signed voucher.


A. J. ENGLISH, Acting
Director of Budget and Finance

Enclosure

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE630 Sansome Street
San Francisco, California 94111

6570

February 4, 1970

Mr. & Mrs. Lue H. Hayes
Somes Bar, California 95568


Dear Mr. and Mrs. Hayes:

This will acknowledge the telephone conversation today between Mrs. Hayes and Deputy Regional Forester Yates, concerning your claim of August 5, 1968 for damage to your water system.

As indicated to you last month, your claim is in the hands of the General Counsel, U. S. Department of Agriculture, Washington, D. C. for settlement. We called his office today and were advised that a settlement letter had been drafted and was ready for review and signature.

Please let me know if you have not received information on your claim by February 16 and we will make further inquiry.

Sincerely yours,


PAUL J. GRAINGER
Regional Fiscal Agent

cc: Klamath N. F.

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20250

Our reference:
MOConnaughton

OCT 22 1968

Mr. and Mrs. Lue H. Hayes
Somesbar, California

Dear Mr. and Mrs. Hayes:

This acknowledges your claim dated August 5, 1968, which has been referred to this Office for its consideration.

We have requested additional information from the Forest Service. We will keep you advised of the status of this claim.

Sincerely,



WILLIAM J. STOKES, Deputy Director
Research and Operations Division

2500

June 30, 1969



Edwin T. McMannis, D.D.S.
Dental Arts Building
815 Fifth Street
Santa Rosa, California 95401

Dear Dr. McMannis:

Congressman Johnson most kindly forwarded your letter, which expressed concern for logging and watershed practices on the Klamath National Forest, to my office. I am glad to be aware of your interest in the matter.

Protection of watershed and esthetic values on the National Forests is one of my primary concerns. As a matter of fact, when your letter arrived at my office we were in the process of conducting a training session for our District Rangers in the area you mention in an attempt to identify ways to conduct the timber management business with less impact on these two very important resources.

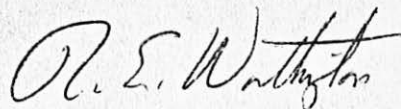
As you have probably recognized, much of the western portion of the Klamath River Drainage flows through country that is geologically very unstable. The disastrous flood experienced here in the winter of 1964 caused tremendous slides and slumps in areas never disturbed by man as well as in many of the areas that had been opened up through logging operations. While we have done a considerable amount of repair and stabilization work, much remains to be done. Also, vegetative life has not yet healed many of the scars created at that time. During periods of heavy precipitation these continue to contribute mud and debris to many streams in the area.

Because we have recognized many of these problems, we have established a team of watershed specialists in our organization. Their primary responsibilities lie in identifying unstable soil areas on the Forest and in developing Forest practices that are compatible with the conditions on the ground. I believe that we are making considerable progress in these fields but much remains to be done.

I'm not sure exactly where your attention is centered. However, ^{WR-193} should you have the time when you are in this area to pursue the matter, I am quite sure that Rangers Joe Ragsdale at Somes Bar or Wes Hamilton at Happy Camp would be most pleased to look at on-the-ground situations with you. This type of discussion can best answer the points you raise because there are so many factors involved.

Please do not hesitate to contact me should you wish further information.

Sincerely,



R. E. WORTHINGTON
Forest Supervisor

HAROLD T. (BIZZ) JOHNSON
2D DISTRICT, CALIFORNIA

OFFICE ADDRESS:
2347 HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515

DISTRICT OFFICE:
324 VERNON STREET
ROSEVILLE, CALIFORNIA 95678

Congress of the United States
House of Representatives
Washington, D.C. 20515

June 23, 1969

COMMITTEES:
INTERIOR AND INSULAR AFFAIRS
SUBCOMMITTEES:
IRRIGATION AND RECLAMATION, CHAIRMAN
NATIONAL PARKS AND RECREATION
PUBLIC LANDS

PUBLIC WORKS
SUBCOMMITTEES:
FLOOD CONTROL
RIVERS AND HARBORS
PUBLIC BUILDINGS AND GROUNDS

SELECT COMMITTEE
INTERSTATE HIGHWAYS

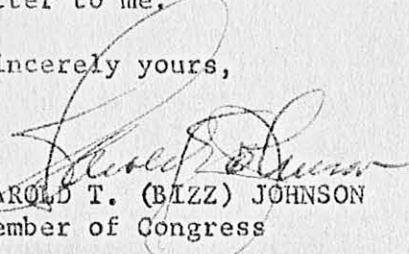
Edwin T. McMannis, D.D.S.
Dental Arts Building
815 Fifth Street
Santa Rosa, California

Dear Dr. McMannis:

Thank you for your letter of June 20 expressing your concern about the pollution of streams in the Klamath National Forest area. The regulatory agency which has jurisdiction over such matters would be the State Water Resources Control Board and I believe that this problem would come under the control of the North Coastal Regional Water Quality Control Board which has its headquarters in Santa Rosa at 1739 Fourth Street.

I am confident that the Forest Service does not wish to pollute the streams at all because they are very conscious of the importance of conservation and proper management of our resources. I am therefore taking the liberty of calling to the attention of the Klamath Forest Supervisor the problem which you outlined in your letter to me.

Sincerely yours,


HAROLD T. (BIZZ) JOHNSON
Member of Congress

J:y

GEO. A. TEBBE
J. P. CORREIA
JAMES E. KLEAVER
LARRY G. BACON

AREA CODE 916
TELEPHONE 842-4193
POST OFFICE BOX 510

TEBBE, CORREIA & KLEAVER

ATTORNEYS AT LAW
201 FOURTH STREET
YREKA, CALIF. 96097

June 9, 1969

Hayes v. Rice, et al

Mr. & Mrs. Lue H. Hayes
Somes Bar
California 96027

Dear Mr. and Mrs. Hayes:

Enclosed is a form of Complaint to be signed by you at the two places indicated with the check marks and returned to me for filing.

Upon returning the documents, please call us to determine a day for the hearing of the Order to Show Cause. It will be necessary that each of you be present on that day with whatever witnesses are available in support of your allegations that the logging operations of Rice have caused the condition complained of.

Upon returning the document to us, we will determine from the Judge the amount of bond and will make arrangements with Glover & Lindley Insurance Agency in Yreka for the issuance of bond.

If there are any questions, please call me.

Very truly yours,

TEBBE, CORREIA & KLEAVER

By

James E. Kleaver

JEK:vr
Encl.

Any time Rice wishes to talk we will be there

SISKIYOU COUNTY
OFFICIAL RECORDSReturn to Division of Highways
P.O. Box 2107, Redding, CA 96001RECORDED
DIVISION OF HIGHWAYSOFFICIAL RECORDS
SISKIYOU COUNTY, CALIF.JUN 20 8 00 AM '69
VOL. 577 PAGE 529*Ernest Johnson*
RECORDER FEE \$ 3.60 paid

12763

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Consideration Under \$100 (Unincorporated Area)

DIRECTOR'S DEED

MAY 1969

5

DISTRICT	COUNTY	ROUTE	P.M.	NUMBER
01	Sis	96	9.9	D.D. 9621

The STATE OF CALIFORNIA, acting by and through its Director of Public Works, does hereby grant to
LUE HAYES and AGNES M. HAYES, husband and wife as Joint Tenants,

all that real property in the _____

County of Siskiyou, State of California, described as:

That portion of the lands in the S.W. 1/4 of the S.E. 1/4 of Section 33, T. 13 N., R. 6 E., H.M., conveyed to the State of California by deed recorded December 15, 1965, in Book 524 of Official Records at page 98, Siskiyou County Records, lying northeasterly of a line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, T. 12 N., R. 6 E., H.M., and Sections 33 and 34, T. 13 N., R. 6 E., H.M., bears S. 88°51'44" E., 1769.19 feet, said point also being Engineer's Station "A" 479+77.35 P.O.C., as established from the Department of Public Works' 1964 Survey between Somes Bar and Ti Creek, Road 01-Sis-96;

thence, from a tangent that bears N. 47°20'27" W., along a curve to the left with a radius of 1000.00 feet, through an angle of 07°37'11", for a distance of 132.99 feet;

thence, N. 35°02'22" E., 100.00 feet;

thence, N. 54°57'38" W., 182 feet, more or less, to the Point of

MAIL TAX

STATEMENTS TO: Lue and Agnes M. Hayes
 Somes Bar, California 95568

D.D. 9621

-2-

Intersection with the East line of said land, last said point being the TRUE POINT OF BEGINNING of this parcel;

thence, continuing N. 54°57'38" W., 117 feet, more or less, to the Point of Termination of this line on the North line of said lands.

Containing 0.07 acre, more or less.

The bearings used in the above description are on the California Co-ordinate System, Zone 1, and the distances are surface.

Subject to special assessments if any, restrictions, reservations, and easements of record.

This conveyance is executed pursuant to the authority vested in the Director of Public Works by law and, in particular, by the Streets and Highways Code.

WITNESS the hand of the Director of Public Works, and the seal of the Department of Public Works of the State of California, this 23 day of May, 1969

APPROVED AS TO FORM AND PROCEDURE

[Signature]
ATTORNEY
DEPARTMENT OF PUBLIC WORKS


STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS

JAMES A. NOE
DIRECTOR OF PUBLIC WORKS
By *[Signature]*
R. T. SODERBERG
Assistant Director

STATE OF CALIFORNIA }
COUNTY OF SACRAMENTO } ss.

On this 23rd day of May, in the year 1969, before me, NANCY C. SILVA Notary Public in and for the State of California, residing therein, duly commissioned and sworn, personally appeared R. T. Soderberg known to me to be the ASST. Director of the Department of Public Works of the State of California, described in and that executed the within instrument, and also known to me to be the person who executed the same on behalf of the State of California therein named and he acknowledged to me that the State of California executed the same.

WITNESS my hand and official seal.

 NANCY C. SILVA
NOTARY PUBLIC
COUNTY OF SACRAMENTO
My commission Expires Mar. 27, 1970

[Signature]
Notary Public

THIS IS TO CERTIFY That the California Highway Commission has authorized the Director of Public Works to execute the foregoing deed at its meeting regularly called and held on the

22d day of May, 1969

in the City of Sacramento

Dated this 23d day of May, 1969

[Signature]
ROBERT T. MARTIN
Assistant Secretary of the
California Highway Commission

VOL 577 PAGE 531

COMPARED
005624

1964 Flood as reported by
Agnes M. Hoyer

WR-193

Day by day forecast on the weather and river conditions.

I wrote yesterday but the river is continuously rising. As I said Lue went down at 6 a.m. to help Dietz and they moved everything up higher to the '55 flood level. But at 5 p.m. last evening the river had gone 10ft above that. They saw the water take the chicken coop out of the barn and come swirling by to replace the chicken coop in its place. Finally moved Dietz to Bradleys place and they took what they could save. Not before Ethel fell off the porch in the hurry and either cracked or broke her ankle or leg just above the ankle. So neither one can do much. Ethel was the last hope.

(9 P.M.) The two younger boys & myself took a walk down Doc's road and the bottom part was all flooded by then. We walked the main road and looked over the hill, the only thing we could see was the water rising and coming up to the house. At 12.p.m. the house was surrounded with water and the lawn chair and table were floating as well as the smoke house and butane tank.

The Trailer house was still standing as well as the house at 5.p.m.(last eve.12/22/64).The water has risen up to the Log cabin and the little house Henry had was gone too.Water is backed up to the frog pond.Herman Albers come over to get the keys to Daily's boat. Lue hadn't gotten back yet. So I gave him the keys never thinking about the motor in the cabin. He moved the boat to higher ground and by the time Lue came at 5 the main lodge and the Stanshaw creek had changed course, and the cabin was

005625

surrounded. The smoke house took off about this time and hit a tree and that was gone. Not only the river is high but the creeks have more water than ever before.

Its 7 A.M. 12-23-64 and I'm about to venture out to see what is left today. 12-22-64 Bag pardon. The water was up on the road above Dietz drive way as well as Roger creek is plugged and the river is running across the road from Dietzs to Roger creek. Lue and I went back and pulled some more stuff out last eve after he ate and water was already lapping at the things they left by the wood pile in front we pulled them to the mail box; getting late and tired.

Imagine everyone who had a home along the river Woods up by Bluenose, McMannis's, Bradley, Dietz, Weber, Sims, Ti Bar School, and Stuart's are all gone. Slide at Jetty Albers so can't get to far and another at Irving creek. I'm out of groceries mainly flour and if I could get some I'll make out. Guess I will anyway for awhile. The barometer is going back up. Perhaps we will get a break in the weather lets hope. This can't go on.

Lue just reported back with Johnnie. Irving creek bridge has caved in on one end where the water has undermined it. Lue and Johnnie are going to try and make it to Ti Bar today to see what the scare is that way after looking to see how much the water took out at McMannis and Daily. Dietz house is still standing this morning with water to the top of the door; water seems to be receding. McMannis house is still standing water running in and out through the bedrooms. No we didn't open the doors Laurette.

Water was rising to fast to get to them in time, water line was at the lower part of the windows bath and kithen. One window I could see was broke out. Store house wall (tool shed) one end by the door was broken out we could see. Boat still floating. Hard to see from our porch. Tried to take a picture. Trailer house was still there but attached pieces were gone trailer house shot.

On to Dailys the water as I said has gone down some. They have all the main buildings and cabins but are surrounded by gravel and rocks from the creek. The gravel is as high as the door clear up to the step going into the restrooms. Water is still raging passed on the lower side of the main building. On Johnson's cabin facing the river got the worse beating but still remained. The Cooks cabin moved some into a tree standing near by which mostly saved it. The water now is running behind as well as in front of the main building. I have taked some pictures hope they turn out if I can ever get them developed. The light plant shed is pretty beat up but I think still intact as well as the pipe line. Lue put in a couple of years ago. Swaying in some places pretty bad.

John and Lue got back from Ti Bar to report there wasn't much left. They think Ken Simms is missing and they are not sure about Ellla and the boy. He wouldn't leave. The house is there yet but pretty badly slammed against the trees. Old Ti Bar school house is piled high with rocks and he said he never could see Ti Bar as when you looked to Ti Bar a hill loomed in the way and where the highway was debre. Not sure what happened beyond that

point. Davises from Ti creek school house made it out but not any to soon. He was janitor at Orleans school house where we heard by radio it had burned down. Upper end of Happy Camp is under water and I suppose Orleans is also fighting to stay on top.

ALBERT F. PARROTT

COUNTY SURVEYOR
SISKIYOU COUNTY

YREKA, CALIFORNIA

November 7th 1957Mr. Lue Hayes
Somes Bar, California.

Dear Lue:

Enclosed you will find map and description.

Also enclosed you will find a Claim against the
Treasurer of the County.

Please sign on line with RED check mark. ✓

When this has been approved by the Board, a check
will be made payable to you in the sum of \$180.29 as a Refund.

ACTUALLY you will still owe Mr. Parrott personally,
the sum of \$140.00. YOUR NET REFUND would be \$ 40.29 on your
original Cash in Advance payment of \$270.00, because the complete
total for the survey to the County and to Mr. Parrott personally,
is \$ 229.71.

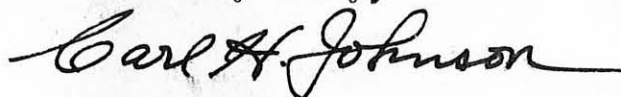
Work on Saturday, Sundays or Holidays done by
Mr. Parrott, is PRIVATE work.

Aug. 9,	Survey and Expenses	\$ 26.21	County
10,	Survey	70.00	Private-Parrott
11,	Survey	70.00	" "
12,	Survey and Expenses	53.50	County
Nov. 6,	Office	10.00	County
	TOTAL	\$ 229.71	Cost of Survey.

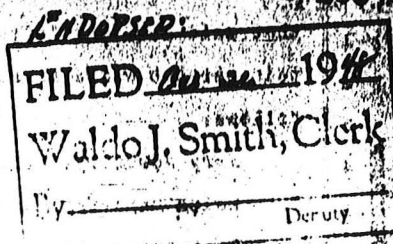
Please sign where noted by Red Check, and return

to: Siskiyou County Surveyor
Room 102
Court House
Yreka, California.

Yours very truly,



Carl H. Johnson
ASS'T. to the SURVEYOR.



2449

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SISKIYOU

In the Matter of the Estate)

of) No. _____

GUY McMURTRY, Deceased.)

ORDER SETTLING FINAL ACCOUNT OF ADMINISTRATOR
AND DECREE OF DISTRIBUTION

The petition of John Skendle, as administrator of the estate of Guy McMurtry, deceased, for Order Settling Final Account of Administrator and for Distribution, Messrs. Tebbe & Correia, appearing as attorneys for said petitioner, coming on regularly to be heard the 11th day of October, 1946, the Court, after examining the petition and hearing the evidence, finds that due notice of the hearing of such petition has been given as required by law; that notice to creditors has been duly given as required by law; that all the allegations of said petition are true; that no inheritance taxes and no personal property taxes are due or payable by said estate, and that said account should be settled and distribution ordered as prayed for;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that notice to creditors has been duly given as required by law, and that said administrator has in his possession belonging to said estate, after deducting credits to which he is entitled, a balance of Four Thousand Seven Hundred Sixty-five and 77/100 Dollars (\$4,765.77, consisting of the property hereinafter described; that said account be allowed and settled accordingly;

TEBBE & CORREIA
ATTORNEYS AT LAW
201 FOURTH STREET
YREKA, CALIF.

Recorded by TEBBE & CORREIA, OCT. 26, 1948 at 25 min. past 3 o'clock P.M., in Vol. 233 Page 423 of OFFICIAL RECORDS OF SISKIYOU COUNTY, CALIFORNIA

233 PAGE 424
COUNTY RECORDER
Fee \$2.00 paid

1 that said deceased left surviving as his only heirs at law cer-
2 tain persons whose names and relationship to the deceased are as
3 follows;

- 4 Mary McMurtry, widow
- 5 Ralph McMurtry, brother

6 That the whole of the said estate is the community property
7 of the said decedent and of the said Mary McMurtry; that all the
8 residue of the property of said estate hereinafter described and
9 all other property belonging to said estate, whether described
10 herein or not, be and the same hereby is distributed as follows;

11 To Mary McMurtry, the whole thereof.

12 The property of said estate hereby distributed, so far as
13 the same is known, is described as follows;

- 14 1. Cash on hand
- 15 2. 1 - 1940 Chevrolet pickup truck
- 16 3. All the following described real property situate in the

17 County of Siskiyou, State of California, and more particularly
18 described as follows, to wit;

19 The SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$; the SW $\frac{1}{4}$ of the
20 NE $\frac{1}{4}$ of the SW $\frac{1}{4}$; the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$
21 of the SW $\frac{1}{4}$; the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$; the
22 NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$; the NW $\frac{1}{4}$
23 of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$; the S $\frac{1}{2}$ of the
24 NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$; and the SW $\frac{1}{4}$ of the
25 SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 33, Township 13 North,
26 Range 6 East Humboldt Base and Meridian.

27 Dated October 26th, 1948.

JAMES M. ALLEN

Judge of the Superior Court

STATE OF CALIFORNIA }
COUNTY OF SISKIYOU }

I, WALDO J. SMITH, County Clerk and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Siskiyou, do hereby certify the foregoing to be a full, true and correct copy of the original Order Settling Final Account of Administration and Decree of Distribution (Guy McMurtry, Deceased)

on file in my office in the above entitled Matter

IN WITNESS WHEREOF, I have hereunto set my hand and seal of said court this
26 day of October, 1948

By  Clerk
Deputy

LUE HAYES

Somes Bar, California.

By: Albert F. Parrott
County Surveyor, R.E. #2144

Nov. 7, 1957

Description for: Additional Homestead to cover land
intended to be patented.E $1/2$ of NE $1/4$ of SW $1/4$ of SW $1/4$, and the S $1/2$ of the NW $1/4$ of the
SE $1/4$ of the SW $1/4$ of section 33, T 13 N, R 6 E, H.M., 10 acres.

Additional homestead
land to be patented
~1957 - and subject
to required improvements
 $\frac{1}{2}$ occupation/use per
patent laws

Map Lue & Agnes Hayes

Sec 33 T13N R6E HM

Field Book No. FBLL

Page No. 29

294-306

Scale 1" = 200'

14,348
Map # 13,458

By ALBERT F. PARROTT

11 A. M.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of December, A. D. 1945.

ACE MOTORS,

BY Jack P. Messner
Jack P. Messner, Manager.

STATE OF CALIFORNIA)

COUNTY OF SISKIYOU (ss.

On this 12th day of December, A. D. 1945, before me, Roy A. Weaver, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Jack P. Messner, known to me to be the manager of Ace Motors, whose name is subscribed to the within instrument, and acknowledged to me that he executed the same on behalf of Ace Motors.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL)

Roy A Weaver

Roy. A. Weaver,

Notary Public in and for the
County of Siskiyou, State of
California.

Recorded at the Request of ROY A. WEAVER DEC 13 1945 at 40 min. past 1 o'clock P.M. in
Vol. 180 Page 335 of Official Records of Siskiyou County, California.

Ernest T. Johnson
County RecorderBy Effie Hamilton
Deputy

Fee \$1.00

COMPARED

3667

-----bd-----

Recorded in
Vol. 422 Page 146 OFFICIAL RECORDS
By Ernest T. Johnson Recorder
By Effie Hamilton Deputy

DEED OF TRUST

THIS DEED OF TRUST, made this 30th day of October A.D. 1945 Between JOHN SKENDLE, single hereinafter called Trustor; Belcher Abstract & Title Company, a corporation, of Eureka, California, hereinafter called Trustee; and GUY McMURTRY and MARY McMURTRY, his wife, as joint tenants, hereinafter called Beneficiary;

WITNESSETH THAT WHEREAS, Trustor is indebted to Beneficiary in the sum of Five Thousand and 00/100ths Dollars, and has agreed to repay the same, with interest, according to the terms of a certain promissory note of even date herewith, executed and delivered therefor by Trustor to Beneficiary; NOW THEREFORE, in consideration of said indebtedness, and to secure: 1st. The indebtedness evidenced by said promissory note; 2nd. Any additional amounts which may be hereafter loaned by beneficiary to the trustor or any of them, with interest thereon, and evidenced by a promissory note or notes executed and delivered by trustor to beneficiary; 3rd. The payment and performance of every obligation, promise, or agreement herein, or in said note or notes contained;

The Trustor does hereby GRANT and CONVEY to said Trustee, IN TRUST, WITH POWER OF SALE, that certain real property in the County of Siskiyou State of California, bounded and described as follows:

The Lot Five, the Southwest quarter of the Northwest quarter of the Northeast quarter, the west half of the Southeast quarter of the Northwest quarter of the Northeast quarter, the Northeast quarter of the Southeast quarter of the Northwest quarter of the Northeast quarter,

quarter, the East half of the Northwest quarter of the Southwest quarter of the Northeast quarter, and the West half of the Northeast quarter of the Southwest quarter of the Northeast quarter of Section Four in Township twelve North of Range Six East of the Humboldt Meridian, California.

A. To protect the security of this Deed of Trust, Trustor agrees:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requiring any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.
2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part thereof may be released to Trustor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.
3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary, or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear.
4. To pay: at least ten days before delinquency all taxes and assessments affecting said property; when due, all incumbrances, charges and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees and expenses of this Trust.

Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: make or do the same in such manner and to such extent as wither may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any incumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and, in exercising any such powers, pay necessary expenses, employ counsel and pay his reasonable fees.

5. To pay immediately and without demand all sums so expended by Beneficiary or Trustee, with interest from date of expenditure at seven per cent per annum.

B. It is mutually agreed that:

1. Any award of damages in connection with any condemnation for public use or injury to said property or any part thereof is hereby assigned and shall be paid to Beneficiary who may apply or release such moneys received by him in the same manner and with the same effect as above provided for disposition of proceeds of fire or other insurance.
2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require prompt payment when due of all other sums so secured or to

written request of Beneficiary and presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby, Trustee may: reconvey any part of said property; consent to the making of any map or plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the lien or charge hereof.

4. Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed and said note or notes to Trustee for cancellation and upon payment of its fees, Trustee shall reconvey, without warranty, the property then held hereunder. The recitals in any reconveyance, whether made under this or the preceding paragraph, of any matters or facts shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto."

5. Upon default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. Beneficiary shall in the event of default deposit with Trustee this Deed, said note or notes and all documents evidencing expenditures secured hereby.

Upon such default Beneficiary may take possession, either personally, by an agent or through a receiver appointed by any court, exclude trustor therefrom, use, operate, manage and control such property and conduct the business thereon and with or without taking possession may collect and receive the rents and proceeds therefrom, which rents and proceeds are hereby assigned to Beneficiary, such assignment to become effective at the ^{time} notice of default hereunder is filed for record in the office of the Recorder of the County in which the land herein described is situated. Such rents and proceeds which may be received by the Beneficiary shall be applied in the same manner as the proceeds of any sale hereunder, but shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

After recordation of a notice of default, Trustee shall give notice of sale as then required by law, and, with ut demand on Trustor, shall sell said property at the time and place of sale fixed by it in said notice of sale, either as a whole or in separate parcels and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee may postpone sale of all or any portion of said property by public announcement at such time and place of sale, and from time to time thereafter may postpone such sale by public announcement at the time fixed by the preceding postponement. Trustee shall deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Trustor, Trustee, or Beneficiary, as hereinafter defined, may purchase at such sale.

After deducting all costs, fees and expenses of Trustee and of this Trust, including cost of evidence of title and reasonable counsel fees in connection with sale, Trustee shall apply the proceeds of sale to payment of: all sums expended under the terms hereof, not then repaid, with accrued interest at seven per cent per annum; all other sums then secured hereby; and remainder, if any, to the person or persons legally entitled thereto.

6. This Deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors, and assigns. The term Beneficiary shall include not only the original Beneficiary hereunder but also any future owner and holder, including pledgees, of the note or notes secured hereby. In this Deed, whenever the context

7. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, Beneficiary or Trustee shall be a party unless brought by Trustee.

8. It is expressly agreed that the trusts hereby created are irrevocable by the trustor.

9. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at his mailing address opposite his signature hereto.

IN WITNESS WHEREOF, Trustor has executed these presents the day and year first above written.

Mailing Address For Notices

Signature of Trustor

Somes Bar Siskiyou Co., Calif.

John Skendle

STATE OF CALIFORNIA

SS.

County of Humboldt.

On this date 30th of October 1945, before me, Ernest J. Anderson, a notary public in and for said County, personally appeared John Skendle known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

(SEAL)

Ernest J. Anderson
Notary Public

My commission expires April 11th/

Recorded at the Request of SISKIYOU COUNTY ABSTRACT CO. DEC 14 1945 at 20 min. past 4 o'clock P.M. in Vol. 180 Page 336 of Official Records of Siskiyou County, California.

Substitution of Trustee
Recorded in
Vol. 402 page 144 OFFICIAL RECORDS
Ernest J. Johnson
Recorder
By R. L. B. Barrett, Deputy

Ernest T. Johnson
County Recorder
By Dorene Wood
Deputy

Fee \$2.50

COMPARED

3689

MORTGAGE OF CHATTELS

THIS MORTGAGE, made this 14th day of December, 1945, by ANDREW W. DOLESHAL and JO ANN S. DOLESHAL, his wife, of the County of Siskiyou, State of California, herein called the Mortgagors, to THE FIRST NATIONAL BANK IN YREKA, by occupation a National Banking Association, with its office in Yreka, California, herein called the Mortgagee;

WITNESSETH:

That said Mortgagors do hereby mortgage to said Mortgagee all the following described personal property, together with all replacements and substitutions therefor, and all additions thereto, said personal property being situated in the Town of Yreka City, County of Siskiyou, State of California, the same being more particularly described as follows, to-wit:

- 1 Electric Neon Sign.
- 1 National Cash Register.
- 2 Grunow Electric Boxes.
- 1 Automatic Electric Heater.
- 13 Stools.
- 6 Chairs.
- 1 High-chair.

I, the undersigned, do hereby certify that the foregoing is a true and correct copy of the original of the within instrument as the same appears in the records of the County of Siskiyou, State of California.
FIRST NATIONAL BANK IN YREKA
By W. W. B. Ballham
President - Cashier
By J. H. Hamilton
Deputy

STATE OF CALIFORNIA)
County of Santa Clara) ss.

On this 27th day of May A.D. 1932, before me, E.S. Erwin, a Notary Public in and for said County, and residing herein, duly commissioned and sworn, personally appeared The Wooley Camp Association & A.E. Taylor, known to me to be the persons whose name.. are subscribed to the annexed and foregoing instrument as party thereto and who, as Trustee & President, executed the said instrument, and they acknowledged that they executed the same as Trustee as therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office in said County of Santa Clara, the day and year in this Certificate first written.

(SEAL)

E.S. Erwin

Notary Public, in and for the County of Santa Clara, State of California.

Recorded at Request of Bank of America Jun 1, 1932 at 17 min. past 11 o'clock A.M.

KAY E. L. BICKEL

County Recorder.

---oOo---

COMPARED

3890

THIS INDENTURE Made this ninth day of May, in the year of our Lord One Thousand Nine Hundred and Thirty-two, Between DAVID DRAKE and LONNIE DRAKE, his wife, of the County of Siskiyou, State of California, the parties of the first part and GUY McMAURTY, of the same place the party of the second part,

WITNESSETH: That the said parties of the first part for and in consideration of the sum of Ten Dollars lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part and to his heirs and assigns forever, all that certain lot, piece or parcel of land, situate, lying and being in the County of Siskiyou, State of California, and bounded and particularly described as follows, to wit:

The Lot Five, the Southwest quarter of the Northwest quarter of the Northeast quarter, the west half of the Southeast of the Northwest quarter of the Northeast quarter, the Northeast quarter of the Southeast quarter of the Northwest quarter of the Northeast quarter, the Northwest quarter of the Northwest quarter of the Southwest quarter of the Northeast quarter, the East half of the Northwest quarter of the Southwest quarter of the Northeast quarter and the West half of the Northeast quarter of the Southwest quarter of the Northeast quarter of Section four in Township twelve North of Range Six East of the Humboldt Meridian, California.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises together with the appurtenances unto the said party of the second part and to his heirs and assigns forever.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their and seals the day and year first above written.

David Drake

(SEAL)

Lonnie Drake

(SEAL)

Subscribed and sworn to before me, this 12 day of May, 1932.

(SEAL) Ernest J. Anderson
Notary Public.

My Commission Expires April 14th, 1936.

State of California)
County of Humboldt) ss.

On this 12 day of May, in the year One Thousand Nine Hundred and Thirty-two, before me, ERNEST J. ANDERSON, a Notary Public in and for the said County, residing therein, duly commissioned and sworn, personally appeared David Drake and Lonnie Drake, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at my office in the County of Humboldt, the day and year in this certificate first above written.

(SEAL) Ernest J. Anderson

Notary Public in and for said County of Humboldt, State of California.

My commission expires April 14th, 1936.

Recorded at Request of Clifford E. Butler Jun 1 1932 at 18 min. past 11 o'clock A.M.

KATE L. BICKEL

County Recorder.

---000---

3696

THIS INSTRUMENT, Made this Nineteenth day of May, A.D. 1932.

BETWEEN C. E. Call & Etta M. Call, his wife: Lulu Call Graham, and Raymond Graham, her husband; and P. L. Call, a single person, the parties of the first part, and N. A. Buckner the party of the second part,

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Ten (\$10.00) Dollars, Lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, two-thirds interest in that certain lot, piece or parcel of land situate, lying and being in the N.E. quarter of Sec. 20 T.P. 47 N.R. 6 W.M.D.M. County of Siskiyou, State of California and bounded and particularly described as follows, to wit:

COMMENCING at a point 131 feet north of a point in the North line of the Henley and Hornbrook wagon Road from which the centre of said section Twenty bears South 73 degs. 8 min. West 1263 feet; thence South 79 degs. 10 min. East to 188 feet to the Hughes lot. Thence North-westerly along the West line of the Hughes, and Creason lots a distance of 194 feet, thence Southwesterly a distance of 108 1/2 feet to a point 191 feet North of the point of Commencement, thence North 0 deg. 2 min. west a distance of 138 feet thence North-westerly along the East boundary line of the property of the late Jane Call Transou, (C.E.Call, P.L.Call and Lulu Call Graham heirs). 164 feet, thence South-westerly along the North line of the property of the late Jane Call Transou, aforementioned a

any lien that it may have against the property above described shall in no way be affected by this conveyance.

IN WITNESS WHEREOF the party of the first part, by its Vice President and Assistant Trust Officer, thereunto duly authorized by resolution of its Board of Directors, has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed, the day and year first above written.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION
By J. B. McGuigan, Vice President.

(SEAL)

By Hugo A. Steinmeyer
Assistant Trust Officer.

STATE OF CALIFORNIA)
City and County of San Francisco) ss.

On this 28th day of August, in the year One Thousand Nine Hundred and Thirty-One, before me, DAN T. FOSTER, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared J. B. McGuigan and Hugo A. Steinmeyer, known to me to be the Vice President and Assistant Trust Officer of the Corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

(SEAL)

Dan T. Foster.

Notary Public in and for the City and County of San Francisco, State of California.
My commission expires November 22, 1932.

Recorded at Request of SISKIYOU COUNTY ABSTRACT CO. Aug. 31, 1931 at 35 min. past 9 o'clock A.M.

KATE L. BICKEL,

County Recorder.

--- 000 ---

COMPARED

1117:

THIS INDENTURE, Made this Tenth day of August in the year of our Lord one thousand nine hundred and Thirty One, BETWEEN J. H. Morris and Mrs. Neva Morris, His Wife, of Somes Bar of the County of Siskiyou, State of California, the parties of the first part, and Guy McMurtry of Somes Bar, of the same place, the party of the second part,

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Ten Dollars, Lawful Money of the United States of America, to Them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece or parcel of land situate, lying and being in the County of Siskiyou, State of California, and bounded and particularly described as follows, to wit:

Southeast One-Quarter of the North West One-Quarter of the South West One-Quarter of Section Thirty Three -- Township Thirteen North Range Six East Humboldt Base and Meridian, Containing Ten Acres, and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainders and remainders, rents, issues and profits thereof, to have and to hold, together with all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to His heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part, have hereunto set their hands and seals the day and year first above written.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF

J. H. Morris (SEAL)

James M. French (SEAL)

STATE OF OREGON, county of Multnomah

ON THIS 27th day of August, in the year A.D. 1931, before me, Esther M. Eaton, a Notary Public in and for said County, duly commissioned and sworn, personally appeared

Neva Morris personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.

WITNESS my hand and official seal.

Notary Public in and for the County of Multnomah, State of Oregon.

STATE OF CALIFORNIA)
COUNTY OF HUMBOLDT)

On this tenth day of August, in the year A.D. 1931, before me, James M. French, a Notary Public in and for said County, duly commissioned and sworn, personally appeared

J. H. Morris, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

WITNESS my hand and official seal.

Notary Public in and for the County of Humboldt, State of California.

Recorded at Request of Bank of Am. Nat. T. & S.A. Aug. 31, 1931 at 55 min. past 9 o'clock A.M.

KATE L. BICKEL, County Recorder.

Commissioner, in and for said County, duly commissioned and sworn, personally appeared Samuel Stenshaw of said County and State personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same/

Witness my hand and official seal,

(seal) James Davis

Court Commissioner in and for the County of Del Norte, State of California.
Filed for Record at the Request of Siskiyou Co. Bank, April 16, A. D. 1922 at 11.05 o'clock A. M.

ALICE V. YOUNG
RECORDER.

-----ooOoo-----

SAMUEL STENSHAW,

TO

GUY MCMURTRY

COMPARED
THIS INSTRUMENT, Made as of the 1st day of APRIL, A. D. 1922 between Samuel Stenshaw of Del Norte County, California the party of the first part, and: GUY MCMURTRY of the County of Siskiyou in said State of California, the party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Ten (\$10.00) Dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quitclaimed, and by these presents does remise, release and forever quitclaim, unto the said party of the second part, and to his heirs and assigns,

All of the right, title and interest in and to such water right; or rights together with ditch rights, and ditches located on what is known as "Stenshaw Creek", near the "Stenshaw Mine" and mining property near the Klamath River, County of Siskiyou State of California, as shall be sufficient for the successful and complete irrigation of, and domestic use on the real property described as follow, to-wit:

The Southwest quarter of the northeast quarter of the southwest quarter, and the North half of the northwest quarter of the southeast quarter of the southwest quarter of Section Thirty-three (33) T.13 N., R. 6.E.N.M. in said County of Siskiyou, State of California.

As the same is reserved unto the said party of the first part-herein, his heirs, executors, administrators and assigns in a certain deed made and exempted by the said party of the first part to J. H. Morris of said County of Siskiyou, State of California on the 27th day of February, 1922.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, And also all that estate right, title, interest in said property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To Have and to Hold, all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

E Stanshaw

Water Notice

Notice: Is hereby given that I have taken up and hold for mining and for purpose of irrigation six hundred inches of the water running in Stanshaw Creek. So called the water so taken, being carried first by ditch and flume, to and past my dwelling home; second by ditch and flume running up the Klamath River to my upper field, said creek being in Dillon's Township, State of California, County of Klamath. March 25th. A.D. 1867 E. Stanshaw

Filed and Recorded March 25th. A.D. 1867
in Book of Mining Claims file 232
B. W. Janks Recorder

Filed for Record at request of E. De Mill
June 1st. 1880 at 15 minutes past 8 o'clock A.M.
Joseph Rice Recorder

Recorded June 9th. 1880 at 50 minutes past 8 o'clock A.M.
Joseph Rice Recorder

Oct. 29th: Saw 1.052. 1.053. 1.054.

✓ vs. Samuel Sturtevant. Water Notice.

Rock Ranch May 8th 1880.

Notice is hereby given that I have taken up
and hold for mining and irrigating purposes
five hundred inches of the water from two small
creeks that running west from Flour Flat.
Also ditch from the same two creeks on the west
side of Mammoth River Dillion Town, Siskiyou Co
Cal.
Samuel Sturtevant

Filed for Record at request of E. De Witt June
1st 1880 at 20 mins past 8 o'clock A.M.
Joseph Rice Recorder

Recorded June 9th 1880 at 37 mins past 9
o'clock A.M.
Joseph Rice, Recorder.

M. J. R.
 Stamp
 50 cts
 Corrected

Klanck Miss

3-1

For and in consideration of the sum of Ten Hundred
 and fifty dollars (\$450.00) the receipt of one half of which
 is hereby acknowledged, the other half to be paid in
 eight months in U. S. gold coin, or gold dust at mar-
 ket rates, I have this day sold and bargained to Bow
 & Co., Chinamen a certain mining claim described as
 follows: Situated in Dellen Town ship, Klannath County
 State of California, on Stenshow Flat, and comprising all the
 ground, both the high and low bars, and the right to wing
 down the river, below a line running from the mountain
 to the river, said line being eighty five yards below my
 dwelling house and store, and near the foot of my orchard
 excepting the ground occupied by the Indians, for houses
 and gardens - Said Bow & Co., to have the use of my
 ditch and water right to work out said gravel, and
 shall keep said ditch in repair; provided that in the
 months of June, July and August of each year, there shall
 be sufficient water running to my house, for irrigating
 purposes, and nothing in these presents shall be so
 construed, as giving the said Bow & Co., any claim to
 the water, or ditch when said gravel is worked out.
 And further provided that said Bow & Co., shall trade
 with me at my store, and purchase all their supplies from
 me, in I shall have the goods they may need, and any
 violation of this stipulation shall make null and void the
 foregoing. Witness my hand and seal this 24th day of
 October 1870 - E. Stenshow -

Witness: B. W. Jenkins

Revised at request of Chas. Jerke - Oct 24th 1870 - at 5 o'clock P. M.

Notice: We the undersigned, claim 1200 feet from this mo-
 nte, four hundred feet (400) in a northw. and eight hun-
 dred feet (800) in a southw. direction, with all dips, spurs
 and angles, beside fifty (50) feet on each side for mining
 and dumping purposes - This loc. shall be known as the
 "Locust Creek" "Quartz Seelye", Located about Five Hundred
 (500) yards east from mouth of White Gulch on the North
 Fork of Salmon River. Nicolas Kusch
 July 16th 1870, Charles Nickel and Company

Revised at the request of J. M. Brown, Oct. 26th 1870 at 10 o'clock A. M.

And I, R. H. Thompson, do hereby acknowledge the other half to be paid in
 50 Cts
 Considered
 For and in consideration of the sum of Four Hundred
 and fifty dollars (\$450.00) the receipt of one half of which
 is hereby acknowledged, the other half to be paid in
 eight months in U. S. gold coin, or gold dust at mar-
 ket rates, I have this day sold and bargained to Ben-
 & Co., Chinamen, a certain mining claim described as
 follows: Situated in Dillon Town ship, Plummer County,
 State of California, on Steenshaw Flat, and comprising all the
 ground, both the high and low bars, and the right to run
 down the river, below a line running from the mountain
 to the river, said line being eighty five rods below my
 dwelling house and store, and near the foot of my cañon
 excepting the ground occupied by the Indians, for house
 and gardens. Said Ben & Co., to have the use of my
 ditch and water right to work out said gravel, and
 shall keep said ditch in repair; provided that in the
 months of June, July and August of each year, there shall
 be sufficient water running to my house, for irrigating
 purposes, and nothing in these presents shall be so
 construed, as giving the said Ben & Co., any claim to
 the water, or ditch when said gravel is worked out.
 And further provided that said Ben & Co., shall trade
 with me at my store, and purchase all their supplies from
 me, so I shall have the goods they may need, and any
 violation of this stipulation shall make null and void the
 foregoing, Witness my hand and seal this 24th day of
 October 1870. — E. Steenshaw —
 Witness: B. H. Smith

Recorded at request of Charles Jette - Oct 24th 1870 - at 5 o'clock P. M.

Notice: Is hereby given, that I have taken up a
 hold for mining and irrigating purposes, six
 hundred inches of the water running in Silver
 Creek, so called, the water so taken, being carried
 first by ditch and flume, to and past my
 dwelling house; second by ditch and flume
 running up the Klammath River to my upper
 fields; said creek being in Dillon Township, State
 of California, County of Klamath
 March 25th 1867 E. Stenstrom

Witness my hand March 25th 1867 at request of E. Stenstrom
 B. W. Smith - Recorder

Notice: Is hereby given to all to whom it may come
 that I have taken up and hold for mining purposes
 one hundred inches of the water running in the
 Creek, that empties in to the Klammath River on
 the west side, and directly opposite the head of
 "Joy Bar", and known as the "Frenchmans" Creek
 said creek being in Dillon Township, State of
 California, County of Klamath
 March 25th A. D. 1867 E. Stenstrom

Witness my hand at request of E. Stenstrom March 25th A. D. 1867

E. STENSHAW

WATER NOTICE

NOTICE IS HEREBY GIVEN: That I have taken up and hold for mining and irrigating purposes, six hundred inches of the water running in Stenshaw Creek. So called the water so taken being carried first by ditch and flume to and past my dwelling house by ditch and flume running up the Klamath River to my upper field. Said creek being in Dillon's Township, State of California, County of Klamath.

March 25, 1867

E. Stenshaw

RECORDED

JUNE 9, 1880

Liber 1 Water Right, page 397

Book #1

Notice: Is hereby given that I have taken up and hold for mining and for purpose of irrigation six hundred inches of the water running in Stanshaw Creek. So called the water so taken, being carried first by ditch and flume, to and past my dwelling home; second by ditch and flume running up the Klamath River to my upper field, said creek being in Dillon Township, State of California, County of Klamath.

March 25th. A.D. 1867 E. Stanshaw

Recorded March 25th. 1867 at request of E. Stanshaw

B. W. Janks Recorder

Notice: Is hereby given to all to whom it may concern that I have taken up and hold for mining purposes one hundred inches of the water running in the creek, that emptys into the Klamath River on the west side and directly opposite the head of "Lay Bar", and known as the "Frenchman's" Creek said creek being in Dillon Township, State of California, County of Klamath

March 25th. A.D. 1867 E. Stanshaw

Recorded at request of E. Stanshaw March 25th. A.D. 1867

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20250

Our reference:
MOConnaughton

Mr. and Mrs. Lue H. Hayes
Somes Bar, California

Dear Mr. and Mrs. Hayes:

This concerns your claim dated August 5, 1968, for alleged damaged to your water system by the United States Forest Service.

We have completely reviewed the file and at this time are prepared to pay \$5,000 as full settlement of all your claims for damage. This offer of settlement does not constitute an admission of liability on the part of the United States Government and it is made for settlement purposes only.

We realize that you are alleging \$19,135.58 as necessary to remedy your water situation. However, our file indicates that an adequate filtration system could be constructed for substantially less than this amount. It also indicates that as far back as 1953, the water supply in your cabins would become turbid after extensive rain storms. Further, our file shows that a considerable amount of damage was done by a flood in December 1964.

If this offer of settlement is satisfactory, please advise and we will take the necessary steps to effect payment.

Sincerely,

Merwin W. Kaye, Acting
Assistant General Counsel

What is "our file"
and what is in it?

This document multiple
cabins using water
at least as far back
as 1953

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OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20250

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Somes Bar, California

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We realize that you are alleging \$19,135.58 as necessary to remedy your water situation. However, our file indicates that an adequate filtration system could be constructed for substantially less than this amount. It also indicates that as far back as 1953, the water supply in your cabins would become turbid after extensive rain storms. Further, our file shows that a considerable amount of damage was done by a flood in December 1964.

If this offer of settlement is satisfactory, please advise and we will take the necessary steps to effect payment.

Sincerely,

Merwin W. Kaye, Acting
Assistant General Counsel



ACCESS TO ADVENTURE
and
MARBLE MOUNTAIN RANCH



92520 HWY 96, SOMES BAR, CA. 95568 1-916-469-3322, 1-800-KLAMATH, (FAX 1-916-469-3357)

Ken Harless
4876 E Hilo St.
Fremont, CA. 94538
510.656.6869

I (Ken Harless) lived at what is now Marble Mountain Ranch in 1947 to 1948. At that time the ditch was used for domestic water and agricultural purposes. I was also responsible for the maintenance of the ditch at that time. By my recollection, the ditch had been in continual use to that time since it's original construction in the 1800's by the Stenshaw mining company.

Declaration of

I, none, declare: -----

Ken Harless
4876 Hilo St.
Fremont, Ca. 94538
510-656-6869

- description of person, I am a resident
of -----, my dated birth is ----- I have
personal knowledge of the facts set forth

I (Ken Harless) lived at what is now Marble Mountain Ranch from 1947 to 1948. At that time the ranch was owned by Mary McMurtry.

I was responsible for the maintenance of the ditch carrying water from Stanshaw creek to the ranch. At that time the water from the ditch was used for domestic consumption and agricultural purposes (raising hay, fetch, gardening, etc.)

To the best of my memory, I understand that the ditch had been in continual use for the same purposes since it's original construction by the Stanshaw Mining Company in the late 1880s.

Signed:

Ken Harless

Date:

If called as a witness, I could & would
competently testify to these facts.
I am familiar with the Stanshaw watershed.
John Skendell (Mary McMurtry's Brother) might
still be alive. Might be in Arcata or Blue Lake
area.

Ernest Spinks

and lived in the area -----
from 1947 to 1949 I work at
what is now known as mine.

I declare under penalty of perjury
~~of~~ under the laws of the State of CA.
that the foregoing is true &
correct.

executed this — day of MAY, 1992
at San Jose, CA.

Sigs. — declarant.

Mr. Merwin W. Koye, Acting
Assistant General Counsel
United States Department of Agriculture
Office of the General Counsel
Washington, D.C. 20250

Dear Mr. Koye:

Your letter of February 3, 1970 was received with much interest and has served to develop new questions rather than answer those pending.

Your first paragraph states you are prepared to submit \$5,000 for damages to our water system. This is followed by a statement to the effect you are not admitting any liability for damage. I ask you six "If you are not liable, why then do you offer this token payment of \$5,000?"

In your second paragraph you acknowledge a figure of \$19,135.58 as the figure we allege to remedy the problem. Sir, the allege figure is \$15,492.73 and has never been the \$19,135.58 you mentioned.

Other statements were equally ambiguous. How can you use a century flood as evidence that the present problem was caused by a flood? ~~Can you~~ It takes little imagination to foresee what effect another flood of such magnitude would have ^{teamed} with the present unprotected ~~amount of drainage increased exposed area due to logging~~ vulnerable drainage basin, due to a lack of protective covering that was removed for access roads and logging blocks.

In the final analysis, Mr. Kaye, the facts are unbelievably clear:

1. My right to the quality and quantity of water from Stonshaw Creek was first established by the original owners of my Ranch.

3. The rights were protected and retained with each valid deed to my Ranch.
2. The establishment of the ranch precedes the creation of the Forest Service
4. As the owner I inherited the water rights to the quality and quantity of water from Stanshaw Creek.
5. Every year I have lived here I have maintained the my claim to Stanshaw Creek by using it for my domestic supply.

In summary, Mr. Kays, your offer is unsatisfactory and falls way short of insuring me with an ample supply of domestic water.

> Mr. Goss's measurements are questionable based on current and historic canal dimensions. They currently average 8-10 in. in depth and 4 ft. wide (cross-section = about 3 sq. ft.). At a flow velocity of 18 ft./15 sec., as recently measured in the half-culvert near the tip of the canal, and using these channel dimensions, the flow rate would be 3.6 cfs. We are actually requesting 2.75 cfs. The cross-section of the canal, especially right after the digging of the canal in about 1867 appears to have been much larger than it now is. Evidence for this comes from the measurement of long-abandoned sections of the connecting canals which were used by the miners during the latter part of the nineteenth century and into the early part of the twentieth. A recent measurement of a typical section of an abandoned canal yields a cross-section seven times as large as that of the currently-used portion of the canal system. The abandoned section measures 10 ft. across the top, is 3.5 ft. deep, and has a bottom measuring about 2 ft. This gives a cross-section of 21 ft.! It is unthinkable that the Chinese laborers who dug these canals would have, by pick and shovel, created a canal seven times larger than necessary, assuming they only needed a flow of about 2.75 cfs.

Mr. Goss reported (under "Current Diversion Capacity of Young's Ranch") the figure of 1.25 cfs as the flow rate in the currently-used canal, measured by him around 1977. On page 3 of his March 17, 1990 report to a Mr. Meith, Mr. Goss states that the "historic use" was 0.49 cfs, with no information as to just how he made this determination. Why would the Chinese miners have dug a canal with dimensions allowing for a flow in excess of 3 cfs when the actual flow was only 0.49 cfs?! If Mr. Goss's measurement of 1.25 cfs is accurate (and none of his methodology is indicated in his report), one must assume that he measured the flow during a low point in the day and/or at a low point in the season and/or under relative drought conditions and/or at a time when the ranch owner had not recently made a needed adjustment to the inflow at Stanshaw Creek.

Mr. Goss's estimates of flow characteristics of Stanshaw Creek, as stated in his March 17th report, page 2, are also suspect since the cross-sectional configuration of Stanshaw Creek is not only highly irregular geometrically, it changes radically from one year to the next due to winter flooding.

On this same page of Mr. Goss's report, he shows an average annual flow of water into the canal of 11.9 cfs and a 1-in-50-years low estimate of 3.02. An average annual flow rate of 11.9 would yield an average monthly flow rate of about 1 cfs, yet in table 4. of his report he states that 362 acre feet (0.5 cfs) of water was being used annually just for flood irrigation of a few acres of pasturage. At that time, the owner Mr. Lu Hayes, was also using water for 16 homes (occupied mostly by highway and forestry worker families), and the watering of 100 head of cattle, in addition to his own domestic needs. How then could Mr. Goss report an annual flow rate of 0.49 in the canal leading to the ranch?!

There is absolutely no record of the diversion canal having ever been increased in its carrying capacity. Yet in his March 17th report, Mr. Goss state that " The...diversion and earth-channel/flume capacity exceeds only the lowest flows which rarely occur on Stanshaw creek between August and December during drought years. The only time this condition has been documented was in 1977 [note that this is the same year in which Mr. Goss claims to have measured a flow rate of 1.25 cfs in the canal!] when flow available for diversion was 0.9 cfs (0.35 cfs below diversion capability), but still 1.75 times greater than historic use (0.49 cfs)." How would Mr. Goss then account for the fact that the current canal, more than likely reduced in its capacity by the continual silting-in, which he also mentions in his report, has a carrying capacity of around 3 cfs, yet he state in his report that, at the time, it had a capacity only slightly more ("exceeds only") than the "flow available for diversion", which he stated to be 0.9 cfs?

Given Mr. Goss's report figures, in relationship to the multiple uses to which water was being put on the ranch during the time he made his measurements, one might well suspect that Mr. Goss and the owner of the ranch (where Mr. Goss was in residence at the time) may well have had a falling-out over some matter and the submission of an erroneous report by Mr. Goss was his way of getting even with the owner.

In a recent letter, dated September 15, 1998, Mr. Harry Schueller, Chief of the Division of Water Rights, states "The Division has supplied you and your attorney with evidence [Mr. Goss's; see above discussion] to show that the upper limit [maximum] of your claim of pre-1914 appropriative rights is 0.49 cfs, continuous flow and may appropriately be only 0.11 cfs." The 0.11 cfs figure quoted here by Mr. Schueller appears to come from a table showing the amount of water used for irrigation (only) to be 0.11. Mr. Schueller further states, in this same letter, "there is no information in our files to indicate that any diversion in excess of 0.11 cfs is authorized under your pre-1914 claim." I'm confused here! Didn't Doug's pre-1914 water rights claim provide for a flow rate of 15 cfs?! And didn't Mr. Goss, in his report, state that the historic use was 0.49 cfs? How does Mr. Schueller now reduce that historic use to 0.11 cfs?

Later, in his letter, Mr. Schueller refers to the "construction" of a reservoir on the property, further stating that he doesn't see how such construction serves to increase the amount of Doug's pre-1914 appropriative water rights. Firstly, the "construction" he refers to was actually an enlargement of an existing ranch pond and was undertaken partly to provide a dumping site for CalTrans which was, at the time, clearing a massive slide just four miles upriver from the ranch. Secondly, no one on our end has ever claimed that the reservoir expansion justifies an increase in the amount of our water rights. The expanded reservoir requires no change whatsoever in the flow rate of the Stanshaw Canal carrying water to the ranch. As far as the current negotiations over water rights for Mr. and Mrs. Cole's ranch is concerned, the expansion of the ranch reservoir would seem to be a non-issue.

In his letter to Doug and Heidi Cole, dated March 11, 1998, Mr. Chris Murray states that, by measurements made by him during a site visit on September 23, 1997, he concluded that the average depth and width of the channel in question were "greatly in excess of the dimensions stated on the application" but that at another point along the canal it appeared to him that the dimensions were close to those in the application. For a given flow rate, obviously the cross-sectional area of the canal must be the same or overflow will take care of the difference! The estimate of canal dimensions averaging 12 in. by 24 in., as stated in the application referred to are fairly close to those which I have measured at several points along the canal, namely, 8 in. by 4 ft. My measurements are greatly exceeded by those of Mr. Murray!

Just a reflection: We have all heard many political leaders in recent times state their intention to do all they can to preserve the family, small business, and the environment. The current, obvious efforts on the part of the State Water Resources Board to limit water available to the Marble Mountain Ranch fly in the face of these political objectives, namely, such limitation will result in the splitting up and financial ruin of an extended family, the destruction of their small business, and the forced use of a fossil-fueled generator by successive owner(s) of the ranch property.

(see Doug's summary of his position entitled "Water Diversion At Marble Mountain Ranch")

SUMMARY OF STANSHAW DIVERSION RIGHTS BY MARBLE MOUNTAIN RANCH

The diversion of water from Stanshaw Creek by Marble Mountain Ranch is founded in a pre-1914 appropriative water right that is now an integral part of the current deed for this property. The following is a chronological summary of the key events relative to this water right and some key documents supporting the our rights to this diversion.

HISTORICAL OVERVIEW OF LEGAL BASIS FOR DIVERSION

The first recorded rights to water for Stanshaw Creek are found in county records for the year 1867. At this time, Samuel Stanshaw filed documents for 600 miners inches for the purpose of mining what is now the current site of Marble Mountain Ranch, the down stream Blue Heron Ranch (a beneficiary of the diversion) and the "old man river" property (a current protestant of the diversion). See attached exhibit A, a photocopy of the 1867 filed water right.

Numerous other water filings, mining leases to the Chinese, and other transactions at the Stanshaw Mining Company are recorded between the years of 1867 and 1911. The most significant event relative to the current water diversion after the original filings was at this 1911 date when Samuel Stanshaw successfully patented the mining claim, converting the involved land from public to privately held property. This patent paper, also in record at Siskiyou County Records Offices was signed by the then president of the United States, William Taft. See exhibit B for a copy of this document. This document states in part:

"Now know ye, That there is, therefore, granted by the United States unto the said claimant the tract of Land above described to have and to hold the said tract of land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant, forever: subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights..."

The Stanshaw Mining Company in succeeding years was divided into various parcels, and sold. Marble Mountain Ranch retained the rights to the original ditch and has continuously reaped the benefit of that ditch. This original

ditch, hand dug by Chinese immigrants, continues in a nearly identical fashion to carry water in identical volumes to Marble Mountain Ranch and is the point of conflict between plaintiff and defendant. Yet, the Current deed, held by the Coles, still includes "all water rights appurtenant thereto." See exhibit C, copy of Cole's deed

It is hoped that this brief summary with attached documents will suffice to demonstrate that the diversion of water by the owners of Marble Mountain Ranch is based on due process and legal rights. This diversion has continued for nearly 140 years and has provided for the sustenance of the occupants of this property as allowed by law. We pray for a removal of the temporary restraining order in case #sc cv cv'00-1700

CLAIM OF DAMAGE BY PLAINTIFF AND A PROPOSED MITIGATION

The essential nature of Stanshaw Creek is that of a steep, high sediment carrying, flash drainage that has both natural and man made obstruction to fish passage at and near it's confluence with the Klamath. These features prevent Stanshaw Creek from being a significant salmon or steelhead spawning or rearing stream. It is, however, populated by some native trout and provides rearing habitat to those trout. The diversion and canal system provides a number of benefits to the fishery, including a 3/4 mile rearing habitat in the canal. The diverted Stanshaw water is carried by canal to Irving Creek, a known salmon and steelhead spawning and rearing stream. This transplanted water supplements the habitat in this stream and provides better flows during low water conditions.

It appears that the only conflict of substance between plaintiff and defendant lies in the loss of fish passage at the point of diversion during low water months. Currently, the diversion is constructed of stacked boulders and rock, and there is a considerable seepage of water through the diversion. It is our proposal that we construct a more efficient in-stream diversion to channelize the seeping water and provide fish passage with this channelized water. This channelized flow could provide a source of fish passage water and have a minimal impact on the diverted water needed by Marble Mountain Ranch. While we stand strong in our claim to diversionary rights for Stanshaw Creek water, we are willing to take some mitigatory measures, such as the proposed fish passage, as long as there are no significant injuries to Marble Mountain Ranch.

WATER DIVERSION AT MARBLE MOUNTAIN RANCH:

Our position is that there has been continuous beneficial use of the water that was originally claimed by Samuel Stanshaw in 1911. This pre-1914 water right makes other appropriative water applications redundant.

The original amount of this claim was for 600 miners inches, but use and maintenance of the permit was truncated to 3cfs after the cessation of mining operations on the ranch. We claim that the current capacity of the ditch (about 3cfs) is what was continuously used by the ranch except for brief periods of time (droughts, seasonal changes, shutdowns during maintenance) since the end of mining operations. There has not been a continuous "5 year period" when the ditch was not carrying it's capacity with beneficial use of the water.

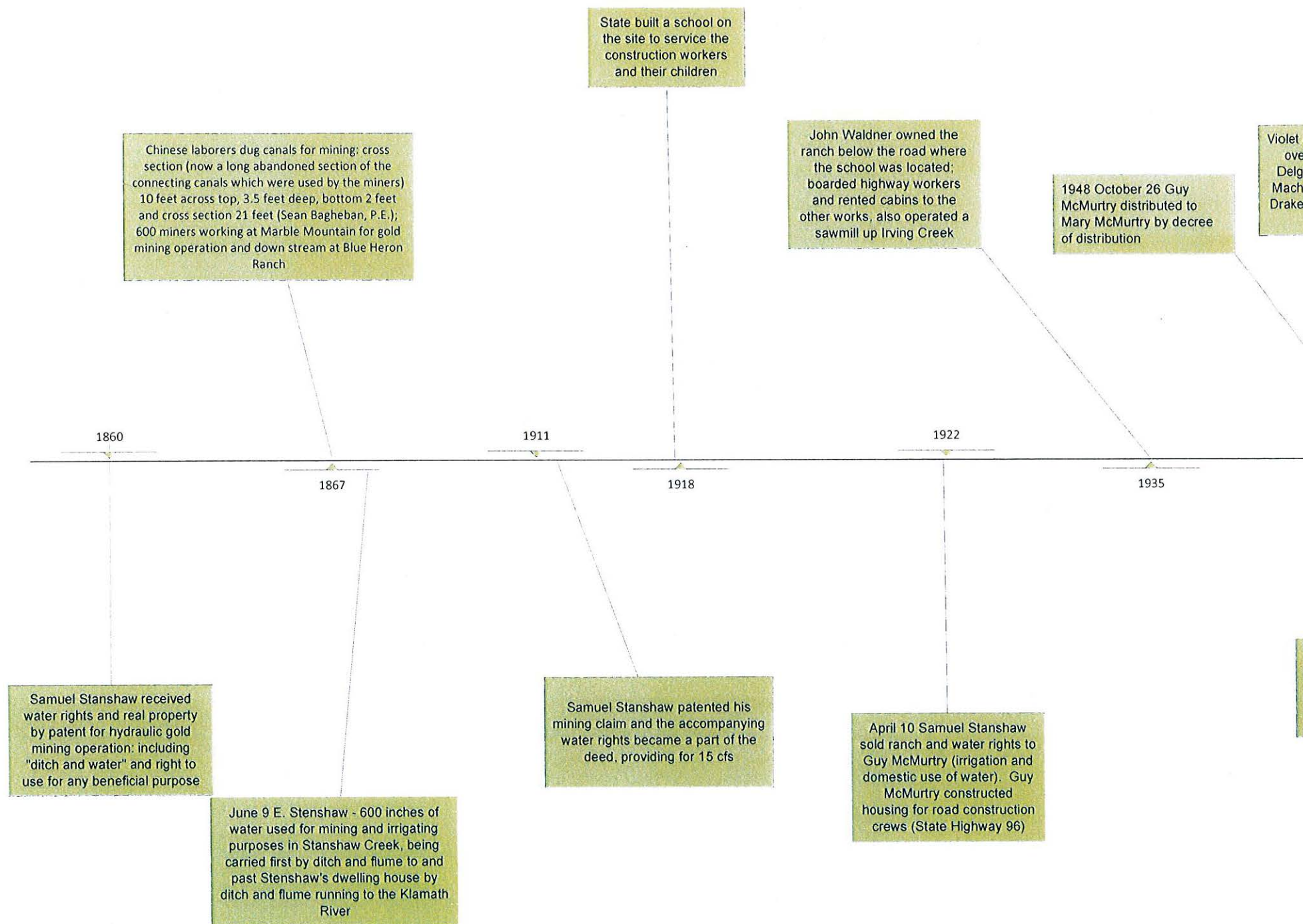
The current dimensions of the ditch range from _____ and carry a limit of 3 cfs. The evidence we use for claiming the pre-1914 right is maintained at 3 cfs is as follows:

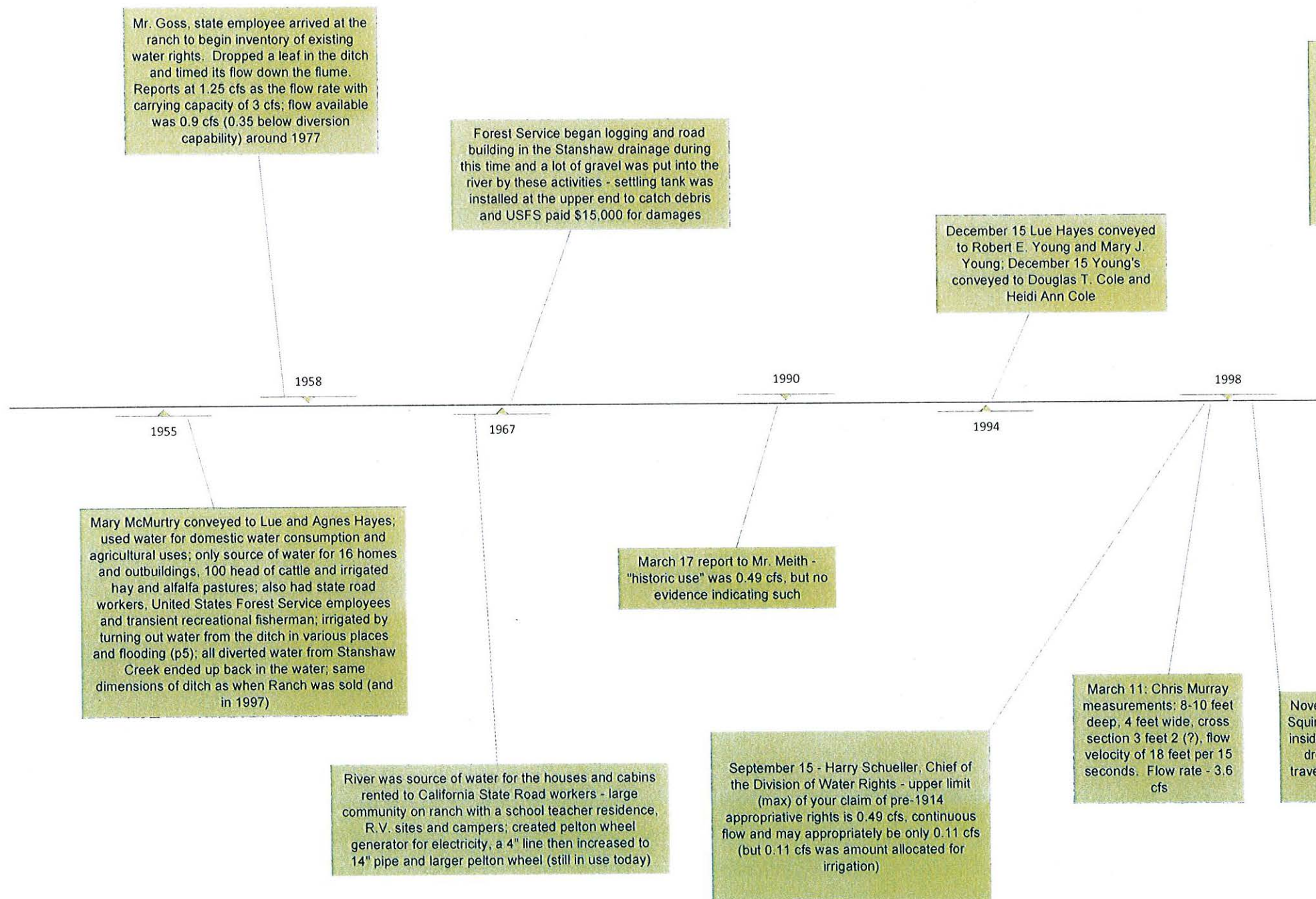
1. Testimony of witnesses (previous ranch owners, residents of the ranch, employees of the ranch, neighbors of the ranch, associates who were familiar with the ranch operations) that confirm:
 - A. An ongoing and continuous household, agricultural, industrial, and hydrogenerational use of the water.
 - B. The general dimensions and nature of the ditch remaining static since it's original construction
 - C. The maintenance requirements of the ditch which address the capacity issue and the general character of the ditch.
 - D. The evolution of hydro needs on the ranch from primarily agricultural, domestic and industrial to more recent needs based on domestic, hydrogeneration, and a lesser level of agricultural and recreational use.
2. The public records indicating the existence of the 1911 water right (signed by president Taft) and it's transfer with the sale of the ranch to successive owners.
3. The historical ditch lines that were abandoned during use changes are the same size and of the same character as the current ditch. There has been no need to enlarge an unused ditch, yet it stands as testimony to the original nature of the ditch.
4. There have been no documented "enlargements" of the ditch, yet it's existence and the existence of the ranch testifies to it's continued maintenance (and continuous beneficial water use).
5. During the years following the hydraulic mining operations, the water flowing through the ditch was used in it's entirety to flood irrigate, supply domestic needs, and industrial needs (state road construction yards on the ranch). Agricultural use of the water evolved to hydrogeneration as the predominant use of the water as the use of

the ranch evolved. The total volume of water carried by the ditch as always been used in a "beneficial" way, although the predominant uses have evolved, and the ditch capacity remains unchanged.

6. The measurement of .49 cfs water in the ditch was taken in the low flow season of the year, and represents a single point in time, not a 5 year span. Seasonal fluctuations will allow extremely divergent flow readings, dependent on the time of the year the reading was taken, and use patterns change dramatically during the course of a season as well.

21-67024





**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 30.4.2 Docs provided by Cole

1. 11-09-12.Cole's Attny.e-mail. statement of water diversion and use
2. 10-04-12.Cole's Attny.e-mail to SWRCB.App 29449
3. 10-01-12. Coles Attny. to SWRCB. App 29449. summary of water use
4. 8-20-01.Cole's Attny.Complaint rebuttal
5. 12-01-98.Cole.Statement of Water Diversion and Use. S015022

per CDFG request for fish flows. You use all of the water diverted for hydropower and divert XXX amount to MR 193 for farming, livestock and domestic use. Do you store any water at the Ranch?

Please clarify and fill out the blank Statement of Use and send it back to me. I want to go over it before it is finalized and sent back to the State Water Board.

Thanks-

Barbara A. Brenner

STOEL RIVES LLP

babrenner@stoel.com | www.stoel.com

New! [California Environmental Law Blog](#)

From: Ebrahimzadeh, Parissa

Sent: Friday, November 09, 2012 12:54 PM

To: Brenner, Barbara A.

Subject: Re: Call with Bob Rinker for Marble Mountain Ranch

Hi Barb,

I just spoke with Bob Rinker from the Water Board. He stated that to inactivate the Statement Nu. 015022 (attached), he would like new information via the Initial Statement of Water Diversion and Use (form attached) and a USGS map that indicates the point of diversion and the place of use.

He stated that the pre-1914 rights will be in place when either 015022 is reactivated or a new Statement is filed.

Parissa

Parissa Ebrahimzadeh

STOEL RIVES LLP | 500 Capitol Mall, Suite 1600 | Sacramento, CA 95814

Direct: (916) 319-4644 | Mobile: (916) 402-8121 | Fax: (916) 447-4781

pebrahimzadeh@stoel.com | www.stoel.com

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Please consider the environment before printing this email.

<intl_stmnt_form.pdf><s015022.pdf>

Ross, Tammy

From: Brenner, Barbara A.
Sent: Thursday, October 04, 2012 4:38 PM
To: McCarthy, Matthew@Waterboards
Cc: Douglas Cole; Ross, Tammy
Subject: RE: A029449/Diversion Rights in Stanshaw Creek Siskiyou County

Matt-

We are seeking recognition from the Board of the Cole's right to divert under its pre-1914 claim. In the past there has been some suggestion by Board staff that the pre-1914 right has been diminished. As indicated in my correspondence, there is no evidence to support this suggestion. Consequently, we would like confirmation that Board staff agrees the Cole's have an existing pre-1914 right of up to 4 cfs to avoid any future confusion.

Thanks-

Barbara A. Brenner
STOEL RIVES LLP
babrenner@stoel.com | www.stoel.com

New! [California Environmental Law Blog](#)

From: McCarthy, Matthew@Waterboards [<mailto:Matthew.McCarthy@waterboards.ca.gov>]
Sent: Tuesday, October 02, 2012 11:53 AM
To: Brenner, Barbara A.
Subject: FW: A029449/Diversion Rights in Stanshaw Creek Siskiyou County

Ms. Brenner,

Thank you for your letter.

After review of the letter, it appears that your client believes he can divert under a claim of pre-1914 right and no longer needs the application. If so, please submit a request for cancellation of Application 29449, available here:
http://www.waterboards.ca.gov/waterrights/publications_forms/forms/docs/can_request.pdf

Please let me know if you have any questions.

Sincerely,
 Matt McCarthy
 Division of Water Rights
 916-341-5310

From: Ross, Tammy [<mailto:TLRoss@stoel.com>] **On Behalf Of** Brenner, Barbara A.
Sent: Monday, October 01, 2012 2:05 PM
To: McCarthy, Matthew@Waterboards
Cc: Crader, Phillip@Waterboards; Douglas Cole (guestranch@marblemountainranch.com); Brenner, Barbara A.
Subject: A029449/Diversion Rights in Stanshaw Creek Siskiyou County

Please see my attached letter.

Barbara A. Brenner | Attorney
STOEL RIVES LLP | 500 Capitol Mall, Suite 1600 | Sacramento, CA 95814

New! [California Environmental Law Blog](#)

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October 1, 2012

BARBARA A. BRENNER
Direct (916) 319-4676
babrenner@stoel.com

VIA E-MAIL AND FIRST-CLASS MAIL

Matt McCarthy
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

**Re: MMcCarthy: A029449/ Diversion Rights in Stanshaw Creek in Siskiyou County:
63:MC:262.0(47-40-01);A029449**

Mr. McCarthy:

Marble Mountain Ranch (the "Ranch"), located in Skiskiyou County, is owned and operated by Douglas and Heidi Cole (the "Coles"). The Coles have diverted water from Stanshaw Creek since purchasing the property in 1994 and continue to use the water to support the Ranch. Previously, the Coles have informed staff for the State Water Resources Control Board ("Board") that the right to divert the water is based on their pre-1914 appropriative rights. Accordingly, the Coles are already entitled to divert water from Stanshaw Creek for irrigation and domestic use and hydroelectric production.

Board staff contends that the Coles do not have a valid pre-1914 claim to the water rights because there is insufficient evidence that the diversion of water has been continuously maintained as to the amount diverted since December 19, 1914. (Letter from Board, September 15, 1998.) However, there is no basis for this assertion and the Coles have enclosed evidence of continuous diversion and use of water from Stanshaw Creek since the 1860's.

Moreover, under California Water Code section 1202, the Board has no jurisdiction over Marble Mountain's pre-1914 water rights. Numerous Board water right decisions and orders confirm that the Board has no authority to adjudicate a pre-1914 water right. (See Board Decisions, D934; D1282; D1290; D1324; D1379.) The Board has conceded to this fact in a letter to the Coles dated August 22, 2002, in which Edward C. Anton, Chief of the Division of Water Rights states,



Matt McCarthy
October 1, 2012
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“Regardless of past letters sent by the Division containing estimates of what could be diverted pursuant to a pre-1914 appropriative right claim, the Division has no adjudicatory authority to quantify such a claim. Only the courts can make this determination. ... All available evidence suggests that the diversion and use has been maintained in a diligent and continuous fashion ever since. Consequently, we believe that a court would find that the Coles have a valid claim of a pre-1914 appropriative right to divert water for the full irrigation and domestic uses currently maintained, including reasonable conveyance losses.”

Accordingly, the Board's arguments regarding the validity of the Coles pre-1914 appropriative rights are moot and Board staff has no authority to make this determination. Once the claimant of a pre-1914 water rights presents prima facie evidence of the existence of a pre-1914 right, the burden shifts to the petitioner, or in this instance Board staff, to show that the pre-1914 right was lost. Board staff has not met this burden and in fact, the evidence establishes a pre-1914 water right, none of which has been lost or diminished.

Board staff argues that the Coles are limited to 0.49 cubic feet per second (cfs) and relies solely on information obtained in a 1965 bulletin by the Department of Water Resources entitled “Land and Water Use in the Klamath River Hydrographic Unit” (Bulletin No. 94-6). Bulletin 94-6 identifies the total amount diverted for irrigation, domestic, stockwatering, and power production of 362 acre-feet, annually. Board staff further states that the information was confirmed by Mr. Marvin Goss, Forest Service Hydrologist, who lived on the property under prior ownership. Mr. Goss inappropriately claimed the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel and that water had been used at a rate of 0.49 cfs for many years.

There is no sound evidence which demonstrates the Department of Water Resources' basis for the total amount of diverted water. In addition, the information documented by Mr. Goss is insufficient. His reading was based on a one-time analysis during a relatively dry season, using a leaf to measure the water flow. It is also well-known in the community that Mr. Goss had a contentious relationship with Lue and Agnes Hayes, the owners of the property at the time of Mr. Goss' reading. That fact, in conjunction with historic canal dimensions and the vast use of water at that time, dispute Mr. Goss' reading. The enclosed details the history of use which evidence prior use of at least 3.6 cfs from Stanshaw Creek (see Attachment A, “Summary of Continuous Water Use at Marble Mountain Ranch”). Furthermore, the Board has previously determined that



Matt McCarthy
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evidence introduced in support of a pre-1914 water right must be considered in the light most favorable to the claimant. (Board Order No. WR 95-10.)

It is also established in common law that the quantity of water to which an appropriator is entitled is determined by quantifying the maximum amount of water reasonably and beneficially used by the appropriator within the five previous calendar years. (*Smith v. Hawkins* (1898) 120 Cal. 86, 87.) The Coles have presented evidence that their use of water from Stanshaw Creek amounts to 3.6 cfs over the past five years, consistent with the amount of water diverted and put to use under previous Ranch ownership.

On these bases, the Coles have the right to divert water from Stanshaw Creek for all their irrigation and domestic consumption as well as hydroelectric power production at a minimum of 3.6 cfs. If you have any questions please contact me at 916-447-0700.

Best regards,

Barbara A. Brenner
Counsel for Marble Mountain Ranch

BB:jhc
Enclosure

cc: Phillip Crader
Doug and Heidi Cole

Attachment A
Summary of Continuous Water Use
At Marble Mountain Ranch

In 1867, the United States of America granted a parcel located in Dillon's Township, Klamath County, California to Samuel Stanshaw who hired Chinese laborers to dig canals on the parcel of land that measured approximately 3.5 feet deep, 2 feet across the bottom, and 10 feet across the top, creating a cross section of 21 feet. (See Sean Bagheban, P.E.) In 1867, Samuel Stanshaw filed a claim for water rights amounting to 600 inches to be used for a gold mining operation and irrigation purposes on several areas of the Stanshaw property, including what is now known as the Marble Mountain Ranch. (Water Notice recorded March 25, 1867 in Book of Mining Claims 232 at Page 397.) Samuel Stanshaw hired 600 miners to mine for gold and created a community for the miners to work and live on the ranch with their families. In 1870, the mining rights were leased to Bow & Company, certain "Chinamen" to take gold ore from the Stanshaw Mining Company who also mined for gold. A requirement under the mining lease was that Bow & Company purchase their eggs from the ranch operating at the Stanshaw Mining Company. Commencing in 1867 water was diverted from Stanshaw Creek to Marble Mountain for reasonable and beneficial use.

In 1911, Samuel Stanshaw patented his mining claim which granted water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with those water rights. This patent granted him the pre-1914 appropriative water rights that continued to be diverted and put to use at Marble Mountain. Commencing in 1911 approximately 15 cubic feet per second (cfs) of water from Stanshaw Creek was diverted to Marble Mountain.

During this time, the State commenced construction of State Highway 96 and the construction crew lived on the site while the mining, ranching and domestic operations were ongoing. Each of these operations relied on Samuel Stanshaw's appropriative water rights until 1922 when the Stanshaw mine/homestead ranch was sold to Guy McMurtry, a state road engineer. Mr. McMurtry was assigned by the State to complete construction of the last unfinished section of Highway 96, between Orleans and Happy Camp. The water distribution system on Marble Mountain Ranch was utilized to support the construction work and soon, Mr. McMurtry built additional housing for these crew members and their families. The Stanshaw Creek pre-1914 water diversion was continuously relied upon and was the sole source of water for all water demands at the ranch.

The population burst prompted the State to build a school on site to service the children of all the people living on the ranch. The first school was a log building with one classroom, situated over Stanshaw Creek. In 1935 the County Superintendent of Schools in Siskiyou County determined that the one room classroom was insufficient to support the 52 children and made arrangements to construct a supporting school house adjacent to Marble Mountain Ranch. The new school house included bathrooms, a kitchen, dining room, and housing for the two teachers on site.

Meanwhile, Mr. McMurtry operated a dairy farm and provided milk and milk delivery services to the community on the ranch. There is some testimony by past residents and locals of a DC powered light system being used to illuminate/heat the main ranch house and the hen house on the ranch then owned by McMurtry. Further evidence of a DC hydroelectric power system is the remnant abandoned penstock system leading to the current powerhouse location and the knob and post electrical remnants removed from the original ranch house during renovations by the Coles in 2006. A single ditch line carrying approximately 4 cfs provide adequate sufficient water for all domestic and agricultural water uses. Although the original mining operation had ceased, the property still demanded water for the agricultural operations and domestic consumption by the residents and school. At this time the water was also used to generate power and the hydropower was and remains as the sole source of power generation.

The McMurtry's utilized the ditch for domestic consumption, as well as agricultural purposes to raise hay, fetch, vegetable garden, and the dairy farm until 1958 when it was sold to Lue and Agnes Hayes. The Hayes operated a cattle ranch with one hundred cattle from 1958 to 1994. The ranch sustained 16 homes and outbuildings and housed State road workers, United States Forest Service employees and transient recreational fisherman. The ditch lines and foundational domestic/agricultural water lines that are in place today were the same lines that existed when the Hayes' purchased the property. The lines carried approximately 4 cfs and supported all the people living on the ranch at that time, the cattle ranch operation and continued agricultural production.

The Hayes' continued to use the water for domestic consumption to support the many residents on the property. In addition, they irrigated hay and alfalfa pastures by turning out water from the ditch in various places and flooding the pastures. Some of the diverted water was returned to Stanshaw Creek. The dimensions of the ditch remained the same from the time the Hayes' purchased the property to the time the Ranch was sold to the Cole's. The Hayes also operated a pelton wheel generator for electricity, still in use today. The wheel generator was a 4 inch line, then increased to a 14 inch line utilized to create electricity for the occupants on the Ranch.

After diverted water was funneled into the domestic water line and hydropower penstock, remaining flows and power plant effluent continued through the lower elevation canals and were diverted at appropriate spots to flood irrigate alfalfa hay pastures, vegetable gardens, fruit trees, and lawns. Per Lue Hayes, there were times in his ownership that virtually every available bit of Stanshaw Creek water was diverted into the canals and used in power generation and irrigation of crops at the ranch. During the Hayes family occupation, the power plant was upgraded to a facility that produced about 40 KW of AC power that was needed for an increasing ranch residency population.

During these years, the Hayes' family maintained the ditch to ensure that any gravel and silt that settled in the ditch was excavated and the flume was kept in good condition particularly because the wood would deteriorate and branches would clog the flume. The Hayes family removed redwood plank ditch linings that had rotted in various places in the canal system and maintained and replaced a wooden flume section at various times during their occupation of the

ranch. The agricultural uses of the ranch continued through the Hayes family era with flood irrigation as the primary agricultural water distribution system.

The Hayes' measurement of the ditch at that time ranged from 2 -1/2 feet to 5 feet wide and from 2-1/2 feet to 1-1/2 feet deep, depending on the water flow. The abandoned ditch, which has now been inactive for approximately 140 years, is the same size as the original ditch in use today. The ranch was then sold to the Young family in 1972 when the Young's licensed the ranch as a state licensed mobile home/RV park with a permitted capacity of 57 mobile home hook-ups. The continuing rental of the 10 previously constructed cabins and three homes also added to the ranch population. Much of the water use was directed at domestic consumption and power generation to support ranch residents. However, the ranch still sustained alfalfa pastures, fruit and nut orchards, and large vegetable gardens.

The Young's Ranch Resort had a resident population between 100 – 200 persons consuming ranch water and hydroelectric power. Past Young's ranch visitors returning to Marble Mountain ranch recant stories of Young's ranch management needing to patrol the ranch routinely to chastise those ranch residents using more than their allotted share of power and water during low Stanshaw Creek stream flow periods during the summer months. Again, during this period, the original Stanshaw Creek canal system carried water at full capacity during periods of available flow, and carried nearly all of Stanshaw Creek flows during periods of diminished low Summer flows.

When the Cole family purchased the ranch in 1994, the infrastructure load requirements for power production and consumption were beyond the capacity of the ranch in the Cole's estimation. A change in business model was implemented at this time to reduce the ranch residency to a smaller population by targeting short term residents on a full service recreational visit. The target guest population now at Marble Mountain Ranch is 30 – 35 visitors on a full service short term guest ranch visit. Guided rafting, fly fishing, trail rides and other recreational activities along with food/meal service provide higher income returns per resident with fewer residents on location to deplete power and water resources. Additional water distribution improvements have been implemented by switching the agricultural uses from flood irrigation to sprinkler irrigated pastures, drip irrigated gardens and by installing culverts in the canal systems to reduce seepage of captured water. Additionally, the hydroelectric power plant was upgraded in 1997 to allow for more efficient power production with available Stanshaw Creek stream flows. Ongoing efforts to improve efficiency of Stanshaw Creek water and reduce demand include grant applications for canal system piping/culverting, and power plant upgrades.

Marble Mountain Ranch, since the Cole's ownership, has beneficially used approximately 4 cfs maintained by the Marble Mountain Ranch predecessors and current occupants. There has been no 5 year continuous lapse of water transport, or truncated use (despite seasonal variations in flow), that might suggest a diminished capacity. In fact, the historical growth and development of the ranch operations over 150 years speaks to the undeniable maintenance of the canal systems and beneficial use of all water diverted from Stanshaw Creek.

KRONICK
MOSKOVITZ
TIEDEMANN
& GIRARD
A PROFESSIONAL CORPORATION

JANET K. GOLDSMITH

August 20, 2001

VIA HAND DELIVERY

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, CA 95812-2000

Attn: Michael Contreras

Re: Water Right Complaint Against Douglas and Heidi Cole;
Stanshaw Creek, Siskiyou County

Dear Mr. Schueller:

This letter responds to the letter dated June 14, 2001 from Donald Mooney on behalf of the Klamath Forest Alliance ("KFA") complaining of diversions by Heidi and Douglas Cole from Stanshaw Creek in Siskiyou County. In essence the letter asserts that the Coles have not provided evidence that the pre-1914 water right filing by Samuel Stenshaw pertained to their land, and that their diversions harm coho salmon and steelhead in Stanshaw Creek and the Klamath River. This letter provides the evidence requested concerning the basis of the Coles' claim of pre-1914 water rights. The KFA allegations that the Coles' diversions constitute a "take" of coho or steelhead salmon are unsupported and incorrect. The Coles' diversion is not harming either the coho or steelhead (or any other) fishery in either Stanshaw Creek or the Klamath River.

A. HISTORY OF USE

Attached as Exhibit A to this letter is Patent 186169¹ from the United States to Samuel Stenshaw dated March 27, 1911. Because the handwritten description in the Stenshaw patent is difficult to read, I have verified the property description using the BLM Master Township Plat and Historical Index.² The description of the land patented to Stenshaw includes forty acres of what is now known as Marble Mountain Ranch, owned by the Coles.³

¹ The patent number appears at the bottom of the page, below the signatures.

² The land is described as a patent granted pursuant to a Homestead Entry: "W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, and the N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, and E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T 13 N, R 6 E, Humboldt Meridian. Because

Harry M. Schueller, Chief
 Division of Water Rights
 August 20, 2001
 Page 2

10987.2-1

According to Edwin Gustave Gudde, California Gold Camps (U.C. Berkeley Press, 1975), the Stanshaw Mine was in operation at the turn of the century and was reported in Mining Bureau reports as late as 1935. A mining pit is located on the Marble Mountain Ranch.

Water was also used for domestic purposes and irrigation. The notice of appropriation states that it was in part "for irrigating purposes" and describes the ditch and flume as running "to my upper field." (See Exhibit D, Notice of Appropriation, Liber 1 of Water Rights, page 397, Siskiyou Official Records)

Violet Anderson, who moved to the area shortly after Stanshaw conveyed a portion of his property to Guy and Blanche McMurtry, recalls that she cooked in an old cookhouse on the property for up to two shifts of workers who boarded there, and that the McMurtrys ran a small dairy. (Exhibit E.) She recalls that electricity was already in use at that time in connection with the dairy. Among other purposes, it was used to sterilize the bottles into which milk was transferred for sale.⁴ Minerva Starritt, one of the early schoolteachers at the Irving Creek schoolhouse recalls that when she arrived in 1935, Guy McMurtry was the Superintendent for the State Highway 96 and "had cabins where the state highway workers lived with their families." (The Siskiyou Pioneer (Siskiyou County Historical Society, Vol. 6, No. 2, 1989). (Exhibit F.))

The McMurtrys owned the property until Lue and Agnes Hayes purchased it in 1955. At the time of the purchase, Mr. Hayes recalls that 30 acres were under irrigation and there was an existing 4 KW pelton wheel and an existing 12" main water line on the property. (Exhibit G.) The pelton wheel was described by William M. Heitler of the U.S.F.S. as "the 85-year old pelton wheel" (Exhibit H). Mr. Hayes identified it as "an old C-3 HP generator."⁵ The power generating facilities have since been upgraded several times by Mr. Hayes and successive owners, including the Coles, but the evidence is that power was being generated from a very early date. The engineer retained by the Coles to upgrade the power facilities described the pelton wheel as dating from perhaps the first decade of the last century. The old pelton wheel remains available for inspection at the Ranch.

Domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. The Hayes' use has been described in the 1963 DWR Bulletin 94-6 "Land and Water Use in Klamath River Hydrographic Unit." (Table 4, at p. 55.) Mr. Hayes believes that the demand estimated at that time may have underestimated his existing uses because it was based on a single flow measurement taken in late fall when he was not irrigating. (See Exhibit G.)

the Historical Index page is 24" x 28" it is difficult to reproduce and is not included as an Exhibit to this letter. It is available for your inspection and verification on request.

The patented land was resurveyed by the Bureau of Land Management in 1985 and designated "Tract 48" on that resurvey. A portion of Sheet 1 of 8 of that resurvey is attached as Exhibit B.

³ A copy of the Coles' deed is attached as Exhibit C.

⁴ Personal communication, 8/19/01.

⁵ Personal communication, 8/16/01.

Harry M. Schueller, Chief
 Division of Water Rights
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10987.2-1

The Hayes conveyed the Ranch to the Youngs, whose uses are documented in your files. The Youngs conveyed the Ranch to the Coles in 1994. The Coles' residence is the same house originally occupied by Samuel Stenshaw.

While there has been an evolution of uses for the Stanshaw Creek appropriation since the early days of the Stanshaw Mine, it is clear that year-round uses of water were in practice from early in the last century. Mining, domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. While mining may no longer be pursued, changes in purpose of use of pre-1914 appropriations have been permissible so long as no other user is injured. The very long history of the current uses of water on Marble Mountain Ranch belie any assertion that others have been harmed by the shift in purpose of use of this water.

B. CALCULATION OF WATER DUTY

The estimate of water demand for the documented uses on Marble Mountain Ranch, as set forth in the SWRCB letter of February 4, 1993 from Katherine Mwroka (Exhibit I) appears questionable for several reasons.

First, it is based on use *at the point of use*, and therefore does not take into account conveyance losses in the ditch leading from Stanshaw Creek. This ditch is seven tenths of a mile long⁶ and is constructed of flumes and earthen materials. While the Coles have taken steps to improve conveyance efficiency (see Exhibit H), there remain reasonable losses that should be considered in calculating the amount of diversion necessary to satisfy their pre-1914 appropriative right.

Second, the calculation completely ignores water demand for power production. As explained above, power use began early in the last century and has been continuous throughout the history of the Ranch.

Third, the water duty used by Ms. Mwroka for calculating irrigation demand is questionable. Ms. Mwroka based her estimate of irrigation demand on a water duty of one cfs per eighty acres of irrigated land. This is the most conservative water duty proposed in the SWRCB guidelines concerning reasonable use for irrigation. While it may be appropriate for other areas of Siskiyou County, it is not appropriate for calculating irrigation water demand on Marble Mountain Ranch. The porous nature of the soil on the Ranch and the slopes involved suggest that a higher water duty should be used.

C. LACK OF JUSTIFICATION FOR A CEASE AND DESIST ORDER

The complainant fails utterly to provide any factual evidence that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. The sole allegation of adverse impact is a single paragraph in the middle of page 3 of the KFA letter that alleges that the National Marine Fisheries Service ("NMFS") and California Department of Fish and Game ("DFG") "are concerned." No specifics are given of just how the long-standing diversions of the Ranch are affecting either coho salmon or steelhead. No statements of either the DFG or NMFS are attached to the KFA letter.

⁶ DWR Bulletin 94-6, Table 4, p. 55.

Harry M. Schueller, Chief
 Division of Water Rights
 August 20, 2001
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The only evidence offered by KFA is a letter from the U.S. Forest Service District Ranger, William Heitler reporting such "concerns," again without specifics. The USFS letter related to the question whether the Coles had, or needed, a fee permit for the ditch. Subsequently, based on the age of the ditches, it was determined that no fee permit was required. (See Exhibit H.) In a subsequent memo, Mr. Heitler also comments on the responsiveness of the Coles to DFG's direction concerning fish passage at the century-old rock and rubble diversion dam. (*Ibid.*)

In a March 8, 2000 letter concerning the Coles' water right application for 3 cfs diversion for power production, the following *general* concerns were listed by NMFS concerning coho salmon: migration delay, loss of habitat due to dewatering, stranding of fish due to dewatering of the stream, entrainment in poorly screened diversions, and increased water temperatures. None of the issues was raised based on any site specific investigation or concern.

None of the issues mentioned in the NMFS letter are being significantly exacerbated, if at all, by the Coles' diversions under their existing rights. Stanshaw Creek is not a migration or spawning resource for coho salmon, nor is it available for juvenile rearing, since the culverts at Highway 96 prevent passage upstream into the creek. There are no pools in the 600' reach of Stanshaw Creek below the highway to serve as "preferred" rearing habitat for juveniles (according to the NMFS letter). However, coho habitat has been documented in Irving Creek to which the Coles' diverted water is ultimately returned. The addition of flow to that creek may well benefit the coho resource of concern to the KFA.

Temperature at the mouth of Stanshaw Creek was measured at 65° F in the afternoon of August 17, 2001 by Douglas Cole, within the reported range of suitability for coho juveniles and within the range of "best" suitability for the steelhead trout that inhabit the creek (Klamath Resource Information System).

Water in Stanshaw Creek is bypassed through the rock and rubble diversion dam. The diversion is maintained pursuant to a Five Year Maintenance Agreement between the Coles and the California Department of Fish and Game, dated January 21, 1999. There is continuous flow bypassing the Ranch diversion, and fish passage has been observed in both directions. As reported by Mr. Heitler in his April 6, 2001 e-mail memo, "The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction." (Exhibit H.) The flow in Stanshaw Creek extends to the mouth, even in this dry month of a dry year.

The mere fact that coho are a listed species and steelhead are a candidate species is no evidence that the decades-long diversions for the Ranch are harming the fishery. The above data refute the allegation that the current diversions by the Coles violate the Endangered Species Act. The complainants have produced no evidence of harm to protected species from a continuation of diversions.

Beyond the Endangered Species Act, however, the KFA has raised a claim of public trust violation. In any public trust evaluation, the harm to the public trust resource (if any) must be balanced against the reliance on the diversions. In this instance, there is clear evidence of a century of reliance on the water and a good faith belief that the diversions are justified under the pre-1914 appropriation by Samuel Stanshaw. The Coles' water use is reasonable and beneficial, and the Coles and their predecessors have continually improved the efficiency of use. No other water source is available to the Coles, whose entire livelihood depends on the continued availability of water from Stanshaw Creek. This

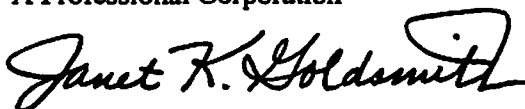
Harry M. Schueller, Chief
Division of Water Rights
August 20, 2001
Page 5

10987.2-1

great reliance, balanced against the lack of any specific allegation or evidence of harm to public trust resources by continuation of diversions pending SWRCB action on the Coles' pending application, should militate against any enforcement action at this time.

Please feel free to contact me if you have further questions.

Sincerely,
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation



Janet K. Goldsmith
Attorneys for Douglas and Heidi Cole,
Marble Mountain Ranch

JKG/mm

Attachments

cc: Douglas Cole
Donald Mooney
Michael Contreras

State of California, State Water Resources Control Board

Division of Water Rights

P.O. Box 2000, Sacramento, CA 95812-2000

Info: (916) 341-5300, FAX: (916) 341-5400 Web: <http://waterrights.ca.gov>

S015022

2005, 2006, 2007

SUPPLEMENTAL STATEMENT OF WATER DIVERSION AND USE FORM

Owner(s) of Record:

DOUGLAS T COLE; SHIRLLE MORGAN

Primary Contact:

AQUA ENGINEERING & CONSULTING

PO BOX 160621

SACRAMENTO, CA 95816

Phone No. 916-612-3539

Fax No.

E-mail Address:

Source Name: STANSHAW CREEK

Tributary To:

County: Siskiyou

Diversion within: SW 1/4 of NE 1/4 Section 33, T 13 N, R 6 E, HB&M

Notifying the Division of Water Rights of ownership or address changes is the responsibility of the claimant

Please Complete and Return This Form by JULY 1, 2008

Agent:

Address:

Phone No.

Fax No.

E-mail Address:

Year of First Use:

Name of Diversion works:

Assessor Parcel Number
of the Diversion site:A. **Water is Used Under:** Riparian claim ___ Pre-1914 claim ___ Court Decree No.: ___ Other (explain): ___B. **Year of First Use:** (Please provide if missing in the Division of Rights database (ewrims)) ___C. **Rate of Diversion:** The rate of diversion of water for each month used and entered in the table below is shown in units of:

Gallons per minute (gpm) ___ Gallons per day (gpd) ___ Cubic feet per second (cfs) ___

Year	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Average Rate
2005													
2006													
2007													

D. **Quantity of Water Used:** The quantity of water used each month and entered in the table below is shown in units of:

Gallons ___ Million Gallons (MG) ___ Acre-feet (AF) ___

Year	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Total Annual
2005													
2006													
2007													

E. **Purpose of Use** – Specify number of acres irrigated, stock watered, persons served, etc.Irrigation ___ acres; Stockwatering ___; Domestic ___;
Other (specify) _____

Parcel Number(s) of Place of Use: _____

F. **Changes in Method of Diversion** – Describe any changes in your project since your previous statement was filed.
(New pump, enlarged diversion dam, location of diversion, etc.) _____

G. Please answer only those questions below which are applicable to your project.

1. Conservation of water

a. Are you now employing water conservation efforts? YES ___ NO ___
Describe any water conservation efforts you have initiated: _____

b. If you are claiming credit for water conservation under section 1011 of the Water Code for your claimed pre-1914 appropriative right, please show the amount of water conserved:

Reduction in Diversions:

Year ___ (AF/MG) Year ___ (AF/MG) Year ___ (AF/MG)

Reduction in consumptive use:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG) ^{WRS-193}

I have data to support the above surface water use reductions due to conservation efforts. YES _____ NO _____

2. Water quality and wastewater reclamation

- a. Are you now or have you been using reclaimed water from a wastewater treatment facility, desalination facility or water polluted by waste to a degree which unreasonably affects such water for other beneficial uses? YES _____ NO _____.
- b. If you are claiming credit due to the substitution of reclaimed water, desalinated water or polluted water in lieu of a claimed pre-1914 appropriative right under section 1010 of the Water Code, please show amounts of reduced diversions and amounts of substitute water supply used:

Amount of reduced diversion:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)

State the type of substitute water supply: _____

Amount of substitute water supply used:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)

I have data to support the above surface water use reductions due to the use of a substitute water supply. YES _____ NO _____.

3. Conjunctive use of surface water and groundwater

- a. Are you now using groundwater in lieu of surface water? YES _____ NO _____.
- b. If you are claiming credit due to the substitution of groundwater for a claimed pre-1914 appropriative right under section 1011.5 of the Water Code, please show the amounts of groundwater used:
Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)
I have data to support the above surface water use reductions due to the use of groundwater. YES _____ NO _____.

I understand that it may be necessary to document the water savings claimed in "F" above if credit under Water Code sections 1010 and 1011 is sought in the future.

I declare that the information in this report is true to the best of my knowledge and belief.

DATE: _____, 20_____ at _____, California

SIGNATURE: _____

PRINTED NAME: _____
(first name) (middle initial) (last name)

COMPANY NAME: _____

ITEM CONTINUATION If there is insufficient space for your answers, please use the space provided below or add an attachment sheet.

GENERAL INFORMATION PERTAINING TO WATER RIGHTS IN CALIFORNIA

There are two principal types of surface water rights in California. They are riparian and appropriative rights.

A riparian right enables an owner of land bordering a natural lake or stream to take and use water on his riparian land. Riparian land must be in the same watershed as the water source and must never have been severed from the sources of supply by an intervening parcel without reservation of the riparian right to the severed parcel. Generally, a riparian water user must share the water supply with other riparian users. Riparian rights may be used to divert the natural flow of a stream but may not be used to store water for later use or to divert water which originates in a different watershed, water previously stored by others, return flows from use of groundwater, or other "foreign" water to the natural stream system.

An appropriative right is required for use of water on non-riparian land and for storage of water. Generally, appropriative rights may be exercised only when there is a surplus not needed by riparian water users. After the formation of the California Water Commission back on December 19, 1914, new appropriators have been required to obtain a permit and license from the State. Appropriative rights can be granted to waters "foreign" to the natural stream system.

Statements of Water Diversion and Use must be filed by riparian and pre-1914 appropriative water users as set forth in Water Code section 5100 with specific exceptions. The filing of a statement (1) provides a record of water use, (2) enables the State to notify such users if someone proposes a new appropriation upstream from their diversions, and (3) assists the State to determine if additional water is available for future appropriators.

The above discussion is provided for general information. For more specific information concerning water rights, please contact an attorney or write to this office. We have several pamphlets available. They include: (1) Statements of Water Diversion and Use, (2) Information Pertaining to Water Rights in California, and (3) Appropriation of Water in California.



S015022%\$%2004

2002, 2003, 2004

SUPPLEMENTAL STATEMENT OF WATER DIVERSION AND USE

If the information below is inaccurate, please line it out in red and provide current information.

Notify this office if ownership or address changes occur during the coming year.

Please Complete and Return This Form by JULY 1, 2005.

***If the mail recipient's name, address or phone No. is wrong or missing, please correct.**

Owner of Record: DOUGLAS T COLE; SHIRLLE MORGAN;

PRIMARY CONTACT OR AGENT FOR MAIL & REPORTING:

AQUA ENGINEERING & CONSULTING

C/O SEAN BAGHEBAN

PO BOX 160621

SACRAMENTO, CA 95816

STATEMENT NO.: S015022
CONTACT PHONE NO.: (916)612-3539

Source Name: STANSHAW CREEK
Tributary To: KLAMATH RIVER
County: Siskiyou
Diversion Within: SW1/4 of NE1/4 Section 33, T13N, R06E, HB&M

Year of First Use:

Parcel Number:

Return Mail

A. **Water is Used Under:** Riparian claim _____ Pre-1914 right _____ Other (explain): _____

B. **Year of First Use:** (Please provide if missing above) _____

C. **Amount of Use:** Enter the amount (or the approximate amount) of water used each month, using the table below.

Amounts below are in: Gallons				Million Gallons (MG)			Acre-feet (AF)			Other			Total Annual
Year	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	
2002													
2003													
2004													

D. **Purpose of Use** – Specify number of acres irrigated, stock watered, persons served, etc.

Irrigation _____ acres; Stockwatering _____; Domestic _____;

Other (specify) _____

E. **Changes in Method of Diversion** – Describe any changes in your project since your previous statement was filed.
(New pump, enlarged diversion dam, location of diversion, etc.)

F. Please answer only those questions below which are applicable to your project.

1. Conservation of water

a. Are you now employing water conservation efforts? YES _____ NO _____
Describe any water conservation efforts you have initiated: _____

b. If you are claiming credit for water conservation under section 1011 of the Water Code for your claimed pre-1914 appropriative right, please show the amount of water conserved:

Reduction in Diversions:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)

Reduction in consumptive use:

Year _____ (AF/MG) Year _____ (AF/MG) Year _____ (AF/MG)

I have data to support the above surface water use reductions due to conservation efforts. YES _____ NO _____

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84

2. Water quality and wastewater reclamation

WR-193

- a. Are you now or have you been using reclaimed water from a wastewater treatment facility, desalination facility or water polluted by waste to a degree which unreasonably affects such water for other beneficial uses? YES ____ NO ____.
- b. If you are claiming credit due to the substitution of reclaimed water, desalinated water or polluted water in lieu of a claimed pre-1914 appropriative right under section 1010 of the Water Code, please show amounts of reduced diversions and amounts of substitute water supply used:

Amount of reduced diversion:

Year ____ (AF/MG) Year ____ (AF/MG) Year ____ (AF/MG)

State the type of substitute water supply: _____

Amount of substitute water supply used:

Year ____ (AF/MG) Year ____ (AF/MG) Year ____ (AF/MG)

I have data to support the above surface water use reductions due to the use of a substitute water supply. YES ____ NO ____.

3. Conjunctive use of surface water and groundwater

- a. Are you now using groundwater in lieu of surface water? YES ____ NO ____.
- b. If you are claiming credit due to the substitution of groundwater for a claimed pre-1914 appropriative right under section 1011.5 of the Water Code, please show the amounts of groundwater used:

Year ____ (AF/MG) Year ____ (AF/MG) Year ____ (AF/MG)

I have data to support the above surface water use reductions due to the use of groundwater. YES ____ NO ____.

I understand that it may be necessary to document the water savings claimed in "F" above if credit under Water Code sections 1010 and 1011 is sought in the future.

I declare that the information in this report is true to the best of my knowledge and belief.

DATE: _____, 20____ at _____, California

SIGNATURE: _____

PRINTED NAME: _____
(first name) (middle initial) (last name)

COMPANY NAME: _____

If there is insufficient space for your answers, please use the space provided below.

ITEM	CONTINUATION
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

GENERAL INFORMATION PERTAINING TO WATER RIGHTS IN CALIFORNIA

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A riparian right enables an owner of land bordering a natural lake or stream to take and use water on his riparian land. Riparian land must be in the same watershed as the water source and must never have been severed from the sources of supply by an intervening parcel without reservation of the riparian right to the severed parcel. Generally, a riparian water user must share the water supply with other riparian users. Riparian rights may be used to divert the natural flow of a stream but may not be used to store water for later use or to divert water which originates in a different watershed, water previously stored by others, return flows from use of groundwater, or other "foreign" water to the natural stream system.

An appropriative right is required for use of water on non-riparian land and for storage of water. Generally, appropriative rights may be exercised only when there is a surplus not needed by riparian water users. Since 1914, new appropriators have been required to obtain a permit and license from the State. Appropriative rights can be granted to waters "foreign" to the natural stream system.

Statements of Water Diversion and Use must be filed by riparian and pre-1914 appropriative water users as set forth in Water Code section 5100 with specific exceptions. The filing of a statement (1) provides a record of water use, (2) enables the State to notify such users if someone proposes a new appropriation upstream from their diversions, and (3) assists the State to determine if additional water is available for future appropriators.

The above discussion is provided for general information. For more specific information concerning water rights, please contact an attorney or write to this office. We have several pamphlets available. They include: (1) Statements of Water Diversion and Use, (2) Information Pertaining to Water Rights in California, and (3) Appropriation of Water in California.



State Water Resources Control Board

SURNAME
WR-193



Winston H. Hickox
*Secretary for
Environmental
Protection*

Division of Water Rights
901 P Street • Sacramento, California 95814 • (916) 657-0765
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 657-1485 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

In Reply Refer
to:332:KSN:S015022

MAR 22 2000

Douglas T. Cole
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

STATEMENT OF WATER DIVERSION AND USE, STATEMENT NUMBER S015022

Your statement of water diversion and use has been received and assigned the above number. You should refer to this number in any future correspondence to this office regarding the statement.

A copy of the statement is enclosed for your records.

Please notify us of any change in address or change in ownership.

The law requires that supplemental statements be filed at three-year intervals. The form is automatically sent to you by the State Water Resources Control Board at the close of the period.

Thank you for your cooperation. If you have any questions or concerns, please telephone me at (916) 657-1872.

Sincerely,

ORIGINAL SIGNED BY:

Koso Nodohara
Sanitary Engineering Associate
Petition Unit

Enclosure

KSNodehara:ksn/tvonrotz:3-17-00
u:/ksn/S015022 ST-TRANS-LTR

STATEMENT OF WATER DIVERSION & USECLAIMANT: DOUGLAS T COLEFILE NUMBER: S015022 NAME INDX(S): _____CLAIM(S) RECEIVED BY: MAIL _____ OC _____ DATE REC'D: 12-1-98ACCEPT: _____ RETURN: _____ STREAM CODE: 101904000QUAD MAP CODE: B-607 QUAD MAP NAME: Somes Bar.CALIF COORD: ZONE 1 N 0785300 E 1589300

REMARKS: _____

_____S015022
005687

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

98 DEC -1 AM 11:27

STATEMENT OF WATER DIVERSION AND USE

(This is not a Water Right)

This statement should be typewritten or legibly written in ink.

- A. Name of person diverting water Douglas T. Cole (Marble Mountain Ranch)
Address 92520 Highway 96
Somes Bar, CA 95568 Telephone: (530) 469-3437
- B. Water is used under: — Riparian claim; ☒ Pre 1914 right; — Other (explain)
- C. Name of body of water at point of diversion Stanshaw Creek
Tributary to Klamath River, thence Pacific Ocean
- D. Place of diversion SW 1/4 NE 1/4 Section 33, Township 13N, Range 6E, H B&M,
Siskiyou County, and locate it on a print from a U.S.G.S. quad sheet or make a sketch on the section grid on the reverse side with regard to section lines and prominent local landmarks. Name of works Marble Mountain Ranch
- E. Do you own the land at the point of diversion? YES ☐ NO ☒
- F. Capacity of diversion works 2.5 (cfs or gpm) Capacity of storage reservoir — (gallons or acre-feet)
Type of diversion facility: Gravity ☒, Pump —
Method of measurement: Weir —, Flume ☒, Electric Meter —, Water Meter —, Estimate —
- G. State quantity of water used each month in gallons or acre-feet

Year	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total Annual
	29.5	29.5	29.5	29.5	24.5	21.5	29.5	29.5	29.5	29.5	29.5	29.5	354.

If monthly and annual use are not known, check months in which water was used. State extent of use in units, such as acres of each crop irrigated, average number of persons served, number of stock watered, etc.

Total annual amount is based on 0.49 cfs.

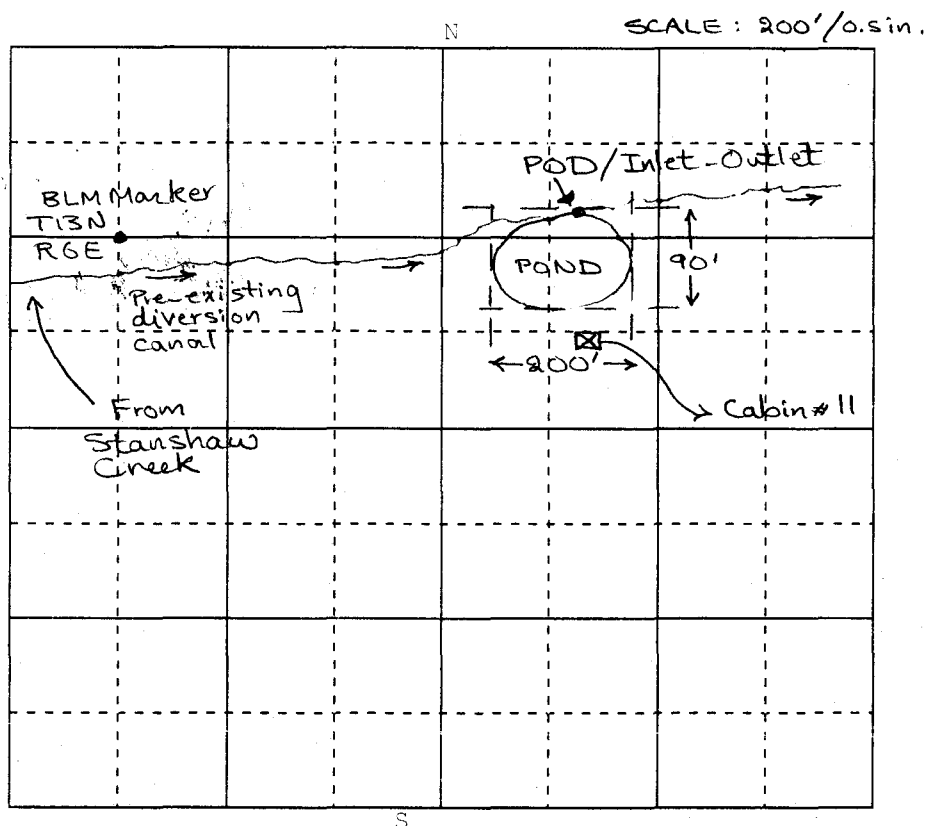
- H. Annual water use in recent years: Maximum — Minimum — (gallons or acre-feet)
- I. Purpose of use (what water is being used for) Irrigation, recreation, domestic
- J. General description or location of place of use (use sketch of section grid on reverse if you desire) See sketch
- K. Year of first use as nearly as known —
- L. Name of person filing statement Sean Bagheban, P.E.
Position: Agent/Consultant for Mr. Cole
Address: P.O. Box 160621, Sacramento, CA 95816

I declare under penalty of perjury that the above is true and correct to the best of my knowledge and belief.

Dated: Nov. 27, 19 98, at Sacramento, California

Signature: Sean Bagheban

The location of the diversion point and the place of use may be sketched on this section grid. If it is used, please enter the section(s), township and range below and show any streams or other landmarks that will assist in identifying the area.



Section(s) 33

Township 13 N ; Range 6 E ; Humboldt B&M

INSTRUCTIONS:

A separate statement should be filed for each point of diversion.

A duplicate copy will be returned for your file.

Please send the completed statement to: State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 30.5 NMFS

1. 7-8-02.NMFS. to SWRCB.complaint
2. 11-15-01.NMFS.dismissal terms
3. 3-8-00.NMFS.protest.App 29449



WR-193
UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

In Response Refer To:

July 8, 2002 151416- SWR-02-SR-6338:SKL

Elk in 1/5/04
Blue Heron do they have
beneficial use over time

Can't find any project that's unlawful

Above unclaimed waters, may
do without a screen

Cole. Documentation of maintenance
rights on S land.

Mr. Michael Contreras
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

1/4/04
potentially enclosed pipe
: No diminishing
: Fish screen is a maintenance
issue
- Seen 2 fish over 10 years.
- Any structural
- Argue loss of habitat

Dear Mr. Contreras:

Thank you for extending the comment period for your letter in regards to your investigation into water rights complaint submitted by the Klamath Forest Alliance alleging unreasonable diversion.

The National Marine Fisheries Service is surprised that SWRCB Complaints Unit has not fully considered the comments by either NMFS or the California Department of Fish and Game (CDFG) in this case. We are forced to disagree with the SWRCB Complaint Unit's conclusions.

NMFS has not been presented any evidence that the Coles have pre-1914 water rights for domestic, irrigation, and hydroelectric generation. It is our understanding that only 0.11 cfs has been used historically, whereas 3 cfs is required for hydroelectric generation. If this is not the case, NMFS requests that documentation.

instantaneous flow Young's Ranch
summer flow
in ditch

The SWRCB bypass flow of 0.7 cubic feet per second (cfs) is based solely on a single measurement of the stream at the time of the site visit last October. It therefore does not account for long term stream discharge pattern of Stanshaw Creek and is clearly inadequate. While Stanshaw Creek is not gaged, its flow magnitude, frequency, duration, and timing can be estimated by prorating by area a nearby gaged stream. Margaret Tauzer of NMFS Arcata has estimated the median, minimum, and average flows in cfs of Stanshaw Creek during August, September, and October (the driest months) based upon prorated estimates from the USGS gage records of Ti Creek. They are:

	August	September	October
Median	2.99	2.58	3.05
Minimum	2.58	2.04	1.02
Average	3.16	2.63	4.09

Change of Materials can be challenged



In addition to inadequate bypass flows, the SWRCB complaint unit's proposed conditions do not protect federally listed species. First, there is no provision to return the diverted flow back to Stanshaw Creek. Without these flows, the summer thermal refuge at the mouth of Stanshaw Creek will warm sooner and be warmer, degrading its value to juvenile coho salmon. These degraded conditions increase the likelihood of take of a federally listed species. The Coles verbally offered to return flows to Stanshaw Creek during the field site visit, so NMFS does not understand why this provision is not included. NMFS' bypass recommendation was contingent upon returning diverted flow to Stanshaw Creek to maintain the thermal refuge at its mouth. Therefore, we reiterate our recommendation to return diverted flow back to Stanshaw Creek.

The SWRCB Complaints Unit proposed solution also does not mention adequate fish screening at the point of diversion (POD) to prevent entrainment of fish. Adequate fish screening was included as conditions to remove our protest.

Finally, NMFS does not see how visual estimation of flow in the creek can be implemented as a condition. This would make any monitoring or compliance meaningless.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning the contents of this letter please contact Dr. Stacy K. Li at (707) 575-6082.

Can apply for Salmon Restoration Funds Leah Mahan
Sincerely,

James R. Bybee

James R. Bybee
Habitat Manager
Northern California

707-575-6077

cc: Doug and Heidi Cole

Margaret Tauzer, PRD, NMFS, Arcata

Tim Broadman, Law Enforcement, NMFS, Arcata

Ron Prestly, CDFG, Redding

William Heitler, USFS

Jim De Pree, Siskiyou County Planning Department

Konrad Fisher

Karuk Tribe of California

825-5174 Primary NMFS contact

F. P. P.

Don Mooney Ph# 530-758-2377 call

*Gary Black # -
Self-Cleaning Headgate*

Fish Screens on small diversions

**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE****Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404**

November 15, 2001 151416-SWR-01-SR-928:SKL

Mr. Charles Rich, Chief
Complaints Unit
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

Dear Mr. Rich:

This letter represents our findings and protest dismissal terms of appropriative water rights application 29449. It is based on a State Water Resources Control Board (SWRCB) field investigation attended by Dr. Stacy Li, National Marine Fisheries Service (NMFS), Mr. Chuck Glasgow (NMFS), and Mr. Tim Broadman and Mr. Dave Rielly (NMFS Law Enforcement) on 17 October 2001 in relation to a complaint of an unpermitted diversion on Stanshaw Creek by Doug and Heidi Cole. The Coles have directly diverted up to 3 cubic feet per second (cfs) from Stanshaw Creek (watershed is approximately 3.2 square miles) the year round (when flows are available) for the purposes of domestic use and hydroelectric generation. The water used for hydroelectric generation is diverted into Irving Creek in an adjacent watershed. Irving Creek is also tributary to the Klamath River. The Coles have applied for appropriative rights for the hydroelectric use, but have pre-1914 rights for domestic use. The amount of the pre-1914 use is approximately 0.5 cfs.

NMFS is interested in this project because the Klamath River watershed supports federally threatened Southern Oregon/Northern California coasts Evolutionarily Significant Unit (ESU) of coho salmon (*Oncorhynchus kisutch*).

Existing Project

Typically each year the Coles must manually construct a structure of cobbles and boulders to divert water from Stanshaw Creek. The unscreened diversion delivers water via an earthen ditch approximately 1-foot deep, 2-foot wide, and 5200 feet long. The penstock is a steel pipe 16-inches in diameter and 455 feet long. A head of 200 feet is used to generate a maximum of 33.9 kilowatts with a Pelton wheel. Water not consumed by domestic use is returned to the Klamath River via



Irving Creek. With the diversion active, approximately a mile of Stanshaw Creek has reduced flows; this reach is well shaded by topographic features as well as a thick canopy coverage of about 60%. About 1/4 mile of Irving Creek has augmented flows from Stanshaw Creek.

Stanshaw Creek enters the Klamath mainstem near River Mile (RM) 76. Irving Creek also enters the Klamath mainstem near RM 75. Stanshaw Creek has a smaller watershed than Irving Creek. While both streams are not gauged, the few measurements of Irving Creek and Stanshaw Creek during the summer suggest a summer base flow in Irving Creek as more than double (7 cfs vs. 3 cfs) that of Stanshaw Creek. Both streams provide cooler water than the mainstem Klamath River during the summer. Because water temperatures during the summer in the mainstem Klamath River are stressful to salmonids, it is likely that rearing juvenile anadromous salmonids use each tributary as a thermal refuge. California Department of Fish and Game collected juvenile coho salmon and steelhead with a backpack electrofisher in the portion of Stanshaw Creek 100 yards downstream of Highway 96 in July 2000. There is a culvert under Highway 96 on Stanshaw Creek that may limit anadromous fish access to upstream reaches.

The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage.

At the site we reviewed the project, examined the point of diversion (POD), the flume, the penstock, the reach downstream of the POD, and the reach of Stanshaw Creek between Highway 96 and the Klamath River.

Terms to Remove Protest

NMFS finds that the following conditions are necessary and sufficient to remove our protest:

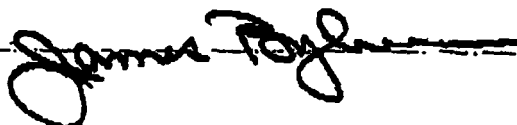
- a) **Diversion Intake:** Limit diversion flow to a maximum of 3 cfs. The applicant proposes to divert a maximum of 3 cfs, but the existing intake has no provision to control the amount of flow diverted. There are a variety of methods of controlling flow including: head gates with adjustable undershot weir, notched weir, orifice, dimensional flume, and the like (See Bureau of Reclamation 1997).
- b) **Fish screen:** The existing diversion is not adequately screened to prevent entrainment. Any diversion should be adequately screened. We saw an 8" salmonid in the flume during the field investigation. The fish screen should follow NMFS/CDFG fish screen criteria. However, these fish screen criteria were developed with large diversions in mind. There may be adequate screening alternatives for smaller diversions such as this one. Please contact Mr. Richard Wantuck, NMFS (707) 575-6063 for technical advice regarding fish screens in small drainages.
- c) **Return flow:** Return the diverted flow from Stanshaw Creek back to Stanshaw Creek instead of to Irving Creek. Thermal refugia during the summer is an important habitat element in the Klamath River. It is our belief that diverted flow returned to Stanshaw Creek will provide necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek without compromising the thermal refuge on Irving Creek. During the field investigation, Mr. Cole,

the applicant, stated that we would be willing to move the hydroelectric generating plant so that the tail race flow would return to Stanshaw Creek. The new return would be located on Stanshaw Creek upstream of Highway 96.

- d) **Bypass flows:** This is based upon the assumption that 3 cfs is a representative summer base flow. The nature of the point of diversion precludes precise bypass flows due to leaf fall or debris accumulation. However, bypass flows are of major concern only at low flows, i.e., 3 cfs. We believe that there is ample canopy that keeps the stream cool downstream of the POD provided that most of the flow is in Stanshaw Creek during low flow periods. Therefore, we recommend that a minimum bypass flow of 1.5 cfs be maintained at all times downstream of the POD. This bypass flow represents 50% of the summer base flow. This bypass flow recommendation assumes tailwater from the hydroelectric plant will be returned to Stanshaw Creek. Therefore, the thermal refuge downstream of Highway 96 will be maintained. This bypass flow recommendation may be modified when CalTrans provides salmonid passage through the Highway 96 culvert. The applicant must install and maintain permanent staff gages at the point of diversion to allow monitoring and facilitate release of bypass flows. Alternatively, the applicant may perform a comprehensive biological and hydrological study to identify an alternate biologically based bypass flow.
- e) **Monitoring:** Regardless of the quality of stream at the point of diversion, the proposed project should provide California Department of Fish and Game personnel access to all points of diversion and places of use for the purpose of conducting routine and or random monitoring and compliance inspections.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning the contents of this letter please contact Dr. Stacy K. Li at (707) 575-6082.

Sincerely,



James R. Bybee
Habitat Manager
Northern California

cc: Doug and Heidi Cole
Irma Lagomarsino, PRD, NMFS, Arcata
Tim Broadman, Law Enforcement, NMFS, Arcata



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

March 8, 2000 F/SWR4:WH

Harry Schueller
Chief, Division of Water Rights
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

Dear Mr. Schueller:

By this letter the National Marine Fisheries Service registers its protest to the application for appropriative water right 29449 filed by Doug Cole, et al. to divert water from Stanshaw Creek, which is tributary to the Klamath River. The Project proposes to divert 3 cfs for the purpose of hydroelectric generation. Stanshaw Creek, which lies within the Klamath River watershed, may support or contribute to sustaining populations of the Central California Coast Evolutionarily Significant Unit (ESU) of coho salmon.

Background

Coho salmon (*Oncorhynchus kisutch*) comprising the Central California Coast ESU are listed as threatened (61 Fed. Reg. 56138; Oct. 31, 1996) under the Endangered Species Act (ESA). Protective regulations were published for coho on October 31, 1996. These protective regulations make it unlawful to "take" coho under section 9 of the ESA. "Take" as defined in the ESA, includes, in part, to harm or harass the species. These protective regulations describe certain activities that may impact coho and result in legal liability. These activities include, in part:

Unauthorized destruction/alteration of the species' habitat, such as removal of large woody debris or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flow.

In contrast to the life history patterns of other anadromous salmonids, coho salmon in California generally exhibit a relatively simple 3-year life cycle. Adult salmon typically begin the freshwater migration from the ocean to their natal streams with the first fall rains. Upstream migration will continue from October to March, generally peaking in December and January (Shapovalov and Taft 1954).

WR 293
29449

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DIV. OF WATER RIGHTS
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Coho fry emerge from redds, in 38 to 101 days depending on stream temperature (Laufle et al. 1986). After emergence, the stream flow conditions and water temperature play a large role in survival. Low summer flows reduce potential rearing areas, may cause stranding in isolated pools, and increase vulnerability to predators (Sandercock 1991). Also the combination of reduced flows and high ambient air temperatures can raise the water temperature to the upper lethal limit of 25°C for juvenile coho (Brett 1962). Later in the year, high winter flows in typical coastal streams may be hostile to juvenile coho, causing displacement and disrupting their habitat and food sources. Juvenile coho show a preference for habitat containing deep pools (1 m or more), logs, rootwads, or boulders in heavily shaded sections of stream. Structurally complex streams that contain stones, logs and bushes in the water support larger numbers of fry (Scrivener and Andersen 1982). Although coho juveniles are found in both pool and riffle areas of a stream, they are best adapted to holding in pools (Hartman 1965).

Proposed Diversion

Appropriation of water will be accomplished by directly diverting 3 cfs from Stanshaw Creek for hydroelectric power generation via flume of 12-inch deep, 24-wide, and 5,200 ft long, then through a penstock of 16-inch diameter, 455 ft long steel pipe. The penstock uses a 200 ft fall to generate a maximum of 33.9 kilowatts at 80% efficiency at a powerplant just above Irving Creek. After use, the water will be returned to Irving Creek through a ditch, and thence to the Klamath River. The applicant has requested to divert water year-round, from January 1 through December 31. Stanshaw Creek, like other Northern California streams, is subject to critical, low flows during much of the year. Granting the proposed diversion will reduce flows in these streams and may degrade habitat necessary to the existence of certain life stages of coho salmon. Alteration of stream flows can result in salmonid mortality for a variety of reasons: migration delay resulting from insufficient flows or habitat blockages; loss of sufficient habitat due to dewatering and blockage; stranding of fish resulting from rapid flow fluctuations; entrainment of juveniles into poorly screened or unscreened diversions; and increased juvenile mortality resulting from increased water temperatures (Bergen and Filardo 1991; California Advisory Committee on Salmon and Steelhead Trout 1988; California Department of Fish and Game 1991; Columbia Basin Fish and Wildlife Authority 1991; Palmisano et al. 1993; Reynolds et al. 1993).

Based upon the need to protect and recover runs of listed coho salmon in the Klamath River watershed, we find it necessary to protest the proposed project because:

- 1) The Klamath River watershed supports federally listed coho salmon. Stanshaw Creek, upon which the proposed diversion would occur, lies within the Klamath River watershed and may support or contribute to the survival of this species.

structures also have the potential to entrain fishes, with resulting mortality.

Recommendations

Based upon the above concerns and potential impacts of the proposed project, we recommend that the project be modified to include the following mitigative provisions:

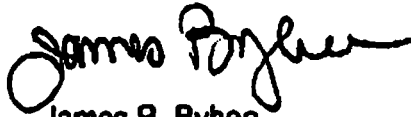
- a) Provide a minimum bypass flow that adequately protects coho salmon in reaches downstream from the point of diversion during all days of the year. The determination of the bypass flow's adequacy can be based on site specific biological investigations conducted in consultation with CFG and NMFS staff. Given the historically low flows during summer months and high temperatures in the Klamath River, we recommend that diversions not occur during the period June 1 through October 1.
- b) the plan should avoid construction or maintenance of a dam or diversion barrier across Stanshaw Creek.
- c) natural, periodic, intermediate and high flows should be maintained immediately below the project. This is a complex issue that concerns potential cumulative impacts of this and other upstream permitted and licensed water diversions within the Stanshaw Creek watershed. Protection of intermediate and high flows can be accomplished through an assessment of cumulative impacts and placing limits on the rate of instantaneous water withdrawals from the stream.
- d) the potential effect of the project on upstream and downstream movements of anadromous salmonids must be addressed. If anadromous salmonids ascend Stanshaw Creek or have the likely potential to ascend this tributary then adequate passage facilities and screening at the diversion intake should be provided.
- e) the proposed project should provide California Department of Fish and Game personnel access to all points of diversion and places of use for the purpose of conducting routine and or random monitoring and compliance inspections.

Because of the presence of federally and state listed species in the Klamath watershed, continued development of the watershed without a coordinated watershed plan would be inconsistent with the purposes of the California Endangered Species Act, the Federal Endangered Species Act, sections 100, 1243, 1243.5, and 275 of the State Water Code and the State Water Resources Control Boards's obligations and authorities under the Public Trust Doctrine.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning

the contents of this letter please contact Dr. William Hearn at (707) 575-6062.

Sincerely,



James R. Bybee
Protected Habitat Manager
Northern California

References Attached

cc: Doug Cole, et al., Applicants
R. Hight, CDFG, Sacramento
D. Koch, CDFG, Redding

References

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**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – 40.1 project description

1. Stanshaw Creek (1)
2. Stanshaw Creek Water Conservation Project Issues and Concerns

Stanshaw Creek has a short but significant section of coho habitat below the Highway 96 crossing. A lateral scour pool is formed just upstream of the Stanshaw Creek mouth when Klamath flood flows are deflected by evulsed alluvium and streamflow from Stanshaw Creek. This pool is subsequently filled by cold Stanshaw Creek water when flooding subsides, creating a high quality summer and winter rearing habitat for non-natal juvenile coho salmon migrating down the Klamath River corridor. Coho ecology studies by the Karuk Tribe at this site, and in Stanshaw Creek upstream to the Highway 96 culvert barrier, over the past 10 years indicate that once coho young of the year (yoy), or 0+ fry, enter this habitat, they are likely to overwinter there until outmigration early the next spring. Growth rates for coho overwintering in this pool are high, likely leading to increased survival and numbers of returning spawners.

In 1867, Civil War veteran Samuel Stanshaw recorded at the County Records office that he had “taken hold for mining and for purpose of irrigation 600 [miner’s] inches of the water running in Stanshaw Creek”. This equates to approximately 15cfs, however over time use and ditch capacity has been reduced to a maximum diversion amount of 3 cfs. Use for mining has changed to primarily hydropower generation for the ranch business, which has no access to grid power. Currently, there is an interbasin transfer via a ditch carrying 2.5 to 3.0 cfs from Stanshaw Creek south to Irving Creek. This diversion is listed in the DFG Coho Recovery Plan for the state as a high priority for restoration.

An application by previous owners of MMR, and subsequently by the Cole’s to the State Water Resources Control Board (SWRCB) (Application #29449) for 3 cfs of Stanshaw Creek water for hydropower generation has been neither rejected or validated by SWRCB for over 15 years. Complaints filed over this application and attempts to resolve these complaints have been hindered by a lack of information on outcomes of proposed improvements. Since 2002, landowners, agency, and tribal personnel have been working together to find solutions that provide for coho habitat needs without unduly impacting the MMR. All stakeholders concur that the interbasin transfer to Irving Creek must be remedied, either by returning water to Stanshaw Creek above the Highway 96 culvert, or directly to the Klamath River. Other options, such as physical modification of the intake, ditch, tailwater return, the hydropower system and consumptive uses of water and power, could likely reduce required diversion amounts and other potential impacts from the current system. This proposal addresses all of these options by attaining specialist reports to objectively describe alternatives and quantify various modifications and system improvements. This project accomplishes the task of improving instream flows by providing necessary specialist information to inform stakeholders about the real consequences of various modifications to the MMR water system. The focus will be on improving hydropower efficiency, redesigning tail water returns to avoid an inter-basin transfer, reducing overall power consumption, and improvements to water conveyance that will reduce ditch loss, excessive maintenance and monitoring.

Lack of resolution and action regarding the MMR diversion from Stanshaw Creek has impacted both rearing coho salmon in lower Stanshaw Creek for over a decade, and relationships between many stakeholder groups and individuals. Doug and Heidi Cole, owners of MMR, have lived with the uncertainty of not knowing if someone would come to shut off or curtail their water system for over a decade. Downstream landowners with riparian rights have been faced with the choice of diverting the remaining flow from Stanshaw Creek for domestic and irrigation uses, or not using this water so it could maintain the refugia at the mouth of Stanshaw. This project aims to address landowner and threatened coho salmon habitat needs by collecting specialist information that will allow stakeholders to agree to a solution without litigation.

The expected short term benefits of this project are that stakeholders will be able to reach consensus on physical solutions that address the current impacts to coho salmon rearing in Stanshaw Creek without lengthy and costly litigation. Long term measurable outcomes will be reduced sedimentation in Stanshaw Creek due to ditch overtopping and scour during flood events, increased flow in Stanshaw Creek, continuous connectivity between Stanshaw Creek and the Klamath River, reduced sedimentation in Irving Creek where the MMR water system tailwater ends up, decreased water temperatures in Stanshaw Creek and Irving Creek, and no illegal interbasin transfer of water from the Stanshaw drainage to the Irving Creek drainage.

Stanshaw Creek Water Conservation Project Issues and Concerns by Stakeholder

Marble Mountain Ranch

Contacts: Doug and Heidi Cole (530) 469-3322

- A reliable water system that provides enough flow to produce 35 kw of hydroelectricity for business purposes.
- Water for domestic use.
- Willing to return hydroelectric tailwater flows to Stanshaw Creek.
- Willing to pipe entire system and decommission ditch from pond to Irving Creek.
- Needs enough water to maintain existing pond. Overflow will irrigate pasture.



California Department of Fish and Game

Contacts: Mark Elfgen (530) 841-2560, Jane Vorpapel (530) 225-2124

- Year-round bypass flow of 2.5 cfs to be measured at the culverts below Hwy 96. Total streamflow be bypassed when flow is lower than this amount. (CDFG may require additional bypass flows in the future if conditions change so that 2.5 cfs no longer maintains connectivity.)
- If water in Stanshaw Creek is less than amount needed to run the hydroelectric plant, then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed.
- Improve the ditch system and/or update the hydroelectric system to allow for power generation and domestic use while diverting less water.
- Return tailwater from hydroelectric plant to Stanshaw Creek.



- Current H₂O right for 0.5 cfs
- Cole filed for hydro and small domestic (pond < 10 ac. ft.)
- DFG drop protest against hydro if H₂O comes back above culvert
- Small domestic 4,500 gal. day.

NOAA Fisheries

Contacts: Margaret Tauzer (707) 825-5174, Richard Wantuck (707) 575-6063

- Limit flow diversion to a maximum of 3 cfs. Control flow with headgate (adjustable undershot weir, notched weir, orifice, dimensional flume, etc.)
- Screen intake to prevent entrainment (NOAA contact Richard Wantuck 707-575-6063)
- Return diverted flow to Stanshaw Creek upstream of Highway 96.
- Minimum 1.5 cfs bypass flow below point of diversion (POD) at all times. Bypass flow assumes tailwater from hydro will be returned.
- Install and maintain permanent staff gauges at POD or perform a comprehensive biological and hydrological study to identify an alternate biologically based bypass flow.
- Provide CDFG access to all points of diversion and places of use for monitoring compliance.

Karuk Tribe

Contacts: Toz Soto (530) 627-3116, Ron Reed (530) 627-3116

- Return diverted flow to Stanshaw Creek upstream of Highway 96.
- Screen intake to prevent entrainment
- Improve the ditch system and/or update the hydroelectric system to allow for power generation and domestic use while diverting less water.
- Coordinate with agency and tribal fisheries biologists monitoring Stanshaw Creek connectivity to minimize diversion in order to maintain connectivity.

** UAA - CEIT Analysis*
** Fishery Bypass Flows*
** Feb of Marble Creek*
** Need to go through collaborative process*
Supervisor Kathy Maroka 916-341-5363
A029449
Back late July
Jim Sutton (916) 341-5388
0.5 cfs for 1914

State Water Resources Control Board

Contacts: Michael Contreras (916) 341-5307

- Cole's allow at least 0.7 cfs flow in Stanshaw Creek below Hwy 96 culvert.
- Required bypass flow be determined in one of two fashions:
 - If full diversion is not allowed, the flow should be visually estimated to maintain a small, hand-dug ditch between terminal pool of Stanshaw Creek and the Klamath River
 - If full diversion is allowed, a device shall be installed at the intake capable of bypassing sufficient flow to maintain 0.7 cfs below Hwy 96 culvert before any water is passed down diversion ditch.
- The complaint filed by KFA be closed.
- Parties give serious consideration to a physical solution similar to that discussed in the Staff Report of Investigation.

*→ * Who is CEQA lead? Proposed to pay for cost CEQA*

Klamath Forest Alliance

Contacts: Donald Mooney (Lawyer) (530) 758-2377

- The State Water Resources Control Board (SWRCB) coordinate the study a publication of an Environmental Impact Report to base minimum bypass flow requirements on.
- The SWRCB conduct a hearing on the Cole's application.
- A detailed monitoring plan be outlined.
- Hydroelectric tailwater flows be returned to Stanshaw Creek above Hwy 96 culvert.
- Minimum bypass flows be agreed upon through consultation with CDFG, NOAA Fisheries, USFS and Karuk tribal biologists.

Cal Trans

Contacts:

- An application to excavate a ditch and lay return pipe along the inside corner of through cut on Hwy 96 between Marble Mountain Ranch and Stanshaw Creek be filed.

US Forest Service

Contacts: Brian Harris (Acting Orleans District Ranger) (530) 627-3291
 Leroy Cyr (530) 627-3291
 Leslie Burroughs (530) 627-3291

- Apply to FERC for hydroelectric use.
- Landowner must request from the US Forest Service to use water for hydroelectric use.
- No excavator use in modification on ditch.
- George Frey would work w/ FERC. None of FS Business. Ferc makes call whether FS. resp., County resp. or not.
- Water use pre-dates F.S., Does not require.
- Mike McCall - Owner Blue Heron Ranch
- Talk to Ron Reed re: fern issue to
- Check SWRCB website www.waterrights.ca.gov
- Blue Heron Ranch no right
-

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – SWRCB Files

- CAT 1 VOL 1 A0299449 (offered separately into evidence at Prosecution Team Exhibit WR-4)
- CAT 1 VOL 2 A0299449 (offered separately into evidence at Prosecution Team Exhibit WR-5)
- STANSHAW CREEK 262.0 COMPLAINTS AND INVESTIGATIONS (offered separately into evidence at Prosecution Team Exhibit WR-6)

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – SWRCB Files

- Docs from CDFW
- Docs from D. Cole
- Docs from K. Fisher
- Docs from MKWC Files
- Reference Documents

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – Docs from CDFW

- 2-7-07. D. Koch. Cole App.29449
- 3-30-12. Water Boards.Cole App 29449
- 4-4-00. Water Board. App 29449 Protest accepted
- 4-8-05. Water Board
- 7-5-05. D. Koch ltr.
- 7-19-02. M. Contreras ES, Complaint Unit w.Inv. Report
- 8-22-02. Water Board. Water Rights Complaint
- 9-3-09. Water Boards. Memo.Regis.Cert.
- 9-15-98. Water Board. Unauth. Diversion
- 10-1-01.Water Board FAX from Dennis Maria
- 10-15-09. G. Stacey Memo.Registration req.
- 11-20-01. D. Koch. Complaint Inv.
- 2002 Complaint Memo
- DFG Letter0001
- DFG_11.20.01
- P_MMCarthy.GHernandez A029499 Cole Cancellation
- P_PCrader.ABarrios Douglas Cole Application 29449
- Stanshaw Creek (1)
- SWRCB Letter0001
- SWRCB_9.15.1998

State of California

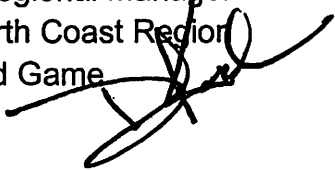
The Resources Agency

M e m o r a n d u m

To: Ms. Katherine Mrowka, Chief
Watershed Unit 3
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Date: February 7, 2007

From: **DONALD B. KOCH**, Regional Manager
Northern California-North Coast Region
Department of Fish and Game
601 Locust Street
Redding, CA 96001



Subject: Application 29449 of Doug Cole, Marble Mountain Ranch, Stanshaw Creek, Siskiyou County

The Department of Fish and Game has received your December 6, 2006, letter which states there has been recent progress in addressing the public trust resource needs associated with Application 29449. You requested a response within 45 days which states any proposed protest dismissal conditions that have been developed for this matter. The Department is not sure what progress you are referring to. Department staff attempted to call you, however, you have been out of the office for several weeks. An attempt was made by the Department to assist the land owner with grant funding to route diverted water back to the Stanshaw Creek watershed. That grant was not funded due, in part, to the unresolved water right issues relating to this diversion.

This diversion was the subject of a complaint investigation as well as a protest on Water Right Application 29449 by the Department on March 17, 2000. The Department has written several letters which should be in the Board's records. Our latest correspondence was a July 5, 2005, letter to Mr. Doug Cole which outlined our primary concerns with this diversion. Board staff received a copy of that letter.

As we stated in our November 20, 2001, letter to the Board, as well as in our letter to Mr. Cole, our primary concerns are for the coho salmon (*Onchorhynchus kisutch*) which rear in the lower reach of Stanshaw Creek below Highway 96.

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

Ms. Katherine Mrowka
February 7, 2007
Page Two

Coldwater habitats such as those provided by Stanshaw Creek are important refuges for juvenile coho salmon which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical coldwater refuge habitats for coho salmon and steelhead in lower Stanshaw Creek need to be accessible to the fish, so sufficient water needs to stay in the stream to maintain connectivity to the Klamath River all year.

The Department currently proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure that existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained. Water temperatures should remain cold and year-round access to the stream from the Klamath River is a better guarantee. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

It is our understanding from discussions with Board staff that water is currently diverted from Stanshaw Creek even when there is not enough flow to run the hydroelectric generators. We believe this procedure results in water being wasted and not being put to beneficial use. This procedure typically occurs during critically dry periods when natural flows are needed to maintain salmonid access from the Klamath River to cooler water, rearing, and refuge habitat found in Stanshaw Creek. If the stream flow in Stanshaw Creek is less than the amount needed to run the hydroelectric plant (3 cfs), then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed to maintain the downstream fishery resources.

During both inspections, various options were discussed which could help satisfy the required downstream flow conditions. We believe two options have merit for the Board and the owner to consider. One option would be returning diverted flows back to Stanshaw Creek after the water is used to generate electricity. Currently, tailwater is discharged to the adjacent drainage of Irvine Creek. Second, improvements to the open ditch system and/or updating the hydroelectric generation system may also allow the applicant to divert less water while still meeting the needs for domestic purposes and electric generation.

Ms. Katherine Mrowka
February 7, 2007
Page Three

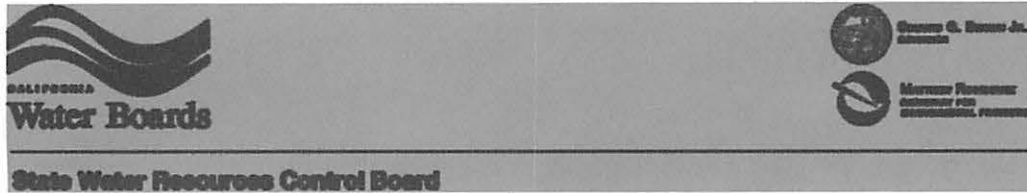
If you have any questions or comments regarding this memorandum, please contact Staff Environmental Scientist Jane Vorpapel at (530) 225-2124.

cc: Mr. James R. Bybee
NOAA Fisheries Service
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Mr. Doug Cole, et al.
92520 Highway 96
Somes Bar, CA 95568

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

ec: Ms. Jane Vorpapel
jvorpapel@dfg.ca.gov



MAR 30 2012

In Reply Refer
To: MMcCarthy: A029449

Mr. Douglas Cole
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

APPLICATION 29449 OF DOUGLAS COLE, ET AL., STANSHAW CREEK TRIBUTARY TO
KLAMATH RIVER IN SISKIYOU COUNTY

Division of Water Rights (Division) staff has reviewed Application 29449 to determine the next step in application processing.

Stanshaw Creek is a tributary to the Klamath River and serves as thermal refuge for coho salmon (*Oncorhynchus kisutch*), which is currently listed as threatened on both state and federal endangered species lists. According to staff from the National Marine Fisheries Service (NMFS) and the Department of Fish and Game (DFG), Stanshaw Creek is an important refuge for juvenile coho salmon and steelhead trout (*O. mykiss*) which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. Both fish have been documented in Stanshaw Creek.

NMFS and DFG have both requested that any permit issued pursuant to your application include a minimum bypass flow to protect salmonids in Stanshaw Creek. You have agreed to alter your diversion system to return flows back to Stanshaw Creek, but only if grant funds are available to cover the costs of such construction. To date, you have not agreed to maintain a bypass flow in Stanshaw Creek nor have you secured grant funds.

Since you have indicated that you will not fund the measures identified as necessary to protect public trust resources, it appears that the Division lacks the information needed to support a finding that the requirements of Water Code section 1275, subdivision (b) have been met. Water Code section 1275, subdivision (b) states that the State Water Board may request the following information:

Information needed to comply, or demonstrate compliance with, any applicable requirements of the Fish and Game Code or the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.)

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

♻️ RECYCLED PAPER

Mr. Douglas Cole

- 2 -

MAR 30 2012

Pursuant to Water Code section 1276, the Division may cancel Application 29449 unless, within the next 60 days, the Applicant provides a plan to supply the information necessary to document compliance with Water Code section 1275, subdivision (b).

Matt McCarthy is the staff person presently assigned to this matter, and he may be contacted at (916) 341-5310 or mmccarthy@waterboards.ca.gov. Written correspondences or inquiries should be addressed as follows: State Water Resources Control Board, Division of Water Rights, Attn: Matt McCarthy, PO Box 2000, Sacramento, CA, 95812-2000.

Sincerely,

ORIGINAL SIGNED BY:

Phillip Crader, Manager
Permitting and Licensing Section
Division of Water Rights

ec: State Water Resources Control Board
John O'Hagan
johagan@waterboards.ca.gov

Department of Fish and Game
Jane Vorpapel
jvorpapel@dfg.ca.gov

National Marine Fisheries Service
Margaret Tauzer
margaret.tauzer@noaa.gov



State Water Resources Control Board

Voreppes
WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
901 P Street • Sacramento, California 95814 • (916) 657-0765
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 657-1485 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

MEMORANDUM

TO: Mr. Donald B. Koch, Regional Manager
Department of Fish and Game
601 Locust Street
Redding, CA 96001

FROM: *Yoko Mooring*
Yoko Mooring
Sanitary Engineering Associate
Application Unit
DIVISION OF WATER RIGHTS

DATE: APR 04 2000

SUBJECT: APPLICATION 29449 OF COLE--STANSHAW CREEK TRIBUTARY TO
KLAMATH RIVER IN SISKIYOU COUNTY

Your protest has been accepted. In your protest, you request an extension of time for a field review to develop suitable minimum bypass flow conditions. You are granted the extension of time until July 1, 2000 to complete your study and submit protest dismissal terms. The applicant is not required to answer your protest until these terms are submitted.

Please let us know promptly if you and the applicant reach agreement and you withdraw your protest. If you have any questions, please call me at (916) 657-1965.

cc: Doug Cole, et al.
92520 Highway 96
Somes Bar, CA 95568

RECEIVED

APR - 5 2000

Dept. of F&G Region 1



State Water Resources Control Board

WR-1



Alan C. Lloyd, Ph.D.
Agency Secretary

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
Mailing Address: P.O. Box 2000 ♦ Sacramento, California 95812-2000
FAX: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

APR 08 2005

In Reply Refer
to:331:YM:D30945R

APR 08 2005

Douglas T. Cole
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

SMALL DOMESTIC USE REGISTRATION D30945R, CERTIFICATE NO. R480,
STANSHAW CREEK TRIBUTARY TO KLAMATH RIVER IN SISKIYOU COUNTY

Thank you for submitting a Report of Registrant for your pond. After reviewing your file for renewal and contacting the Department of Fish and Game (DFG), there has apparently been no clearance issued from the DFG on Certificate No. R480. However, on November 17, 1998, your agent of record (Sean Bagheban) signed a form stating you had contacted an Environmental Services Supervisor from DFG.

As Condition 19 of Certificate No. R480 states, you are required to obtain all necessary federal, state, and local approvals. Your specific attention is directed to Conditions 16, 17, and 18. Before your certificate is renewed, you are requested to send the Division of Water Rights a copy of DFG clearance. If you do not have one, please contact DFG and obtain written clearance. Your renewal is pending submittal of DFG clearance.

If you have any questions, please call me at (916) 341-5362.

Sincerely,

Yoko Mooring
Engineering Associate
Water Rights Processing

cc: Jane Vorpagel
Northern California Region
Department of Fish and Game
601 Locust Street
Redding, CA 96001

California Environmental Protection Agency



005720

United States Department of Justice

Office of the Attorney General

Washington, D.C. 20530

Enclosed for the

Director, FBI

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NORTHERN CALIFORNIA-NORTH COAST REGION
 601 Locust Street
 Redding, CA 96001
 (530) 225-2300

July 5, 2005

Mr. Doug Cole
 Marble Mountain Ranch
 92520 Highway 96
 Somes Bar, CA 95568

Dear Mr. Cole:

The Department of Fish and Game has received your letter which details your proposals to mitigate impacts to coho salmon from your current unauthorized diversion in Stanshaw Creek. As you know the Department protested your water right application on March 17, 2000. We are also preparing comments and conditions for your small domestic use application which has come up recently for renewal.

The Department's primary concern regarding your diversion is the protection of anadromous fish habitat in the approximately 0.25 mile reach of Stanshaw Creek from the Highway 96 crossing to the stream's confluence with the Klamath River.

Your letter proposes two phases of mitigation. Phase I involves piping effluent from hydroelectric generation back to Stanshaw Creek above the Stanshaw Creek/Highway 96 culvert. This mitigation method was discussed on various field trips to your ranch during the protest of the water right application. The Department agrees if you pipe this water, which is currently being discharged to Irving Creek, back to Stanshaw Creek, above the Highway 96 culvert, then coho habitat below the culvert should be maintained in this portion of Stanshaw Creek.

Specific flow requirements will be discussed in the future, however, the Department determined in a previous field review that a flow of 2.4 cubic feet per second in Stanshaw Creek below the culvert should maintain suitable habitat for coho salmon.

Phase II in your letter proposes:

- Maintaining current minimum flows past the point of diversion for resident Stanshaw Creek trout.

work out 7-5-05
 SURNAME

Verpyle 7-5/05

Turek 7/6/05

K. M. M. w/ edits 7-7-05

005722

out 7/6/05

Mr. Doug Cole
July 5, 2005
Page Two

- Installing a half-round culvert in the historic canal line to prevent berm failures, overtopping in high water events and to improve efficiency of water transportation.
- Installing solar power generation systems to compliment hydroelectric generation.

Maintaining current commitments for minimum flows past your "Point of Diversion" is a requirement of your lake or streambed alteration agreement and should not be considered part of Phase II implementation.

The Department supports the concept of your proposals. We look forward to working with you in the future to resolve our protests to your water right applications. If you have questions or comments regarding this letter please contact Staff Environmental Scientist Jane Vorpapel at (530) 225-2124.

Sincerely,

DONALD B. KOCH
Regional Manager

cc: Mr. Jim Sutton
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95814

Mr. Will Harling
Mid Klamath Watershed
P.O. Box 764
Somes Bar, CA 95568

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

bc: Jim Whelan, Mark Elfgen, Anne Manji, Caitlin Bean

Vorpapel:pm W:\Correspondence\2005\Habitat Conservation\coleproposal.doc

WR-193

FAX Coversheet

**From: Michael Contreras
Environmental Specialist III
Complaint Unit**

**Phone: (916) 341-5307
Fax: (916) 341-5400
e-mail: mcontreras@waterrights.swrcb.ca.gov**

**To: Jane Vorpapel
Date: July 19, 2002
Subject: Cole's Application #29449**

Fax: (530) 225-2381

Jane:

The following pages are the filed report of investigation regarding the Cole's diversion on Stanshaw Creek, tributary to the Klamath River in Siskiyou County, resulting from a complaint.

Although DFG Warden Ron Presley received a copy directly, please accept this fax for your own use.

I would be happy to discuss the matter with you on Monday, July 22nd after you have had opportunity to look through our report.

Have a nice day.





Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

WR-193



Gray Davis
Governor

In Reply Refer to:
363:MC:262.0(47-40-01)

MAY 23 2002

Klamath Forest Alliance
c/o Law offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Mr. Doug and Mrs. Heidi Cole
c/o Ms. Jan Goldsmith
Kronick, Moskowitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Ladies and Gentlemen:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE – ALLEGING UNREASONABLE DIVERSION

Complaint Unit staff of the Division of Water Rights have completed their investigation of the complaint lodged by the Klamath Forest Alliance (KFA) against Doug and Heidi Cole (dba Marble Mountain Ranch). A copy of the Staff Report of Investigation regarding this matter is enclosed. Complaint Unit staff reached the following conclusions:

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Coles' ditch to cover both the diversion and bypass requirement with subsequent measurement and release of a bypass back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."

Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

2

MAY 23 2002

Based on these conclusions, Complaint Unit staff believe the following actions are appropriate:

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their Point of Diversion to maintain a flow in lower Stanshaw Creek below the Highway 96 culverts similar to that present during the October 16, 2001, field investigation (≈ 0.7 cfs).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Coles' ditch is not allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small, hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or
 - b) if full diversion of the creek into the Coles' ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
4. That the parties give serious consideration to a physical solution similar to that discussed in the Staff Report of Investigation.

If either party to the complaint disagrees with the conclusions reached by Complaint Unit staff, please let me know of the points with which you disagree and the specific evidence you believe is available to substantiate or justify a different conclusion or action. If we do not hear from you within 30 days from the date of this letter, we will assume that you agree with the conclusions and recommendations contained therein. If the Coles are unable to produce evidence to justify a different recommendation, failure on their part to maintain the bypass flows as specified may result in appropriate enforcement action without further notice. Similarly, if the KFA is unable to provide evidence to justify a different course of action, this complaint would be subject to closure without further notice.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,



Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

3

MAY 23 2002

cc: Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman
Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klinge Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5377
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Division of Water Rights: <http://www.waterrights.ca.gov>

WR-193



Gray Davis
Governor

Memorandum to File

To: File Number 262.0 (47-40-01)

Date: MAY 23 2002

From:

Charles A. Rich
Charles A. Rich, Chief
Complaint Unit

Michael Contreras
Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

Memo to File

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May 23, 2002

measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

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May 23, 2002

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 - 200 feet above the terminal

Memo to File

Page 4

May 23, 2002

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommend that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

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May 23, 2002

Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for power purposes in her letter of August 20, 2001, Complaint Unit staff are not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believe that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The SWRCB has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Another weighed factor is the extent of injury caused by the water diversion. If an investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide not to take enforcement action. The SWRCB may also consider the degree of hardship enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

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Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phyllis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. **Pre-1914 appropriative claim of right for domestic / irrigation use.** This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. **Application A029449** – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. **Small Domestic Registration D030945R** – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

*Cole's
did not
get a letter
From DFG
regarding
conditions*

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land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "innocent until proven guilty" concept of the law.

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- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: "*The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage.*" While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

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The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of ±50%.

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problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of $\frac{1}{2}$ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 - 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

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would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an Injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of $\frac{1}{2}$ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

what
about
our
protests?

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

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The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

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CONCLUSIONS

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their 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).
2. That the required bypass flow be determined in one of two fashions:
 - a) If full diversion of the creek into the Cole's ditch is not allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

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hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) If full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.



State Water Resources Control Board

WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5377
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>

Gray Davis
RECEIVED

2002 AUG 23 PM 2 02
363:MC:262.0(47-40-01); A029449DFG - REDDING

AUG 22 2002

In Reply Refer to:

363:MC:262.0(47-40-01); A029449DFG - REDDING

Klamath Forest Alliance
c/o Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Dear Mr. Mooney:

WATER RIGHTS COMPLAINT OF THE KLAMATH FOREST ALLIANCE AGAINST THE COLES REGARDING DIVERSIONS FROM STANSHAW CREEK IN SISKIYOU COUNTY

Staff of the Division of Water Rights (Division) has completed their review of your letter of June 24, 2002 regarding the subject complaint. You indicate in this letter that you and your client disagree with the conclusions reached by Complaint Unit staff, as expressed in their letter and Staff Report of Investigation dated May 23, 2002. After review of both the Staff Report of Investigation and your letter, I have concluded that further action with respect to your client's complaint is not warranted, and I have directed the Complaint Unit to close this complaint. The supporting rationale for this action is described below.

Unauthorized Diversion of Water – You contend that the Division previously determined that any pre-1914 appropriative right held by the Coles is limited to approximately 0.11 cubic feet per second (cfs). Regardless of past letters sent by the Division containing estimates of what could be diverted pursuant to a pre-1914 appropriative right claim, the Division has no adjudicatory authority to quantify such a claim. Only the courts can make this determination. The most recent evidence submitted by the Coles and their legal counsel indicates that diversion of water from Stanshaw Creek into their ditch, and the subsequent use of this water for irrigation and domestic purposes at the Marble Mountain Ranch, was initiated prior to 1914 using at least as much, if not more, water than is used today. All available evidence suggests that the diversion and use has been maintained in a diligent and continuous fashion ever since. Consequently, we believe that a court would find that the Coles have a valid claim of a pre-1914 appropriative right to divert water for the full irrigation and domestic uses currently maintained, including reasonable conveyance losses.

While the Cole's current diversion of water for power purposes is not technically covered by a permit, this diversion and use has been ongoing for almost 60 years. Diversions prior to a determination regarding issuance of a permit are very common, especially for long-standing diversions such as the Cole's. The State Water Resources Control Board (SWRCB) has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to initiate enforcement against a person who files an application promptly upon notification of the complaint, and then

California Environmental Protection Agency

Klamath Forest Alliance

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AUG 22 2002

diligently pursues the application, complies with all application requirements and requests for information, and cooperates with SWRCB staff. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Potential Injury to Other Uses of Water - Another important factor in considering enforcement is the extent of injury caused by the water diversion. If a complaint investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide *not* to take enforcement action. The SWRCB may also consider the degree of hardship that enforcement action would impose on persons who rely on the diversion of water when it decides whether to take enforcement action in response to a complaint. Based on available evidence and rationale described in the Staff Report of Investigation, Complaint Unit staff concluded that there would be little potential for harm to other diverters or public trust resources if the Coles were allowed to divert water for power purposes, as long as a minimum bypass flow is maintained similar to that occurring during their investigation. You disagree with this conclusion, and make reference to the professional opinions of staff for the National Marine Fisheries Service, Department of Fish and Game, Karuk Tribe, and Humboldt State University. While we have received copies of these opinions, the evidence and logical rationale on which these opinions are based has not been submitted. Consequently, I believe the *prima facie* evidence utilized by Complaint Unit staff is more persuasive. Asking the Coles to terminate their diversion would also cause severe economic hardship on them without providing much if any benefit to the instream resources.

I do agree with you that the Cole's application has been pending for far too long. This application has been noticed and protests received. I doubt the parties will be able to resolve these protests amicably amongst themselves. The next steps in the process would be to complete an environmental review of the project pursuant to the California Environmental Quality Act (CEQA), and then proceed to protest resolution via either a field investigation or formal hearing. I have directed the Division's Environmental Section to give as much priority as possible to this application so that final resolution of the protests can be achieved as soon as feasible. I have also asked the Division's Application and Environmental units to send copies of all correspondence to you so that you will be kept apprised of the progress in this matter.

In the meantime, I expect the Coles to maintain a minimum bypass, as described in the Staff Report of Investigation. Failure to do so could result in a reevaluation of the need for enforcement action prior to a final determination of the Cole's request for a permit.

If there are any questions regarding this matter, please contact Charles Rich, Chief of the Division's Complaint Unit, at (916) 341-5377.

Sincerely,



Edward C. Anton, Chief
Division of Water Rights

cc: See next page.

Klamath Forest Alliance

3

AUG 22 2002

cc: Mr. Doug and Mrs. Heidi Cole
c/o Jan Goldsmith
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
Attention Mr. Ron Presley and
Jane Vorpapel
601 Locust Street
Redding, CA 96001

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman and
Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klinge Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556



State Water Resources Control Board

WR-193



Linda S. Adams
Secretary for
Environmental Protection

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterboards.ca.gov/waterrights

Arnold Schwarzenegger
Governor

*drafted
letter 10/8/9 to Weaver
due out by 10/15/02*

MEMORANDUM

45 days

SEP 9 AM 9 24

TO: Gary Stacey, Regional Manager
Department of Fish and Game
Northern Region
601 Locust Street
Redding, CA 96001

Katherine Mrowka

FROM: Katherine Mrowka, Chief
Inland Streams Unit
DIVISION OF WATER RIGHTS

DATE: **SEP 03 2009**

SUBJECT: REQUEST FOR DEPARTMENT OF FISH AND GAME WRITTEN CONDITIONS FOR SMALL DOMESTIC USE REGISTRATION IN THE NAME OF DOUGLAS COLE, REGISTRATION NO. D030945R, CERTIFICATE NO. R480; DIVERSION FROM STANSHAW CREEK TRIBUTARY TO KLAMATH RIVER IN SISKIYOU COUNTY

On August 25, 2009 and August 27, 2009 the Division of Water Rights (Division) staff discussed or e-mailed the Department of Fish and Game (DFG) regarding Small Domestic Use (SDU) Certificate No. R480 regarding the lack of DFG written conditions for the SDU.

1600
The Division of Water Rights (Division) received this Registration on September 9, 1999, and the Certificate was issued on November 30, 1999. Our records indicate that Division staff visited the site in May 1999. Mr. Squires, agent for Mr. Cole, indicated DFG had made a site visit and that Mr. Cole was entering into an Agreement with DFG. The Division never received either written conditions for the SDU, or a copy of the DFG Streambed Alteration Agreement. (DFG Code § 1600 et seq.)

Mr. Cole returned his Registrant Report and Request for Renewal in August, 2004, along with his renewal fee. A subsequent conversation with Yoko Mooring of this office and Jane Vorpagal, dated January 18, 2005, is summarized in a contact report in our records. Subsequently, on April 8, 2005, the Division sent Mr. Cole a letter requesting that he contact DFG again to obtain a written clearance letter from DFG. Division staff stated that his renewal was pending the DFG clearance letter. This office never received a letter from DFG regarding clearance for this SDU, and consequently, Certificate R480 has not been renewed.

Emails from Ms. Vorpagal of August 25 and 27, 2009 state that DFG has not issued clearance for this SDU, and DFG may require a new Streambed Alteration Agreement. The emails also state that Mr. Cole may need to file an Incidental Take permit for Coho. Please confirm in writing whether or not DFG will require either or both the Streambed Alteration Agreement and Incidental Take permit for this Registration.

California Environmental Protection Agency



005745

Gary Stacey, Regional Manager
Department of Fish and Game

- 2 -

The ongoing protest regarding pending Application A029449, and the complaint regarding Mr. Cole's pre-1914 claim of right are separate issues and should be considered separately.

We will put a hold on the renewal process for this Registration for 45 days. If no response is received within 45 days of this letter, we will assume that DFG has determined that no special conditions for the Small Domestic Use Registration are required. We will proceed with the renewal process, if Mr. Cole submits his Report and Request for Renewal, along with the renewal fee.

Enclosures: Copy of Original Application
Copy of Certificate R480

cc: (with enclosures)

Jane Vorpagal
Department of Fish and Game
Northern Region
601 Locust Street
Redding, CA 96001

bcc: Katherine Mrowka, Steve Herrera, Chuck Rich (electronic copy of memo only)

sjw:08282009: DCC: 09/02/09

u:\perdrv\swilson\LSU SDU Registration\D030945R DFG clearance memo 08282009

MINIMUM FILING FEE: \$100.00
FILE ORIGINAL & ONE COPY
TYPE OR PRINT IN BLACK INK
(For explanation of entries required, see
booklet "How to File an Application to
Appropriate Water in California")

STATE OF CALIFORNIA
State Water Resources Control Board
DIVISION OF WATER RIGHTS
901 P Street, Sacramento
P. O. Box 2000, Sacramento, CA 95812-2000

99 SEP 17 11 3 57

☐ APPLICATION TO APPROPRIATE WATER BY PERMIT

(Check one
box only)

or

☒ REGISTRATION OF SMALL DOMESTIC USE APPROPRIATION*

(If this form is used to register a small domestic use appropriation, the
terms "application" and "applicant" herein, and in related forms, shall
mean "registration" and "registrant".)

Application No. 30945 R
(Leave blank)

1. APPLICANT

Douglas T. Cole (Name of applicant) (530) 469-3437
(Telephone number where you may be reached
between 8 a. m. and 5 p. m. - include area code)
92520 Highway 96
Somes Bar CA 95568
(Mailing address) (City or town) (State) (Zip code)

2. SOURCE

a. The name of the source at the point of diversion is Stanshaw Creek
(If unnamed, state that it is an unnamed stream, spring, etc.)
tributary to Klamath River thence Pacific Ocean
b. In a normal year does the stream dry up at any point downstream from your project? YES ☐ NO ☒ If yes, during
what months is it usually dry? From _____ to _____
What alternate sources are available to your project should a portion of your requested direct diversion season be
excluded because of a dry stream or nonavailability of water? None

3. POINTS of DIVERSION and REDIVERSION

a. The point(s) of diversion will be in the County of Siskiyou

List all points giving coordinate distances from section corner or other tie as allowed by Board regulations i. e. California Coordinate System	Point is within (40-acre subdivision)	Section	Township	Range	Base and Meridian
785,300' N , 1,589,300' E	SW 1/4 of NE 1/4	33	13N	6E	H
CA. COORD. ZONE 1	1/4 of 1/4				
	1/4 of 1/4				

c. Does applicant own the land at the point of diversion? YES ☐ NO ☒

d. If applicant does not own the land at point of diversion, state name and address of owner and what steps have been taken
to obtain right of access: Applicant has a recorded easement,

U.S. Forest Service
Somes Bar, California

FOR0053-R2

005747

12/1/98
\$100.00
C.S.

4. PURPOSE of USE, AMOUNT and SEASON

a. In the table below, state the purpose(s) for which water is to be appropriated, the quantities of water for each purpose, and the dates between which diversions will be made. Use gallons per day if rate is less than 0.025 cubic foot per second (approximately 16,000 gallons per day). Purpose must only be "Domestic" for registration of small domestic use.*

PURPOSE OF USE (Irrigation, Domestic, etc.)	DIRECT DIVERSION				STORAGE		
	QUANTITY		SEASON OF DIVERSION		AMOUNT	COLLECTION SEASON	
	RATE (Cubic feet per second or gallons per day)	AMOUNT (Acre-feet per year)	Beginning Date (Mo. & Day)	Ending Date (Mo. & Day)	Acre-feet per annum	Beginning Date (Mo. & Day)	Ending Date (Mo. & Day)
Domestic					10.0	Jan. 1	Dec. 31
					10.0		

b. Total combined amount taken by direct diversion and storage during any one year will be 10.0 acre-feet.

*Not to exceed 4,500 gallons per day by direct diversion or 10 acre-feet per annum by storage.

5. JUSTIFICATION OF AMOUNT (For small domestic use registration, complete item b. only)

a. IRRIGATION: Maximum area to be irrigated in any one year is _____ acres.

CROP	ACRES	METHOD OF IRRIGATION (Sprinklers, flooding, etc.)	ACRE-FEET PER YEAR	NORMAL SEASON	
				Beginning Date	Ending Date

b. DOMESTIC: Number of residences to be served is 3. Separately owned? YES ☒ NO ☐

Total number of people to be served is 9. Estimated daily use per person is 100.

Total area of domestic lawns and gardens is 8,500 square feet. (Gallons per day)

Incidental domestic uses are _____
(Dust control area, number and kind of domestic animals, etc.)

c. STOCKWATERING: Kind of stock _____ Maximum number _____
Describe type of operation: _____

(Feed lot, dairy, range, etc.)

d. RECREATIONAL: Type of recreation: Fishing ☐ Swimming ☐ Boating ☐ Other ☐

e. MUNICIPAL: (Estimated projected use)

POPULATION 5-Year periods until use is completed		MAXIMUM MONTH		ANNUAL USE		
PERIOD	POP.	Average daily use (gal. per capita)	Rate of diversion (cfs)	Average daily use (gal. per capita)	Acre-foot (per capita)	Total acre-feet
Present						

Month of maximum use during year is _____. Month of minimum use during year is _____.

- f. **HEAT CONTROL:** The total area to be heat protected is _____ net acres.
 Type of crop protected is _____
 Rate at which water is applied to use is _____ gpm per acre.
 The heat protection season will begin about _____ and end about _____
 (Date) (Date)
- g. **FROST PROTECTION:** The total area to be frost protected is _____ net acres.
 Type of crop protected is _____
 Rate at which water is applied to use is _____ gpm per acre.
 The frost protection season will begin about _____ and end about _____
 (Date) (Date)
- h. **INDUSTRIAL:** Type of industry is _____
 Basis for determination of amount of water needed is _____
- i. **MINING:** The name of the claim is _____. Patented ☐ Unpatented ☐
 The nature of the mine is _____. Mineral to be mined is _____
 Type of milling or processing is _____
 After use, the water will be discharged into _____
 (Name of stream)
 in _____ 1/4 of _____ 1/4 of Section _____, T _____, R _____, _____ B. & M.
 (40-acre subdivision)
- j. **POWER:** The total fall to be utilized is _____ feet. The maximum amount of water to be used through the penstock is _____ cubic feet per second. The maximum theoretical horsepower capable of being generated by the works is _____. Electrical capacity is _____ kilowatts at _____ % efficiency.
 (Cubic feet per second x fall ÷ 8.8) (Hp x 0.746 x efficiency)
 After use, the water will be discharged into _____
 (Name of stream)
 in _____ 1/4 of _____ 1/4 of Section _____, T _____, R _____, _____ B. & M. FERC No. _____
 (40-acre subdivision)
- k. **FISH AND WILDLIFE PRESERVATION AND/OR ENHANCEMENT:** YES ☐ NO ☐ If yes, list specific species and habitat-type that will be preserved or enhanced in item 17 of Environmental Information form WR 1-2.
- l. **OTHER:** Describe use: _____. Basis for determination of amount of water needed is _____

6. PLACE OF USE

- a. Does applicant own the land where the water will be used? YES ☒ NO ☐ Is land in joint ownership? YES ☐ NO ☐
 (All joint owners should include their names as applicants and sign the application.)
 If applicant does not own land where the water will be used, give name and address of owner and state what arrangements have been made with the owner. _____

b.

USE IS WITHIN (40-acre subdivision)	SECTION	TOWNSHIP	RANGE	BASE & MERIDIAN	IF IRRIGATED	
					Number of acres	Presently cultivated (Y/N)
SW 1/4 of NE 1/4	33	13N	6E	H		
1/4 of 1/4						
1/4 of 1/4						
1/4 of 1/4						
1/4 of 1/4						
1/4 of 1/4						

(If area is unsurveyed, state the location as if lines of the public land survey were projected, or contact the Division of Water Rights. If space does not permit listing all 40-acre tracts, include on another sheet or state sections, townships and ranges, and show detail on map.)

7. DIVERSION WORKS

- a. Diversion will be by gravity by means of flume
(Dam, pipe in unobstructed channel, pipe through dam, siphon, weir, gate, etc.)
- b. Diversion will be by pumping from n/a Pump discharge rate — Horsepower —
(Sump, offset well, channel, reservoir, etc.) (cfs or gpd)
- c. Conduit from diversion point to first lateral or to offstream storage reservoir:

CONDUIT (Pipe or channel)	MATERIAL (Type of pipe or channel lining) (Indicate if pipe is buried or not)	CROSS SECTIONAL DIMENSION (Pipe diameter or ditch depth and top and bottom width)	LENGTH (Feet)	TOTAL LIFT OR FALL		CAPACITY (Estimate)
				Feet	+ or -	
Channel	Earthen	12" in. deep 24" in. wide	5,200'	40'	10'	2.5-3.0
Pipe	Steel (not buried)	16" in. diam.	455'	200'	1'	2.5-3.0

- d. Storage reservoirs: (For underground storage, complete Supplement 1 to WR1, available upon request.)

Name or number of reservoir, if any	DAM				RESERVOIR		
	Vertical height from downstream toe of slope to spillway level (ft.)	Construction material	Dam length (ft.)	Freeboard Dam height above spillway crest (ft.)	Approximate surface area when full (acres)	Approximate capacity (acre-feet)	Maximum water depth (ft.)
						10	

- e. Outlet pipe: (For storage reservoirs having a capacity of 10 acre-feet or more.)

Diameter of outlet pipe (inches)	Length of outlet pipe (feet)	FALL (Vertical distance between entrance and exit of outlet pipe in feet)	HEAD (Vertical distance from spillway to outlet pipe in reservoir in feet)	Estimated storage below outlet pipe entrance (dead storage)

- f.. If water will be stored and the reservoir is not at the point of diversion, the maximum rate of diversion to offstream storage will be _____ cfs. Diversion to offstream storage will be made by: ☐ Pumping ☐ Gravity

8. COMPLETION SCHEDULE

- a. Year work will start n/a b. Year work will be completed n/a
c. Year water will be used to the full extent intended 2005 d. If completed, year of first use 1876

9. GENERAL

- a. Name of the post office most used by those living near the proposed point of diversion is _____
- b. Does any part of the place of use comprise a subdivision on file with the State Department of Real Estate? YES ☐ NO ☐
If yes, state name of the subdivision _____
If no, is subdivision of these lands contemplated? YES ☐ NO ☐
Is it planned to individually meter each service connection? YES ☐ NO ☐ If yes, When? _____
- c. List the names and addresses of diverters of water from the source of supply downstream from the proposed point of diversion: _____
- d. Is the source used for navigation, including use by pleasure boats, for a significant part of each year at the point of diversion, or does the source substantially contribute to a waterway which is used for navigation, including use by pleasure boats? YES ☐ NO ☐ If yes, explain: _____

10. EXISTING WATER RIGHT

Do you claim an existing right for the use of all or part of the water sought by this application? YES ☐ NO ☐

If yes, complete table below:

Nature of Right (riparian, appropriative, groundwater.)	Year of First Use	Purpose of use made in recent years including amount, if known	Season of Use	Source	Location of Point of Diversion

11. AUTHORIZED AGENT (Optional)

With respect to ☒ all matters concerning this water right application ☐ those matters designated as follows:

Sean Bagheban (916) 612-3539
 (Name of agent) (Telephone number of agent between 8 a. m. and 5 p. m.)
P.O. Box 160621 Sacramento CA 95816
 (Mailing address) (City or town) (State) (Zip code)

is authorized to act on my behalf as my agent.

12. SIGNATURE OF APPLICANT AUTHORIZED AGENT

I (~~we~~) declare under penalty of perjury that the above is true and correct to the best of my (~~our~~) knowledge and belief.

Dated Nov. 27 19 98, at Sacramento, California

(If there is more than one owner of the project,
please indicate their relationship.)

Ms. Mr. Sean Bagheban

Miss. Mrs. _____

(Signature of applicant)

Sean Bagheban

Ms. Mr.

Miss. Mrs. _____

(Signature of applicant)

Additional information needed for preparation of this application may be found in the Instruction Booklet entitled "HOW TO FILE AN APPLICATION TO APPROPRIATE WATER IN CALIFORNIA". If there is insufficient space for answers in this form, attach extra sheets. Please cross-reference all remarks to the numbered item of the application to which they may refer. Send original application and one copy to the STATE WATER RESOURCES CONTROL BOARD, DIVISION OF WATER RIGHTS, P. O. Box 2000, Sacramento, CA 95812-2000, with \$100 minimum filing fee.

NOTE:

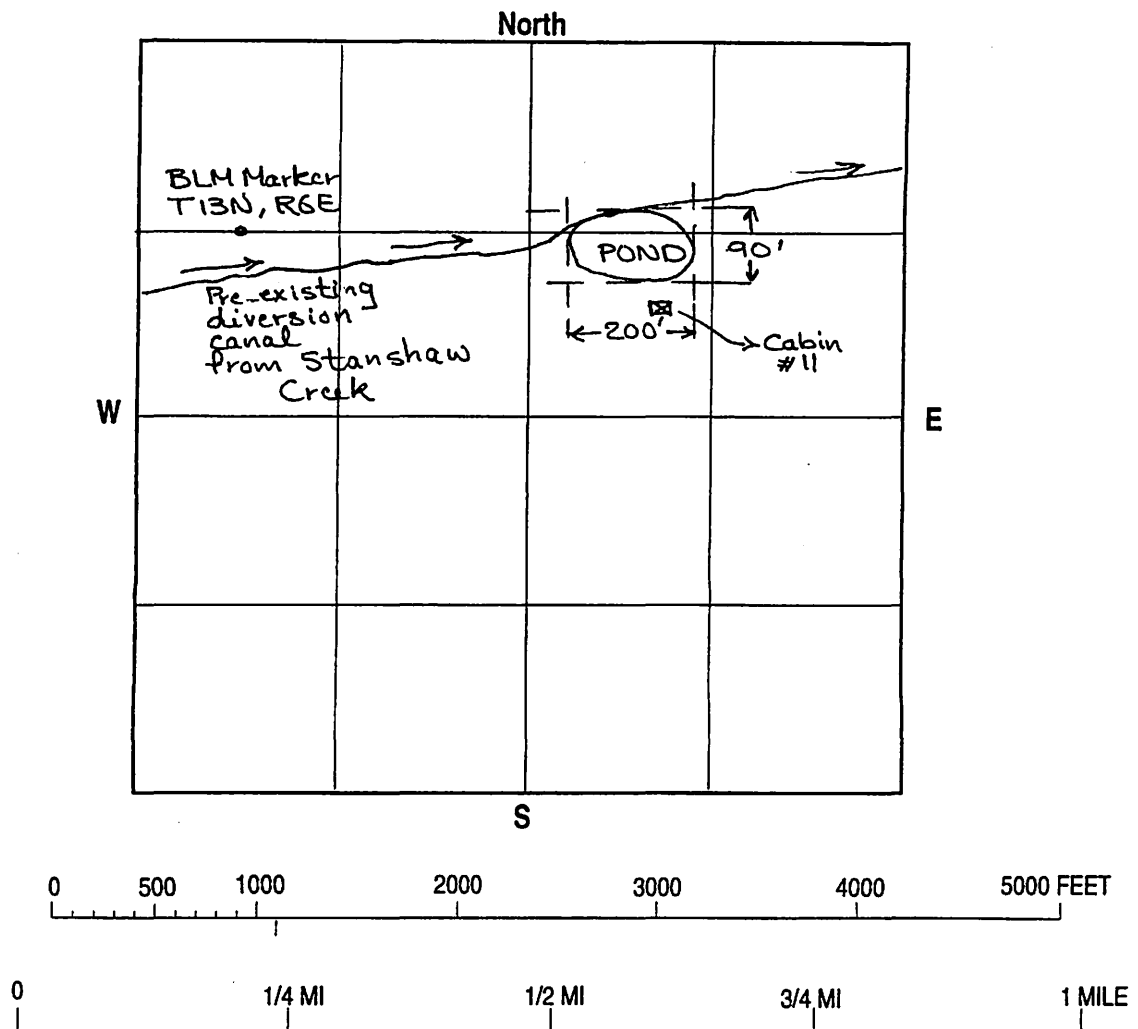
If this application is approved for a permit, a minimum permit fee of \$100 will be required before the permit is issued.
There is no additional fee for registration of small domestic.

FOR0053-R2

13. MAP

(Please complete legibly, as much detail as possible, or attach a suitable alternative. See example in instruction booklet.)

SECTION(S) 33 TOWNSHIP 13N RANGE 6E, H B. & M.



- (1) Show location of the stream or spring, and give name.
- (2) Locate and describe the point of diversion (i. e. the point at which water is to be taken from the stream or spring) in the following way: Begin at the most convenient known corner of the public land survey, such as a section or quarter section corner (if on unsurveyed land more than two miles from a section corner, begin at a mark or some natural object or permanent monument that can be readily found and recognized) and measure directly north or south until opposite the point which it is desired to locate; then measure directly east or west to the desired point. Show these distances in figures on the map as shown in the instructions.
- (3) Show location of the main ditch or pipeline from the point of diversion.
- (4) Indicate clearly the proposed place of use of the water.

14. SUPPLEMENTAL INFORMATION

- a. If you are applying for a permit, Environmental Information form WR1-2 should be completed and attached to this form.
- b. If you are registering a small domestic use, Fish and Game Information form WR1-3 should be completed and attached to this form.
- c. If you are applying for underground storage, Supplement 1 to WR 1 (available upon request) should be completed and attached to this form.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
901 P STREET, SACRAMENTO, CA 95814
MAILING ADDRESS
P.O. BOX 2000, SACRAMENTO, CA 95812-2000

REGISTRATION OF SMALL DOMESTIC USE APPROPRIATION
FISH AND GAME INFORMATION

APPLICATION NO. 30945R
(leave blank)

IN ORDER FOR YOUR REGISTRATION OF SMALL DOMESTIC USE TO BE ACCEPTED AS COMPLETE, YOU SHOULD DO THE FOLLOWING:

- A) Complete Application/Registration for WR 1 to the best of your ability.
- B) Contact the Environmental Services Supervisor for the California Department of Fish and Game region in which your diversion will be located (see last page of this form) to discuss your project and the information to be included in this form.
- C) Complete, sign, and date this form. (Note certification above your signature).
- D) Send a copy of this form and a copy of form WR 1 to the Environmental Services Supervisor of the regional office of the California Department of Fish and Game (see last page of this form for address).
- E) Send the original of this form and form WR 1 to the Division of Water Rights at the mailing address given at the top of this page.

IF YOUR COMPLETED FORMS MEET THE REQUIREMENTS OF THE WATER CODE, IF YOU HAVE PAID THE \$100.00 FILING FEE, AND IF YOUR DIVERSION WILL NOT BE FROM A STREAM DECLARED BY THE STATE WATER RESOURCES CONTROL BOARD TO BE FULLY APPROPRIATED OR FROM A STREAM SEGMENT FOR WHICH THE DEPARTMENT OF FISH AND GAME HAS ESTABLISHED STREAMFLOW REQUIREMENTS (THE DIVISION OF WATER RIGHTS MAINTAINS CURRENT LISTS FOR THESE), YOUR REGISTRATION WILL BE ACCEPTED AND EVIDENCED BY A CERTIFICATE OF REGISTRATION, A COPY OF WHICH WILL BE MAILED TO YOU.

PROJECT DESCRIPTION

1. Provide a brief description of your project including, but not limited to, the type of diversion structure and conveyance facilities, any existing facilities, and how the project will operate.

Water is diverted from Stanshaw Creek and conveyed
through a flume to the property. Water is stored in an
oval-shaped pond and used for domestic purposes.

Owner is Douglas T. Cole

Marble Mountain Ranch

92520 Highway 96

Somes Bar, CA 95568

Tel: (530) 469-3437

FISH AND WILDLIFE INFORMATION

2. Will this project require a Department of Fish and Game Streambed Alteration Agreement? No If yes, has one been filed? n/a
3. What resident or migratory game or nongame fish species occur in affected streams? Steelhead,
resident trout
What season of the year do they occur in the stream? Year-round
4. Do any plants or animals which are (1) federally-identified as candidate, threatened, or endangered; (2) state-listed as rare, threatened, or endangered; or (3) listed by the Department of Fish and Game Natural Diversity Data Base occur in the project area? No
- (If so, a survey will need to be completed that identifies the species and the habitat requiring protection.)
5. Will your project have an adverse effect on any resident or migratory fish populations, any wildlife populations, or any rare or endangered plant or animal species? No If so, explain: n/a
6. Will your project adversely affect wetlands? No
- (If so, a survey will need to be completed that identifies the habitat requiring protection.)
7. What measures are you proposing to incorporate into your project to protect fish, wildlife, or endangered or rare species? Appropriate seasonal fish flows.

CERTIFICATION

By signing and submitting this form to the State Water Resources Control Board, I certify that I have contacted the Environmental Services Supervisor for the California Department of Fish and Game region in which my point of diversion is located, that I have furnished a copy of this form and Application/Registration form WR 1 to said Supervisor, and that I will comply with all lawful conditions required by the California Department of Fish and Game.

I further certify that all of the information given in this form is true and correct to the best of my knowledge and belief.

Date: Nov. 27, 1998

Signature: Sean Bagheban

Sean Bagheban (Agent of record)

P.O. Box 160621 PRINT NAME

Sacramento STREET ADDRESS

CITY

CA 95816

STATE

ZIP

916 612-3539

TELEPHONE NUMBER

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

DIVISION OF WATER RIGHTS

SMALL DOMESTIC USE REGISTRATION

CERTIFICATE NO. R 480

**Application 30945R of Douglas T. Cole
 92520 Highway 96
 Somes Bar, CA 95568**

filed with the State Water Resources Control Board (SWRCB) on September 17, 1999 meets the requirements for registration of small domestic use specified in Article 2.7 (commencing with section 1228) of Chapter 1 of Part 2 of Division 2 of the Water Code. The appropriation is subject to the following conditions.

1. Source:

Stanshaw Creek

Tributary to:

Klamath River thence
Pacific Ocean

within the County of Siskiyou

2. Location of Point of Diversion: By California Coordinate System, Zone 1	Point is within (40-acre subdivision)	Section	Township	Range	Base and Meridian
North 785,300 feet and East 1,589,300 feet	SW ¼ of NE ¼	33	13N	6E	H

3. Purpose of Use:	4. Place of Use:	Section	Township	Range	Base and Meridian	Acres
DOMESTIC	SW ¼ of NE ¼	33	13N	6E	H	

The place of use is shown on a map on file with the SWRCB.

APPLICATION 30945R

REGISTRATION CERTIFICATE NO. R. 480

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.

6. Appropriation of water pursuant to this registration shall be made in accordance with the information set forth in the completed registration form as to source, location of point of diversion, purpose of use, place of use, and quantity and season of diversion. This information is reproduced as conditions 1 through 5 of this certificate.

7. The appropriation registered herein shall be limited to the use of water in houses, resorts, motels, organization camps, campgrounds, and other similar facilities, including the incidental watering of domestic stock for family sustenance or enjoyment, the irrigation of not to exceed one-half acre of lawn, ornamental shrubbery, or gardens at any single establishment, and the human consumption, cooking, and sanitary needs at campgrounds or resorts.

8. Any storage of water registered herein may include impoundment for incidental aesthetic, recreational, or fish and wildlife purposes.

9. This appropriation is limited to the season of diversion specified in condition 5 herein. If such specified season is less than the actual season of need, an alternative supply of water, or other valid right, shall be utilized for all uses outside of the season registered herein.

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 SWRCB 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.

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.

12. Registrant shall allow representatives of the SWRCB, and other parties as may be authorized from time to time by the SWRCB, reasonable access to project works to determine compliance with the terms and conditions of this registration.

APPLICATION 30945R

REGISTRATION CERTIFICATE NO. R. 480

13. If the registrant does not own the point of diversion, this registration shall not be construed as conferring upon the registrant right of access to the point of diversion.
14. To the extent that water available for use under this registration is return flow, imported water, or wastewater, this registration shall not be construed, as giving any assurance that such supply will continue.
15. Diversion works shall be constructed and water applied to beneficial use with due diligence.
16. In accordance with sections 1600 through 1607 and 6100 of the Fish and Game Code, no work shall be started on the diversion works and no water shall be diverted until registrant has entered into a stream or lake alteration agreement with the California Department of Fish and Game and/or the Department has determined that measures to protect fishlife have been incorporated into the plans for construction of such diversion works. Construction, operation, and maintenance costs of any required facility are the responsibility of the registrant.
17. In compliance with section 5937 of the Fish and Game 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 Game, 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.
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 the California Department of Fish and Game.
19. No construction shall be commenced and no water shall be diverted under this registration until all necessary federal, state, and local approvals have been obtained, including obtaining and complying with any waste discharge requirements from the appropriate California Regional Water Quality Control Board.
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 Game 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.

APPLICATION 30945R

REGISTRATION CERTIFICATE NO. R. 480

21. This registration is subject to the submittal of a report of water use and satisfactory renewal of the registration, on forms to be furnished by the SWRCB, including payment of the then-current renewal fees prior to the expiration of each five-year period following the date of first filing the completed registration.

22. The point or points of diversion and the place of use registered herein may be changed by filing a completed amended registration form with the SWRCB, including payment of the then-current registration fee. Such change shall not operate to the injury of any legal user of the water involved.

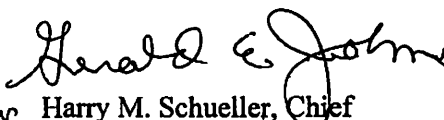
23. The appropriation registered herein shall be totally or partially forfeited for nonuse if the diversion is abandoned or if all or any part of the diversion is not beneficially used for a continuous period of five years.

24. The appropriation registered herein is subject to enforcement, including but not limited to revocation, by the SWRCB if 1) the SWRCB 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 SWRCB finds that the registrant is in violation of the conditions of this registration.

25. In the event that water is to be collected to storage under this registration, the Registrant shall install and maintain an outlet pipe of adequate size and capacity through the dam, as near as practicable to the bottom of the natural stream channel so that water that is not authorized for collection to storage can be bypassed through the dam. In the event that the dam is already constructed, registrant shall provide other means satisfactory to the Chief of the Division of Water Rights for bypassing water. Before storing water in the reservoir, registrant shall provide evidence that substantiates that the outlet pipe or other means of bypassing water has been installed. Evidence shall include photographs showing the completed works or a certification by a registered engineer. The facilities shall be maintained and operated to ensure compliance with the terms of this registration.

Dated: 11/15/99

STATE WATER RESOURCES CONTROL BOARD


for Harry M. Schueller, Chief
Division of Water Rights



Peter M. Rooney
Secretary for
Environmental
Protection

State Water Resources Control Board

John P. Caffrey, Chairman

Division of Water Rights

901 P Street • Sacramento, California 95814 • (916) 657-0765 FAX (916) 657-1485
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
Internet Address: <http://www.swrcb.ca.gov>



Pete Wilson
Governor

SEPTEMBER 15 1998

In Reply Refer
to:332:CM:29449, 29450

Doug Cole, Heidi Cole,
Norman D. Cole, Caroline Cole
c/o Mr. Doug Cole
92520 Highway 96
Somes Bar, CA 95568

RECEIVED

AUG - 1 2000

Dept. of F&G Region

Dear Mr. Cole:

UNAUTHORIZED DIVERSION--STANSHAW CREEK IN SISKIYOU COUNTY

I understand that you have been involved in an ongoing discussion with the Division of Water Rights (Division) regarding your diversion and use of water from Stanshaw Creek in Siskiyou county. It is my understanding that you have on file with the Division, two pending applications to appropriate water, numbered 29449 and 29450. These applications were filed by the previous owner of your property in Somes Bar, California to authorize his diversions from Stanshaw Creek for use upon the parcel which you now own. You claim pre-1914 appropriative rights as a basis for your ongoing and, apparently increasing diversions for domestic use and hydroelectric power production and you have expressed a desire to withdraw your pending applications.

To date, the Division has been unwilling to cancel your pending applications because you do not appear to have a valid pre-1914 claim for the water you are currently diverting. The Division has supplied you and your attorney with evidence to show that the upper limit of your claim of pre-1914 appropriative rights is 0.49 cubic feet per second (cfs), continuous flow and may appropriately be only 0.11 cfs. This assertion is based upon information contained within the May, 1965 bulletin by the Department of Water Resources entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6). This publication lists the property, which you now own and states that the total amount of water diverted for irrigation, domestic, stockwatering, and power production totaled 362 acre-feet, annually. This total usage equates to a continuous flow rate of approximately 1/2 cfs. This information was verified by Mr. Marvin Goss, Forest Service Hydrologist, who lived on your property while it was under prior ownership. Mr. Goss evaluated the flow capacity of the ditch as well as measuring the actual amount of water put to use generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel.

Please understand that the nature of any appropriative right is such that it is limited to the amount of water put to continuous, reasonable and beneficial use regardless of the original "face value" of the appropriation. Your predecessor in interest, Mr. Young, submitted a copy of a water appropriation notice by Samuel Stanshaw dating well into pre-1914 times, claiming

RECEIVED
AUG 21 1998
005759
Dept. of F&G Region I

Copy: Vorpagel 9-21-98

SEPTEMBER 15 1998

600 miner's inches (15 cfs) of water from Stanshaw Creek for mining purposes. You claim to be successor in interest to Mr. Stanshaw's water rights. Although you have submitted no information to suggest that those rights ever pertained to your parcel of land, the Division is willing to accept, given that you are the current operator of an obviously old ditch on Stanshaw Creek, that you are the successor in interest to Mr. Stanshaw's water rights. However, you are not entitled to the entire 15 cfs appropriation described in Mr. Stanshaw's original notice, due to the documented failure of the previous landowners to apply that amount of water to beneficial use; additionally, your ditch is not capable of carrying that much water and expansion of the ditch does not allow you to reclaim water previously lost by nonuse. All appropriative water rights are limited as to both amount and season to the amounts actually used, which has been documented, in your case, as a maximum of 0.49 cfs for power generation and domestic purposes.

On September 23, 1997 an engineer from this office visited your site and observed that you were diverting water from Stanshaw Creek to supply your hydroelectric power plant. No measurements were taken at that time, but it was the opinion of the engineer that your diversions were well in excess of 0.49 cfs. Based upon the observations made during this visit, Division staff has attempted to help you understand the limitations of your claimed right and the need for the two pending applications. This subject has been discussed in considerable detail with your attorney. You continue to maintain that your current diversions are authorized by your "pre-1914 rights". 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 0.11 cfs. On June 3, 1998 an engineer from this Division measured the flow rate in your ditch (located upon public lands) and determined that you were diverting 2.4 cfs from Stanshaw Creek to operate your hydroelectric power plant.

The Division has received a report from the Department of Fish and Game that you have recently constructed a reservoir upon your property. It is difficult to envision how such a reservoir, constructed in 1998, could be authorized by a pre-1914 appropriative right. Although a pre-1914 right may be changed as to purpose of use, place of use, or point of diversion without the approval of this Division, such a change cannot serve to increase the amount of the right. The construction of a new reservoir is generally considered to be an increase in a water right and usually requires the filing of a new application to appropriate water.

At this time, the Division is willing to cancel application 29450, filed for 0.11 cfs for domestic and irrigation use, as soon as you complete and submit the enclosed Request for Cancellation form and the Statement of Water Diversion and Use form. It would appear that the diversion of this water is authorized under your pre-1914 claim of right. There is no information in our files to indicate that any diversion in excess of 0.11 cfs is authorized under your pre-1914 claim. Consequently, I recommend that you work with my staff to process application 29449. In the event you do not wish to process application 29449, please submit evidence to substantiate your alleged pre-1914 claim of right including a discussion of the recently constructed reservoir (capacity, amount and season of use, basis of right). Such evidence should clearly show the extent water was continuously used from the time of the appropriation to the present. Our files indicate that the hydroelectric plant was installed in the 1940's, so you may wish to substantiate the use of this water between 1914 and 1950. Any claim in excess of 0.49 cfs should be accompanied by substantial evidence to refute the Department of Water Resources' Bulletin 94-6 as well as the testimony of Mr. Goss.

Mr. Doug Cole

-3-

SEPTEMBER 15 1998

If the Division fails to receive the following within 45 days of the date of this letter, this matter will be referred to our Complaints Unit to consider appropriate enforcement action which may include the imposition of Administrative Civil Liabilities (fines) of up to \$500 per day for continued unauthorized use of water:

1. Description and location of your reservoir, use thereof, and basis of right to store water. If a basis cannot be documented, submit the enclosed application forms, properly completed along with the required fees.
2. Statement indicating whether you wish to continue processing application 29449; if not, substantial evidence which shows that your diversion of water has been continuously maintained in time and amount since December 19, 1914;
3. Completed Request for Cancellation form relating to application 29450 as well as a completed Statement of Water Diversion and Use for your domestic and irrigation use of water. *Please note that, in accordance with Section 5105 of the Water Code, the Division is authorized to investigate and determine the facts relating to your diversion, at your expense, if you do not submit a properly completed Statement of Water Diversion and Use within 60 days.*

If you have any further questions, Chris Murray, the engineer assigned to this case, can be reached at (916) 657-2167.

Sincerely,

ORIGINAL SIGNED BY:

Harry M. Schueller, Chief
Division of Water Rights

Enclosures

CERTIFIED

cc: Nancy Smith, Esq.
1041 East Green Street, Suite 203
Pasadena, CA 91106-2417

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001



Winston H. Hickox
*Secretary for
Environmental
Protection*

State Water Resources Control Board

WR-193



Gray Davis
Governor

Division of Water Rights

901 P Street • Sacramento, California 95814 • (916) 657-2170
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 657-1485 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

ORDER REJECTING AND CANCELING

APPLICATION 29450

Applicant: Doug Cole, Heidi Cole, Norman Cole, and Caroline Cole

Source: Stanshaw Creek thence Klamath River in Siskiyou County

It is ordered that this application is hereby rejected and canceled, without prejudice, upon the records of the State Water Resources Control Board because a request has been received from, or on behalf of the applicant that the application be canceled.

Applicant is hereby put on notice that any diversion of water from the proposed point(s) of diversion proposed under this application may be subject to an Administrative Civil Liability penalty of up to \$500 per day without further notice, pursuant to Water Code section 1052 et seq., unless the diversion is covered by an existing right.

If diversions will be made under claim of riparian or pre-1914 water rights, diversions shall be documented by the filing of a Statement of Water Diversion and Use in accordance with Water Code section 5100 et seq.

ORIGINAL SIGNED BY:

Harry M. Schueller, Chief
Division of Water Rights

Dated: JUL 16 1999

AQUA ENGINEERING & CONSULTING**Water Rights • Bay Delta • Modeling • Design**

November 25, 1998

Mr. Chris Murray
State Water Resources Control Board
Division of Water Rights
901 P Street
Sacramento, CA 95814

Subject: 332:CM:29449,29450

Dear Mr. Murray:

This letter is to inform you that I will be representing Mr. Douglas Cole concerning water rights for the Marble Mountain Ranch. Mr. Cole has retained my services and notified the State Water Resources Control Board (Board) in his November 18, 1998 letter. My clients and I are committed to working diligently with the Board staff to reach an equitable solution.

Also, per our telephone conversations on November 17 and 25, 1998, and considering the letter from the Board to my clients, dated September 15, 1998, I am taking the actions that are outlined below.

- Filing a Registration of Small Domestic Use Appropriation;
- Filing a Request for Cancellation of Application 29450, and a Statement of Water Diversion and Use;
- Working closely with Board staff to modify and process application 29449.

I would like to thank you in advance for your professional cooperation and understanding. Please do not hesitate to contact me if you have any questions or concerns. I can be reached by telephone at (916) 612-3539.

Sincerely,

ORIGINAL SIGNED BY

SEAN BAGHEBAN, P.E.

RECEIVED

NOV 30 1998

Dept. of F&G Region I

cc: Mr. Douglas Cole
92520 Highway 96
Somes Bar, CA 95568

Mr. Ron Prestly
Department of Fish and Game
Environmental Services
601 Locust Street
Redding, CA 96001

Memorandum

To : Steve Conger

Date: January 4, 1979

From : Department of Fish and Game - Region 1, Eureka

Subject: Stanshaw and Sandy Bar Creeks

Thanks very much for your survey information on the above creeks. I had no information whatsoever on either creek in the Eureka files. Rogers agrees with your analysis, that steelhead probably cannot negotiate the culverts. He also says that there is little or no steelhead habitat above the culverts because of very steep gradient.

This will be of great help at the next Project Development Team meeting with Caltrans about the culvert repairs.

Thanks, again.

Don A. La Faunce
Assoc. Fishery Biologist

DAL:km

cc: Rogers

DEPARTMENT OF FISH AND GAME
FIELD CORRESPONDENCE

FROM: S. L. Hanger, Colons

PLACE Stanchaw, Sandy Bar Creek

TO: Don La Jaurie

DATE 12-30-78

SUBJECT: Surveys of Stanchaw, Sandy Bar Creek, Liskiyou Co.

On this date I made cursory surveys of Stanchaw Cr. and Sandy Bar Cr., from Hwy. 96 culvert downstream to mouth.

Culverts: Stanchaw Cr. - Twin, 6' dia. C.M.P. with concrete lining bottom.

Culvert approx. 150' long or longer, with dogleg in center.

Sandy Bar Cr. - Twin, 6' dia. C.M.P. with concrete lining bottom.

Length approx. 50'-75', fairly steep drop.

Riparian vegetation: Both streams well shaded with alder overstory. Sandy Bar Cr. overstory mixed with firs, madrone and alder.

Stanchaw Creek had heavy understory of brush & blackberries.

Fish Life: - None observed in either stream. Stanchaw Cr. appears barren in area checked. It is improbable that fish migrate up from Klamath. Mouth of creek bifurcates, drops 8 ft. to Klamath.

Sandy Bar Creek probably has run of steelhead during normal flows. Flows now will impale upstream migrants. It is possible that SH might be able to traverse culvert at Sandy Bar Cr. during "normal" winter flows.

Flows: Stanchaw Cr., 1 c.f.w.; Sandy Bar Cr. - 5-7 c.f.w. Both streams are extremely low, possibly reflecting drought flows.

If flows increase, it is possible that SH will migrate into Sandy Bar Cr. and attempt to spawn in pools downstream from culvert at Hwy. 96.

S. L. C.

c.c. - Dave Rogers

CALIFORNIA DIVISION OF FISH AND GAME **STREAM SURVEY**

FILE FORM

No. _____

NAME Stanshaw Creek COUNTY Siskiyou

STREAM SECTION FROM Mouth To 1/2 mile upstream LENGTH 0.5 mile

TRIBUTARY TO Klamath River Twp. 13N R. 6E Sec. 33

OTHER NAMES _____ RIVER SYSTEM Klamath River

SOURCES OF DATA Stream survey by G. Itano and P. Kalvass, Cal. DFG, 8/4/75.

Observations through entire section surveyed.

EXTENT OF OBSERVATION
Include Name of Surveyor, Date, Etc.
LOCATION
RELATION TO OTHER WATERS
GENERAL DESCRIPTION
Watershed
Immediate Drainage Basin
Altitude (Range)
Gradient
Width
Depth
Flow (Range)
Velocity
Bottom
Spawning Areas
Pools
Shelter
Barriers
Diversions
Temperatures
Food
Aquatic Plants
Winter Conditions
Pollution
Springs
FISHES PRESENT AND SUCCESS
OTHER VERTEBRATES
FISHING INTENSITY
OTHER RECREATIONAL USE
ACCESSIBILITY
OWNERSHIP
POSTED OR OPEN
IMPROVEMENTS
PAST STOCKING
GENERAL ESTIMATE
RECOMMENDED MANAGEMENT
SKETCH MAP
REFERENCES AND MAPS

Altitude: At mouth- 600 feet; Headwaters originate at 4720 feet.

Gradient: 20%

Width: Average of 8 feet, narrowing to 4 feet in upper reaches surveyed.

Depth: To 3 feet in pools; averaging 6- 10 inches.

Flow: Estimated at between 2- 5 cfs.

Velocity profile: From mouth to 50 feet above culverts under hiway 96 flow is rapid; Velocity becomes cascading further upstream as gradient of stream increases and depth decreases.

Bottom: Much of the stream bed is rubble, with little gravel and some sand in pools.

Spawning areas: Due to a lack of adequate spawning gravels there are few good spawning areas. Occasional gravelly pools observed below culverts, however some of these were silted and inordinately sandy.

Pools: Pool to riffle ratio of about 1:1; many pools of 2- 3 feet deep above hiway 96 culverts; large pool 3 feet deep and 6 feet long below twin culverts under 96.

Shelter: Entire section surveyed densely overgrown with local hardwoods and bushes.

Barriers: Two large U- shaped culverts under hiway 96, approximately 150 feet in length are probable barriers to anadromous salmonid migrations upstream. Gradient of culverts is long and gradual slope with a generally smooth concrete bottom. Stream survey of summer 1964 (Clark and Bugbee) reports that local residents observed steelhead just below culverts but none above them. Approximately 50 feet above culverts area of cascades and shallow water leading to a 5 foot, 50 degree gradient waterfall constitute a possible barrier to migrating fish, though in higher flows fish may be able to bypass waterfall.

Diversions: Many abandoned and inoperative rubber-tube type and steel piping diversions observed above hiway 96 crossing.

Aquatic plants: None observed.

Pollution: None observed.

Food: Caddis, Stone, and Dragon fly observed in larval stages, but not plentiful.

Fishes present: Salmonid fry observed below culverts, probably steelhead smolts, though not numerous. No fry of any type seen above culverts.

Fishing intensity: Light; though inoperative, abandoned dwellings observed near mouth of creek on south side, aptly referred to as the 'Old Man River Lodge'.

Accessibility: State route 96 crosses Stanshaw Creek 1/2 mile upstream from mouth; dirt road from 96 near crossing parallels creek to the mouth at lodge referred to above. Upper section is accessible only by foot due to dense riparian growth, however forestry road 13N12 from 96 crosses headwaters of creek.

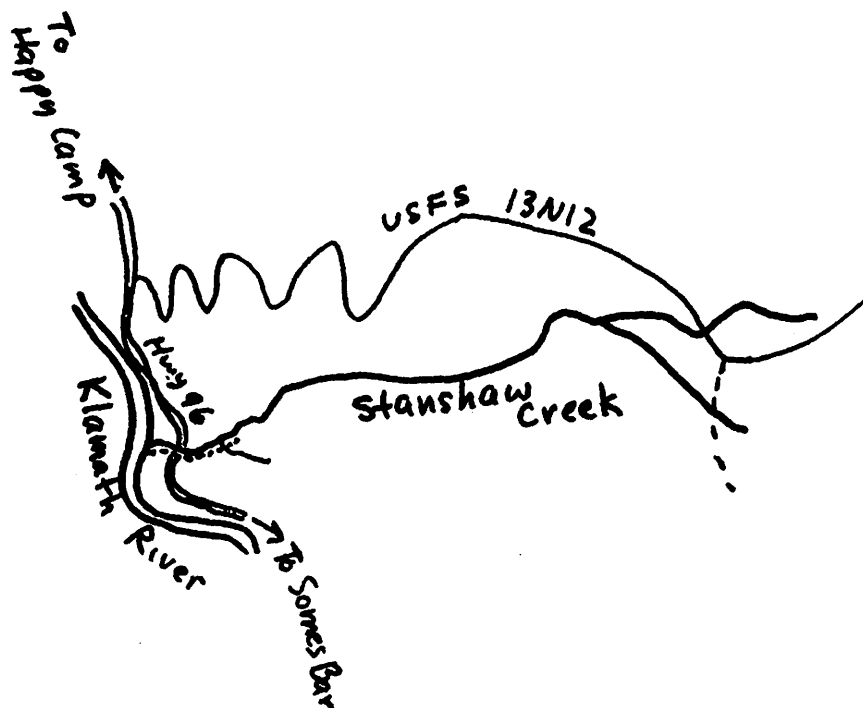
Ownership: From State Route 96 to mouth land is privately owned. ^{East} ~~West~~ of hiway is
USFS land.
Posted or open: Open.

Station Data

Station:	1.	2.
Location:	Mouth.	$\frac{1}{2}$ mile up from mouth.
Width:	8 feet.	8 feet.
Depth:	6 inches.	2 feet.
Bottom:	Rubble to gravel.	Sand, gravel, rubble.
Spawning area:	No.	No.
Flow and velocity:	Rapid, II.	Slow, II.
Stream condition:	Clear.	Clear.
Water temperature:	60F.	62F.
Air temperature:	90F.	82F.
Time:	1430.	1530.
Date:	8/4/75.	8/4/75.
Weather:	Clear.	Clear.
Altitude:	600 feet.	850 feet.

Recommended management: Possible modification of culvert bottoms (ie. baffling, etc.) could open up ~~the~~ western section of stream for anadromous salmonids. Due to good canopy over stream, upper reaches above route 96 could be managed for resident rainbow trout, though they would probably have to be introduced. Manage lower section of stream as adequate anadromous salmonid stream.

Stanshaw Creek
Siskiyou County (Orleans & Forks of
Salmon Quadrangle)



Legend

Scale: 1 inch = 1 mile
Portion surveyed - - - -

Stanshaw Creek

October 2⁴, 1969

At mouth @ 1000

51°F

1 cfs

crystal clear

Mouth easily accessible from Mammoth River for steelhead; not enough flow for king salmon. First 75 yards of stream flat and sandy-gravel bottom - good steelhead spawning area. A culvert is present under Highway 96 about 250 yards up-stream from its mouth. Steelhead can ascend stream to culvert, but cascades and almost no spawning area make stream past flat delta area unattractive to steelhead.

Culvert is about 70 yards long with flat concrete bottom - impossible for fish to pass. Stream above culvert becomes more steep and bottom changes to mostly bedrock.

R.E.D.

Asst. F.B.

Stanshaw Creek

February 2, 1968

At mouth @ 1230

H₂O temperature - 42°F

Estimated flow - 20 cfs

Water clarity - turbid

Salmon do not enter stream, save possibly for a few silver salmon. Steelhead probably ascend as far as a few hundred yards above Highway 96. Passage under Highway 96 is guaranteed by a unique split culvert, which has for its bottom the natural stream bottom and for its sides cemented rock. Actually it is probably more of a budge than a culvert.

Phil

Asst. F.B.

STANSHAW CREEK
Siskiyou County
Aug. 5, 1964

Location of Mouth: R6E, T13N
 Tributary To: Klamath River
 Stream Section: From the mouth to 3 miles upstream to the forks.
 Accessibility: State 96 crosses the stream and there is also a U.S. Forest Service road which leaves 96 between Stanshaw Creek and Sandy Bar Creek and crosses Stanshaw Creek three miles upstream at the Forks.
 Ownership: U. S. Forest Service.

DRAINAGE CHARACTERISTICS

1. Topography - The stream flows for $4\frac{1}{2}$ miles through a steep canyon and is primarily cascading water.
2. Vegetation - The canyon walls exhibited various hardwoods and firs, the stream had vegetation that was mainly berry vines and heavy brush.

STREAM CONDITIONS

1. Depth - Average depth was 6-8 inches.
2. Width - Average width was 3-4 feet.
3. Flow - the estimated flow was 2-3 c.f.s.
4. Pool-riffle ratio - cascading water.
5. Altitude - Headwaters originate at 4720 feet and the mouth is situated at 600 feet above sea level.
6. Gradient - 20%
7. Shape of Stream - The stream bottom is composed of coarse rubble and boulders.

SPAWNING CONDITIONS

1. Anadromous fish would probably be unable to utilize this stream for spawning, however, resident trout apparently do spawn in the upper reaches of the stream.

HABITAT SUITABILITY

1. The insects were scarce, but stone fly and caddis fly were present in small numbers.
2. There is good shelter throughout the stream with low hanging trees and pools.

STREAM OBSTRUCTIONS

1. Due to the steepness of the stream, the chances of anadromous fish getting beyond the culvert on Hwy. 96 are very slim. Local residents report that steelhead do make it up the road, but not beyond.
2. About $1\frac{1}{2}$ miles upstream from the road there is an extremely steep area about 200 yards in length that would have to be considered a definite barrier.

FISHINGS

1. Only three salmonids were observed during the survey. These were located

about 1 mile down from the Flume take-off (see below), fish seen were from 4-6 inches in length, and were assumed to be resident trout.

LIVESTRINGS

1. Approximately 1 mile upstream from the road, a flume takes-off from the creek. Average width - 12 inches; average depth 4 inches; its flow was estimated between 0.5 and 1 c.f.s. Its purpose - unknown.
2. Approximately 1 mile upstream, a 4 inch pipe line removes some of the stream flow.

RECOMMENDATIONS

1. Manage the stream for a resident trout population.

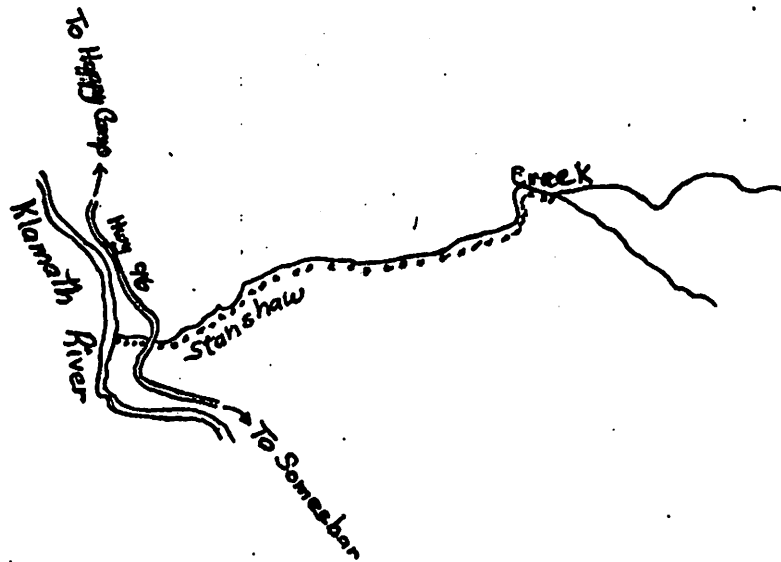
SUMMARY

1. Stanshaw Creek is approximately $4\frac{1}{2}$ miles in length with a flow of 2-3 c.f.s.
2. The stream gradient is 20% with headwaters at 4,750 feet and the mouth at 600 feet above sea level.
3. The stream is primarily cascading water with little or no spawning area for anadromous fish.
4. Three salmonids were observed during the survey.
5. Manage the stream for a resident trout population.

SURVEY CREW: Jack Clark, Steve Bugbee

SURVEY DATE: 8/5/64

Stanshaw Creek Siskiyou County (Orleans & Forks of Salmon Quadrangles)



Legend

Scale: 1 inch = 1 mile

Portion surveyed

May 25, 1961

STANSHAW CREEK

Tributary to: Klamath River

Mouth Location: T. 13 N., R. 6 E., Section 15, S. W. Quarter

DRAINAGE

Stanshaw Creek, a tributary to the Klamath River, has a drainage area of approximately 3,000 surface acres. The drainage extends in an easterly direction from its mouth for about 4 miles. Seven small tributaries empty into the drainage area.

The drainage is characterized by steep, heavily forested mountains covered primarily with fir, pine, maple, alder and poison oak.

STREAM CONDITIONS

Physical Profile: The average flow of Stanshaw Creek was estimated at 40 cfs. This estimate was made at Highway 96. The average width was about 15 foot and the average depth was 7 inches.

The pool-riffle ratio was estimated at 60:20. The entire stream is a series of pools that cascade down the stream bed. Riffles were observed in limited areas but were more common above the water diversion pipe located about 200 yards above the highway.

The bottom is predominately rubble and boulders although some gravel was observed in areas of less torrential flow.

HABITAT SUITABILITY

Shelter is abundant along Stanshaw Creek in the form of boulders, brush, pools, and logs.

Spawning area is quite limited on Stanshaw Creek especially in the lower and upper portions. The area above the water diversion pipe contains some riffle area suitable for spawning anadromous fish. Some spawning potential is located from the mouth to the highway.

Nursery area is available along the entire stream. Pools with back-eddies are quite common.

STREAM OBSTRUCTIONS

Log Jams: Six partial barriers of debris accumulations were recorded on Stanshaw Creek below the upper limits to anadromous fish. These barriers

contained about 730 cubic feet of material. None of these barriers are a total barrier and at present, removal does not seem to be pressing.

Natural Barriers: A 75 yard long series of high falls creates an impassable barrier to anadromous fish about one mile above the mouth. These falls should be considered as the upper limits to anadromous fish.

FISHES

Salmonid fry were observed in many pools along Stanshaw Creek. The fry were too small to make an identification.

A local resident of this area says he used to see steelhead running up Stanshaw Creek although not for several years.

SUMMARY

Stanshaw Creek has a drainage area of about 3,000 surface acres.

The stream has a pool-riffle ratio of about 80:20.

Drainage area is limited on the stream although some areas contain gravel suitable for anadromous fish.

Six partial barriers were located below the upper limits to anadromous fish. The upper limits to anadromous fish is about 1 mile above the mouth and consist of a high series of falls.

RECOMMENDATIONS

1. Remove partial barriers although they are not a pressing problem.
2. Manage lower portions below series of falls as an anadromous fishery.
3. Manage area above falls as a resident trout stream.

Surveyed by: Tom Sawyer and Mike Kruse

Surveyed on: May 25, 1961



FACSIMILE TRANSMISSION
CALIFORNIA DEPARTMENT OF FISH AND GAME
NORTHERN CALIFORNIA-NORTH COAST REGION (REGION 1)
1625 SOUTH MAIN STREET
YREKA, CALIFORNIA 96097



Telephone # (530) 841-2550 [] (Yreka Stream Improvement Center)
841-2552 [X] (District Fisheries Biologist)
841-2554 [] (Fisheries Biologist- Shasta River Resource Assessment)
841-2555 [] (Law Enforcement)
436-2347 [] (Stream Alteration Agreements)

If Fax is unreadable or you have question(s) regarding this FAX call telephone number of sender checked above.

FAX - (530) 841-2551

To: JANE Vorpage

Date: 10 - 01 - 01

Fax #: Redding HQ

No. of Pages: 3 (including this cover sheet)

From: DENNIS MARIA

Subject: Cole Tour (Stanshaw Creek)

Comments:

JANE -

Attached letter FYI. I am not sure how another tour is going to change ~~anything~~ ^{anything}. Also, I am not sure what Irving Creek has to do with any of this. See you on the 17th!

Dennis

RECEIVED
OCT - 1 2001
DFG-REDDING



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>



Gray Davis
Governor

SEP 20 2001

To Attached Mailing List

The Division of Water Rights (Division) received a complaint against Doug and Heidi Cole on June 18, 2001, lodged by Don Mooney, legal counsel representing the Klamath Forest Alliance (KFA). On August 20, 2001, an Answer to Complaint was received from Janet Goldsmith, legal counsel for the Coles. Based on a short telephone discussion with Mr. Mooney prior to him leaving on vacation, we do not believe that Ms. Goldsmith's response adequately resolves the complaint filed on behalf of the KFA. Therefore, unless notified to the contrary, the next step in the complaint process is to schedule a field investigation.

We propose to conduct this investigation on **Wednesday, October 17, 2001**. We would like to have all interested parties meet at the Marble Mountain Ranch at 9:00 a.m. on that date. Because the issues raised by KFA relate to the health and well being of anadromous fish, we would appreciate the participation of representatives from the National Marine Fisheries Service and the California Department of Fish and Game. We will be inspecting both Stanshaw Creek below the point of diversion and Irving Creek below the point where diverted water is released to this creek. Because the ditch heads on Forest Service property, we would also appreciate the participation of a representative from the U.S. Forest Service. If these agencies do not participate in this investigation or make other arrangements for their input, we will assume that they have no position or interest in this matter.

If this date is unworkable for any party, please let me know what alternate dates are better. However, Division staff believe that this investigation must be conducted before the onset of winter rains. Therefore, we are not willing to postpone this investigation beyond October 26th.

Please let me know if you intend to participate in the October 17th investigation, or if some other date/time during that week would be preferable. I can be reached by telephone at (916) 341-5307, or by e-mail at mcontreras@waterrights.swrcb.ca.gov.

Sincerely,

Michael Contreras

Attachment

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."

005777

SEP 20 2001

Mailing List

Kronick, Moskovitz, Tiedemann & Girard
Attention Ms. Janet Goldsmith
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-4416

Mr. Don Mooney
129 C Street, Suite 2
Davis, CA 95616

National Marine Fish Service
Santa Rosa Field Office
Attention Ms. Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Department of Fish and Game
Environmental Services
Attention Dennis Maria
Attention Ron Prestly
601 Locust Street
Redding, CA 96001

U.S. Department of Agriculture
Orleans Ranger District
Attention Bill Heitler, District Ranger
P.O. Drawer 410
Orleans, CA 95556-0410


California Environmental Protection Agency

*"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption.
For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."*

Memorandum

Date: October 15, 2009

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

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

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

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

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

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

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

Ms. Katherine Mrowka, Chief
October 15, 2009
Page Two

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

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

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

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

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

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

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

Ms. Katherine Mrowka, Chief
October 15, 2009
Page Three

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

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

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

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

Ms. Katherine Mrowka, Chief
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Page Four

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

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Northern Region
Department of Fish and Game
601 Locust Street
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State of California

M e m o r a n d u m

To: Mr. Edward C. Anton, Chief
 Division of Water Rights
 State Water Resources Control Board
 Post Office Box 2000
 Sacramento, California 95812-2000

Date: November 20, 2001

From: Donald B. Koch, Regional Manager
 Northern California-North Coast Region
 Department of Fish and Game
 601 Locust Street, Redding, California 96001

Subject: Complaint Investigation Relating to Application 29449 Doug Cole – Stanshaw Creek,
 Tributary to Klamath River, Siskiyou County

The Department of Fish and Game has reviewed the subject application and attended two site visits with State Water Resources Control Board (Board) staff. The first field investigation was conducted by the Board's application and environmental section on July 26, 2000, and the latest complaint inspection was held on October 17, 2001. On March 17, 2000, we submitted a protest on the application which was accepted by the Board on April 4, 2000. Our protest is based on adverse environmental impacts which could result from reduced flows in Stanshaw Creek. Both the complaint and application refer to an existing unpermitted diversion of water from Stanshaw Creek.

At the time our protest of this application was filed in March 2000, our primary concern was protection of anadromous fish habitat in about a 0.25 mile reach of Stanshaw Creek from the Highway 96 crossing to the stream's confluence with the Klamath River. On April 27, 2001, the California Fish and Game Commission (Commission) accepted a petition to list coho salmon north of San Francisco Bay as an endangered species. Consequently, coho salmon are now considered as a candidate species pursuant to the California Endangered Species Act (CESA). On April 26, 2001, emergency regulations adopted by the Commission pursuant to Fish and Game Code Section 2084 went into effect. These regulations remain in effect during the 12-month candidacy period and authorize the incidental take of coho salmon resulting from diversion of water. The Commission will likely make its final listing decision in early June 2002 and if they decide to list the species, the current Section 2084 incidental-take authorization for water diversions will terminate. After listing, take of coho salmon will be prohibited unless authorized under Fish and Game Code Section 2081(b) or 2080.1. We urge the Board to consider the implications of their actions regarding subject complaint and final decision on water rights application #29449 in light of Fish and Game Code Section 2053 and the potential listing of coho salmon next year.

During the complaint inspection, we were told that the merits of the complaint would be reviewed within 30 days and, therefore, we are submitting these comments and recommendations for the Board's consideration. Formal protest dismissal terms will be submitted to the application unit at a future date.

SURNAME

FG-455 (REV. 1/92)

Vorpayel

Vorpayel
for TurekStacey
Stacey for Koch

005783

11/20/01

Filed
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mailed
11/21/01
SC

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November 20, 2001
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Federally Listed coho salmon (*Onchorhynchus kisutch*) are known to exist in Stanshaw Creek. Coho salmon were listed as threatened under the Federal Endangered Species Act effective June 5, 1997, and as a candidate under the California Endangered Species Act on April 27, 2001. On two recent occasions, the Department has collected field information within Stanshaw Creek below the subject diversion in the area near its confluence with the Klamath River. On May 25, 2000, we collected 8 young of the year and 18 yearling steelhead trout in this area of Stanshaw Creek. On July 26, 2000, we sampled and found one juvenile coho salmon in Stanshaw Creek below the culverts which run under Highway 96. We believe the Highway 96 culverts are currently a barrier to upstream migration of fish and have, therefore, focused our concerns and mitigation measures on the 0.25 mile stream reach downstream of these culverts. This stream reach is characterized by deep pools, large woody debris, dense overhanging riparian cover shading the stream and generally cool water temperatures and thus provides good rearing and refuge habitat for juvenile coho salmon and steelhead trout. Coldwater habitats such as those provided by Stanshaw Creek are important refuges for juvenile coho salmon which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical cold water refuge habitats for coho salmon and steelhead in lower Stanshaw Creek need to be accessible to the fish so sufficient water needs to stay in the stream to maintain connectivity to the Klamath River all year.

The Department currently proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

It is our understanding from discussions with Board staff that water is currently diverted from Stanshaw Creek even when there is not enough flow to run the hydroelectric generators. We believe this procedure results in water being wasted and not being put to beneficial use. This procedure typically occurs during critically dry periods when natural flows are needed to maintain salmonid access from the Klamath River to cooler water, rearing and refuge habitat found in Stanshaw Creek. If the stream flow in Stanshaw Creek is less than the amount needed to run the hydroelectric plant (3 cfs), then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed to maintain the downstream fishery resources.

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During both inspections, various options were discussed which could help satisfy the required downstream flow conditions. We believe two options have merit for the Board and the owner to consider. One option would be returning diverted flows back to Stanshaw Creek after the water is used to generate electricity. Currently, tailwater is discharged to the adjacent drainage of Irvine Creek. Second, improvements to the open ditch system and/or updating the hydroelectric generation system may also allow the applicant to divert less water while still meeting the needs for domestic purposes and electric generation.

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

cc: Mr. James R. Bybee
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 Somes Bar, California 95568

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bc: G. Stacey D. Maria R. Prestey NANCY
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State Water Resources Control Board

WR-193



Winston H. Hickox
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Division of Water Rights
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Gray Davis
Governor


Memorandum to File

To: File Number 262.0 (47-40-01)

Date: MAY 23 2002

From:


Charles A. Rich, Chief
Complaint Unit


Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 – 200 feet above the terminal

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommend that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for power purposes in her letter of August 20, 2001, Complaint Unit staff are not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believe that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The SWRCB has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Another weighed factor is the extent of injury caused by the water diversion. If an investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide not to take enforcement action. The SWRCB may also consider the degree of hardship enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phylis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. Pre-1914 appropriative claim of right for domestic / irrigation use. This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. Application A029449 – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. Small Domestic Registration D030945R – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "*innocent until proven guilty*" concept of the law.

- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: *"The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage."* While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of ±50%.

problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of $\frac{1}{2}$ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 – 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of $\frac{1}{2}$ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

CONCLUSIONS

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their 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).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Cole's ditch is **not** allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) if full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.

State of California

Memorandum

To: Mr. Edward C. Anton, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-2000

Date: November 20, 2001

From: Donald B. Koch, Regional Manager
Northern California-North Coast Region
Department of Fish and Game
601 Locust Street, Redding, California 96001

Subject: Complaint Investigation Relating to Application 29449 Doug Cole – Stanshaw Creek,
Tributary to Klamath River, Siskiyou County

The Department of Fish and Game has reviewed the subject application and attended two site visits with State Water Resources Control Board (Board) staff. The first field investigation was conducted by the Board's application and environmental section on July 26, 2000, and the latest complaint inspection was held on October 17, 2001. On March 17, 2000, we submitted a protest on the application which was accepted by the Board on April 4, 2000. Our protest is based on adverse environmental impacts which could result from reduced flows in Stanshaw Creek. Both the complaint and application refer to an existing unpermitted diversion of water from Stanshaw Creek.

At the time our protest of this application was filed in March 2000, our primary concern was protection of anadromous fish habitat in about a 0.25 mile reach of Stanshaw Creek from the Highway 96 crossing to the stream's confluence with the Klamath River. On April 27, 2001, the California Fish and Game Commission (Commission) accepted a petition to list coho salmon north of San Francisco Bay as an endangered species. Consequently, coho salmon are now considered as a candidate species pursuant to the California Endangered Species Act (CESA). On April 26, 2001, emergency regulations adopted by the Commission pursuant to Fish and Game Code Section 2084 went into effect. These regulations remain in effect during the 12-month candidacy period and authorize the incidental take of coho salmon resulting from diversion of water. The Commission will likely make its final listing decision in early June 2002 and if they decide to list the species, the current Section 2084 incidental-take authorization for water diversions will terminate. After listing, take of coho salmon will be prohibited unless authorized under Fish and Game Code Section 2081(b) or 2080.1. We urge the Board to consider the implications of their actions regarding subject complaint and final decision on water rights application #29449 in light of Fish and Game Code Section 2053 and the potential listing of coho salmon next year.

During the complaint inspection, we were told that the merits of the complaint would be reviewed within 30 days and, therefore, we are submitting these comments and recommendations for the Board's consideration. Formal protest dismissal terms will be

submitted to the application unit at a future date
Mr. Edward C. Anton
November 20, 2001
Page Two

Federally Listed coho salmon (*Onchorhynchus kisutch*) are known to exist in Stanshaw Creek. Coho salmon were listed as threatened under the Federal Endangered Species Act effective June 5, 1997, and as a candidate under the California Endangered Species Act on April 27, 2001. On two recent occasions, the Department has collected field information within Stanshaw Creek below the subject diversion in the area near its confluence with the Klamath River. On May 25, 2000, we collected 8 young of the year and 18 yearling steelhead trout in this area of Stanshaw Creek. On July 26, 2000, we sampled and found one juvenile coho salmon in Stanshaw Creek below the culverts which run under Highway 96. We believe the Highway 96 culverts are currently a barrier to upstream migration of fish and have, therefore, focused our concerns and mitigation measures on the 0.25 mile stream reach downstream of these culverts. This stream reach is characterized by deep pools, large woody debris, dense overhanging riparian cover shading the stream and generally cool water temperatures and thus provides good rearing and refuge habitat for juvenile coho salmon and steelhead trout. Coldwater habitats such as those provided by Stanshaw Creek are important refuges for juvenile coho salmon which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical cold water refuge habitats for coho salmon and steelhead in lower Stanshaw Creek need to be accessible to the fish so sufficient water needs to stay in the stream to maintain connectivity to the Klamath River all year.

The Department currently proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

It is our understanding from discussions with Board staff that water is currently diverted from Stanshaw Creek even when there is not enough flow to run the hydroelectric generators. We believe this procedure results in water being wasted and not being put to beneficial use. This procedure typically occurs during critically dry periods when natural flows are needed to

maintain salmonid access from the Klamath River to cooler water, rearing and refuge habitat found in Stanshaw Creek. If the stream flow in Stanshaw Creek is less than the amount needed to run the hydroelectric plant (3 cfs), then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed to maintain the downstream fishery resources.

Mr. Edward C. Anton

November 20, 2001

Page Three

During both inspections, various options were discussed which could help satisfy the required downstream flow conditions. We believe two options have merit for the Board and the owner to consider. One option would be returning diverted flows back to Stanshaw Creek after the water is used to generate electricity. Currently, tailwater is discharged to the adjacent drainage of Irvine Creek. Second, improvements to the open ditch system and/or updating the hydroelectric generation system may also allow the applicant to divert less water while still meeting the needs for domestic purposes and electric generation.

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

cc: Mr. James R. Bybee
National Marine Fishery Service
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

Mr. Doug Cole, et al.
92520 Highway 96
Somes Bar, California 95568

Ms. Jane Vorpapel
Department of Fish and Game
601 Locust Street
Redding, California 96001

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State of California

Memorandum

To: Mr. Edward C. Anton, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-2000

Date: November 20, 2001

From:  Donald B. Koch, Regional Manager
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November 20, 2001
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cc: Mr. James R. Bybee
National Marine Fishery Service
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

Mr. Doug Cole, et al.
92520 Highway 96
Somes Bar, California 95568

Ms. Jane Vorpapel
Department of Fish and Game
601 Locust Street
Redding, California 96001



WR-193

EDMUND G. BROWN JR.
GOVERNORMATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

JAN 07 2013

In Reply Refer to:
MJM:29449**CERTIFIED MAIL**

Marble Mountain Ranch
c/o Ms. Barbara Brenner
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814

Dear Ms. Brenner:

ORDER CANCELING APPLICATION 29449, STANSHAW CREEK IN SISKIYOU COUNTY

The Division of Water Rights is canceling Application 29449, due to failure to submit information requested by the Division. An order canceling the application is enclosed.

The order can also be viewed at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/compliance/revisions/

If you disagree with the enclosed order, you may file a petition for reconsideration with the State Water Resources Control Board (State Water Board) to set aside the cancellation and reinstate the application in accordance with California Code of Regulations, title 23, sections 768 and 769. Section 768 requires that the petition be submitted within 30 days of the date of the order, and be based on one or more of the causes listed in that section. The petition must contain the information required by section 769.

It is your responsibility to remove or modify diversion works or impoundments to ensure that water subject to this cancellation is not diverted and used. Unauthorized diversion and use of water is considered a trespass and subject to enforcement action under Water Code sections 1052 and 1831. Pursuant to Water Code section 1052, any diversion of water from the point of diversion identified in this application may be subject to Administrative Civil Liability of up to \$500 per day without further notice. The State Water Board also may issue a Cease and Desist Order in response to an unauthorized diversion or threatened unauthorized diversion pursuant to Water Code section 1831.

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

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Marble Mountain Ranch
c/o Ms. Barbara Brenner

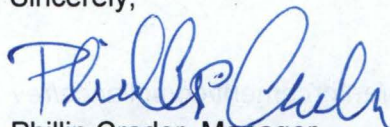
- 2 -

Before initiating any work in a stream channel, you should consult with the Department of Fish and Game and the Regional Water Quality Control Board to ensure that removal of project facilities does not adversely affect a fishery or result in unregulated sediment discharge to a waterway. You must also consult the Department of Water Resources, Division of Safety of Dams if a jurisdictional size dam will be removed or breached (dam height 25 feet or more, or reservoir volume 50 acre-feet or more). These agencies may require a permit or other approval prior to any construction activity.

Some diverters claim rights to divert independent of a permit, license, registration or certification issued by the State Water Board, such as diversions under riparian or pre-1914 rights. With limited exceptions, Water Code section 5101 requires that a Statement of Water Diversion and Use be filed for these diversions. Water Code section 5107 (c)(1) provides that the State Water Board may impose a civil liability of \$1,000, plus \$500 per day for each additional day on which the violation continues if the person fails to file a statement within 30 days after the board has called the violation to the attention of that person. These penalties are in addition to any penalties that may be imposed if the diverter does not hold a valid right or diverts in excess of what is authorized under that right. This letter serves as your notice of the statement requirement and potential penalty.

If you require further assistance, please contact Matt McCarthy at (916) 341-5310 or mmccarthy@waterboards.ca.gov. Written correspondence or inquiries should be addressed as follows: State Water Resources Control Board, Division of Water Rights, Attn: Matt McCarthy, P.O. Box 2000, Sacramento, CA, 95812-2000.

Sincerely,



Phillip Crader, Manager
Permitting and Licensing Section
Division of Water Rights

Enclosure

cc (certified w/enclosure): Douglas Cole, et al.
92520 Highway 96
Somes Bar, CA 95568

cc (w/o enclosure): T. James Fisher, et al.
100 Tomorrow Rd
Somes Bar, CA 95568

Konrad Fisher
100 Tomorrow Rd
Somes Bar, CA 95568

California Sportfishing Protection Alliance
1608 Francisco Street
Berkeley, CA 94703

Klamath National Forest
Ukonom Ranger District
c/o Mr. Jon Grunbaum
P.O. Drawer 410
Orleans, CA 95556

ec (w/o enclosure): State Water Resources Control Board
Taro Murano
tmurano@waterboards.ca.gov

Regional Water Quality Control Board
Bryan McFadin
bmcfadin@waterboards.ca.gov

Department of Fish and Game
Jane Vorpapel
jvorpapel@dfg.ca.gov

National Marine Fisheries Service
Margaret Tauzer
margaret.tauzer@noaa.gov

State Water Resources Control Board

NOV 02 2012

In Reply Refer to:
MJM:A029449

Marble Mountain Ranch
c/o Ms. Barbara Brenner
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814

Dear Ms. Brenner:

**APPLICATION 29449 OF DOUGLAS COLE, ET AL., STANSHAW CREEK TRIBUTARY TO
KLAMATH RIVER IN SISKIYOU COUNTY**

By letter dated March 30, 2012, State Water Resources Control Board (State Water Board), Division of Water Rights (Division) staff requested that Douglas Cole (Applicant) provide a plan within sixty days to supply information necessary to document compliance with Water Code section 1275, subdivision (b). This information is necessary in order to continue processing Application 29449.

By letter dated May 29, 2012, you requested additional time to gather information about the Applicant's claim of pre-1914 right. Division staff granted your request. In your letter, however, you indicated that it had become apparent that the Applicant holds a valid pre-1914 water right that would negate the need for Application 29449.

By letter dated October 1, 2012, you provided information regarding the Applicant's claim of pre-1914 right. In the letter, you state that the State Water Board has no authority to adjudicate a pre-1914 right and thus has no jurisdiction over the Applicant's pre-1914 claim of right.

Pre-1914 Claim and Statement Requirements

The Applicant filed Statement of Water Diversion and Use (Statement) No. 15022 with the Division on December 1, 1998. According to Division files, no Supplemental Statements have been filed pursuant to Water Code section 5104, subdivision (a). Consequently, Statement No. 15022 is inactive in the Division's records. In your October 1, 2012 letter, you indicate that the Applicant has made continuous use of water pursuant to their pre-1914 claim of right.

With limited exceptions, Water Code section 5101 requires that a Statement be filed for a diversion not covered by a permit or license. After an Initial Statement is filed, Water Code section 5104 requires Supplemental Statements to be filed at three-year intervals. Water Code section 5107, subdivision (c)(1) provides that the State Water Board may impose a civil liability of \$1,000, plus \$500 per day for each additional day on which the violation continues if the person fails to file a

NOV 02 2012

Statement within 30 days after the State Water Board has called the violation to the attention of that person. These penalties are in addition to any penalties that may be imposed if the diverter does not hold a valid right or diverts in excess of what is authorized under that right. This letter serves as your notice of the Statement requirement and potential penalty. You should immediately file a new Statement, or contact Mr. Bob Rinker to see if Statement No. 15022 can be reactivated so you can file online Supplemental Statements. Mr. Rinker can be reached at (916)-322-3143 or by email at rrinker@waterboards.ca.gov.

Request for Information

In the Division's March 30, 2012 letter, the Division threatened cancellation of Application 29449, pursuant to Water Code section 1276, if the requested information was not received within the time period specified. To date, the Division has not received the requested information. If the Division does not receive the requested information within 30 days of the date of this letter, Application 29449 will be cancelled.

Matt McCarthy is the staff person presently assigned to this matter, and he may be contacted at (916) 341-5310 or mmccarthy@waterboards.ca.gov. Written correspondence or inquiries should be addressed as follows: State Water Resources Control Board; Division of Water Rights; Attn: Matt McCarthy; P.O. Box 2000; Sacramento, CA 95812-2000.

Sincerely,



Phillip Crader, Manager
Permitting and Licensing Section
Division of Water Rights

- cc: Marble Mountain Ranch
c/o Douglas Cole
92529 Highway 96
Somes Bar, CA 95568
- ec: State Water Resources Control Board
Matthew McCarthy
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Marble Mountain Ranch
c/o Ms. Barbara Brenner

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WR-193

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ec: Department of Fish and Game
Jane Vorpagel
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National Marine Fisheries Service
Margaret Tauzer
margaret.tauzer@noaa.gov

005811

Stanshaw Creek has a short but significant section of coho habitat below the Highway 96 crossing. A lateral scour pool is formed just upstream of the Stanshaw Creek mouth when Klamath flood flows are deflected by evulsed alluvium and streamflow from Stanshaw Creek. This pool is subsequently filled by cold Stanshaw Creek water when flooding subsides, creating a high quality summer and winter rearing habitat for non-natal juvenile coho salmon migrating down the Klamath River corridor. Coho ecology studies by the Karuk Tribe at this site, and in Stanshaw Creek upstream to the Highway 96 culvert barrier, over the past 10 years indicate that once coho young of the year (yoy), or 0+ fry, enter this habitat, they are likely to overwinter there until outmigration early the next spring. Growth rates for coho overwintering in this pool are high, likely leading to increased survival and numbers of returning spawners.

In 1867, Civil War veteran Samuel Stanshaw recorded at the County Records office that he had “taken hold for mining and for purpose of irrigation 600 [miner’s] inches of the water running in Stanshaw Creek”. This equates to approximately 15cfs, however over time use and ditch capacity has been reduced to a maximum diversion amount of 3 cfs. Use for mining has changed to primarily hydropower generation for the ranch business, which has no access to grid power. Currently, there is an interbasin transfer via a ditch carrying 2.5 to 3.0 cfs from Stanshaw Creek south to Irving Creek. This diversion is listed in the DFG Coho Recovery Plan for the state as a high priority for restoration.

An application by previous owners of MMR, and subsequently by the Cole’s to the State Water Resources Control Board (SWRCB) (Application #29449) for 3 cfs of Stanshaw Creek water for hydropower generation has been neither rejected or validated by SWRCB for over 15 years. Complaints filed over this application and attempts to resolve these complaints have been hindered by a lack of information on outcomes of proposed improvements. Since 2002, landowners, agency, and tribal personnel have been working together to find solutions that provide for coho habitat needs without unduly impacting the MMR. All stakeholders concur that the interbasin transfer to Irving Creek must be remedied, either by returning water to Stanshaw Creek above the Highway 96 culvert, or directly to the Klamath River. Other options, such as physical modification of the intake, ditch, tailwater return, the hydropower system and consumptive uses of water and power, could likely reduce required diversion amounts and other potential impacts from the current system. This proposal addresses all of these options by attaining specialists reports to objectively describe alternatives and quantify various modifications and system improvements. This project accomplishes the task of improving instream flows by providing necessary specialist information to inform stakeholders about the real consequences of various modifications to the MMR water system. The focus will be on improving hydropower efficiency, redesigning tail water returns to avoid an inter-basin transfer, reducing overall power consumption, and improvements to water conveyance that will reduce ditch loss, excessive maintenance and monitoring.

Lack of resolution and action regarding the MMR diversion from Stanshaw Creek has impacted both rearing coho salmon in lower Stanshaw Creek for over a decade, and relationships between many stakeholder groups and individuals. Doug and Heidi Cole, owners of MMR, have lived with the uncertainty of not knowing if someone would come to shut off or curtail their water system for over a decade. Downstream landowners with riparian rights have been faced with the choice of diverting the remaining flow from Stanshaw Creek for domestic and irrigation uses, or not using this water so it could maintain the refugia at the mouth of Stanshaw. This project aims to address landowner and threatened coho salmon habitat needs by collecting specialist information that will allow stakeholders to agree to a solution without litigation.

The expected short term benefits of this project are that stakeholders will be able to reach consensus on physical solutions that address the current impacts to coho salmon rearing in Stanshaw Creek without lengthy and costly litigation. Long term measurable outcomes will be reduced sedimentation in Stanshaw Creek due to ditch overtopping and scour during flood events, increased flow in Stanshaw Creek, continuous connectivity between Stanshaw Creek and the Klamath River, reduced sedimentation in Irving Creek where the MMR water system tailwater ends up, decreased water temperatures in Stanshaw Creek and Irving Creek, and no illegal interbasin transfer of water from the Stanshaw drainage to the Irving Creek drainage.

State Water Resources Control Board

WR-193



Gray Davis
Governor

Division of Water Rights

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Hickox

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Memorandum to File

To: File Number 262.0 (47-40-01)

Date:

From:

Charles A. Rich
Charles A. Rich, Chief
Complaint Unit

Michael Contreras
Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a field

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measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed. 005815

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 – 200 feet above the terminal

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommend that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for power purposes in her letter of August 20, 2001, Complaint Unit staff are not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believe that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The SWRCB has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Another weighed factor is the extent of injury caused by the water diversion. If an investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide not to take enforcement action. The SWRCB may also consider the degree of hardship enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below. 005818

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phylis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. Pre-1914 appropriative claim of right for domestic / irrigation use. This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. Application A029449 – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. Small Domestic Registration D030945R – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "innocent until proven guilty" concept of the law. 005820

- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: *"The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage."* While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of ±50%.

problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of $\frac{1}{2}$ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 – 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of $\frac{1}{2}$ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

CONCLUSIONS

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their 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).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Cole's ditch is not allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) if full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.

3. That the complaint filed by KFA against the Coles be closed.

4. That the parties give serious consideration to a physical solution similar to that discussed above.



State Water Resources Control Board

John P. Caffrey, Chairman

L. B. Brown
J. Brown
W. Brown

Division of Water Rights
801 P Street • Sacramento, California 95814 • (916) 637-6700 FAX (916) 637-1400
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
Internet Address: http://www.swrn.ca.gov

John W. Bess
Chairman

J. W. Bess

WR-193

SEPTEMBER 15 1998

RECEIVED

JUN 26 2000

In Reply Refer
to: 332:CM:29449, 29450

Doug Cole, Heidi Cole,
Norman D. Cole, Caroline Cole
c/o Mr. Doug Cole
92520 Highway 96
Sonoma Bar, CA 95568

National Marine Fish
Wildlife
Agency

OPTIONAL FORM NO. 7-65

FAX TRANSMITTAL

1 of 3 pages = 3

TO: <i>David Fisher</i>	FROM: <i>M. Turner</i>
DATE: <i>530 244 0923</i>	TIME: <i>825 5174</i>
TO: <i>530 244 0923</i>	TIME: <i>825 4840</i>

NO. 704-01-271-0000

0000-101

GENERAL SERVICES ADMINISTRATION

Dear Mr. Cole:

UNAUTHORIZED DIVERSION--STANSHAW CREEK IN SISKIYOU COUNTY

I understand that you have been involved in an ongoing discussion with the Division of Water Rights (Division) regarding your diversion and use of water from Stanshaw Creek in Siskiyou county. It is my understanding that you have on file with the Division, two pending applications to appropriate water, numbered 29449 and 29450. These applications were filed by the previous owner of your property in Sonoma Bar, California to authorize his diversions from Stanshaw Creek for use upon the parcel which you now own. You claim pre-1914 appropriate rights as a basis for your ongoing and, apparently increasing diversions for domestic use and hydroelectric power production and you have expressed a desire to withdraw your pending applications.

To date, the Division has been unwilling to cancel your pending applications because you do not appear to have a valid pre-1914 claim for the water you are currently diverting. The Division has supplied you and your attorney with evidence to show that the upper limit of your claim of pre-1914 appropriate rights is 0.49 cubic feet per second (cfs), continuous flow and may appropriately be only 0.11 cfs. This assertion is based upon information contained within the May, 1965 bulletin by the Department of Water Resources entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6). This publication lists the property, which you now own and states that the total amount of water diverted for irrigation, domestic, stock watering, and power production totaled 362 acre-feet, annually. This total usage equates to a continuous flow rate of approximately 1/4 cfs. This information was verified by Mr. Marvin Goss, Forest Service Hydrologist, who lived on your property while it was under prior ownership. Mr. Goss evaluated the flow capacity of the ditch as well as measuring the actual amount of water put to use generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel.

Please understand that the nature of any appropriative right is such that it is limited to the amount of water put to continuous, reasonable and beneficial use regardless of the original "face value" of the appropriation. Your predecessor in interest, Mr. Young, submitted a copy of a water appropriation notice by Samuel Stanshaw dating well into pre-1914 times, claiming

Same to Division 9/21/98

RECEIVED
JUN 21 1998

OFFICE OF THE REGIONAL

JUN-26-2000 09:39

DFW R1 REDDING

Mr. Doug Cole

-2-

SEPTEMBER 15 1998

600 miner's inches (15 cfs) of water from Stanshaw Creek for mining purposes. You claim to be successor in interest to Mr. Stanshaw's water rights. Although you have submitted no information to suggest that those rights ever pertained to your parcel of land, the Division is willing to accept, given that you are the current operator of an obviously old ditch on Stanshaw Creek, that you are the successor in interest to Mr. Stanshaw's water rights. However, you are not entitled to the entire 15 cfs appropriation described in Mr. Stanshaw's original notice, due to the documented failure of the previous landowners to apply that amount of water to beneficial use; additionally, your ditch is not capable of carrying that much water and expansion of the ditch does not allow you to reclaim water previously lost by nonuse. All appropriative water rights are limited as to both amount and season to the amounts actually used, which has been documented, in your case, as a maximum of 0.49 cfs for power generation and domestic purposes.

On September 23, 1997 an engineer from this office visited your site and observed that you were diverting water from Stanshaw Creek to supply your hydroelectric power plant. No measurements were taken at that time, but it was the opinion of the engineer that your diversions were well in excess of 0.49 cfs. Based upon the observations made during this visit, Division staff has attempted to help you understand the limitations of your claimed right and the need for the two pending applications. This subject has been discussed in considerable detail with your attorney. You continue to maintain that your current diversions are authorized by your "pre-1914 rights". 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 0.11 cfs. On June 3, 1998 an engineer from this Division measured the flow rate in your ditch (located upon public lands) and determined that you were diverting 2.4 cfs from Stanshaw Creek to operate your hydroelectric power plant.

The Division has received a report from the Department of Fish and Game that you have recently constructed a reservoir upon your property. It is difficult to envision how such a reservoir, constructed in 1998, could be authorized by a pre-1914 appropriative right. Although a pre-1914 right may be changed as to purpose of use, place of use, or point of diversion without the approval of this Division, such a change cannot serve to increase the amount of the right. The construction of a new reservoir is generally considered to be an increase in a water right and usually requires the filing of a new application to appropriate water.

At this time, the Division is willing to cancel application 29450, filed for 0.11 cfs for domestic and irrigation use, as soon as you complete and submit the enclosed Request for Cancellation form and the Statement of Water Diversion and Use form. It would appear that the diversion of this water is authorized under your pre-1914 claim of right. There is no information in our files to indicate that any diversion in excess of 0.11 cfs is authorized under your pre-1914 claim. Consequently, I recommend that you work with my staff to process application 29449. In the event you do not wish to process application 29449, please submit evidence to substantiate your alleged pre-1914 claim of right including a discussion of the recently constructed reservoir (capacity, amount and season of use, basis of right). Such evidence should clearly show the extent water was continuously used from the time of the appropriation to the present. Our files indicate that the hydroelectric plant was installed in the 1940's, so you may wish to substantiate the use of this water between 1914 and 1950. Any claim in excess of 0.49 cfs should be accompanied by substantial evidence to refute the Department of Water Resources' Bulletin 94-6 as well as the testimony of Mr. Goss.

Mr. Doug Cole

-3-

SEPTEMBER 15 1998

If the Division fails to receive the following within 45 days of the date of this letter, this matter will be referred to our Complaints Unit to consider appropriate enforcement action which may include the imposition of Administrative Civil Liabilities (fines) of up to \$500 per day for continued unauthorized use of water:

1. Description and location of your reservoir, use thereof, and basis of right to store water. If a basis cannot be documented, submit the enclosed application forms, properly completed along with the required fees.
2. Statement indicating whether you wish to continue processing application 29449; if not, substantial evidence which shows that your diversion of water has been continuously maintained in time and amount since December 19, 1914;
3. Completed Request for Cancellation form relating to application 29450 as well as a completed Statement of Water Diversion and Use for your domestic and irrigation use of water. *Please note that, in accordance with Section 5105 of the Water Code, the Division is authorized to investigate and determine the facts relating to your diversion, at your expense, if you do not submit a properly completed Statement of Water Diversion and Use within 60 days.*

If you have any further questions, Chris Murray, the engineer assigned to this case, can be reached at (916) 657-2167.

Sincerely,

ORIGINAL SIGNED BY:

Harry M. Schueller, Chief
Division of Water Rights

Enclosures

CERTIFIED

cc: Nancy Smith, Esq.
1041 East Green Street, Suite 203
Pasadena, CA 91106-2417

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

TOTAL P.03

005830

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – Docs from D. Cole

- email re diversion rights in stanshaw 10-04-12
- letter re m mccarthy diversion rights in stanshaw 10-01-12
- email re call w bob rinker for marble mountain 11-09-12

per CDFG request for fish flows. You use all of the water diverted for hydropower and divert XXXamount to MR193 for farming, livestock and domestic use. Do you store any water at the Ranch?
Please clarify and fill out the blank Statement of Use and send it back to me. I want to go over it before it is finalized and sent back to the State Water Board.

Thanks-

Barbara A. Brenner

STOEL RIVES LLP

babrenner@stoel.com | www.stoel.com

New! [California Environmental Law Blog](#)

From: Ebrahimzadeh, Parissa

Sent: Friday, November 09, 2012 12:54 PM

To: Brenner, Barbara A.

Subject: Re: Call with Bob Rinker for Marble Mountain Ranch

Hi Barb,

I just spoke with Bob Rinker from the Water Board. He stated that to inactivate the Statement Nu. 015022 (attached), he would like new information via the Initial Statement of Water Diversion and Use (form attached) and a USGS map that indicates the point of diversion and the place of use.

He stated that the pre-1914 rights will be in place when either 015022 is reactivated or a new Statement is filed.

Parissa

Parissa Ebrahimzadeh

STOEL RIVES LLP | 500 Capitol Mall, Suite 1600 | Sacramento, CA 95814

Direct: (916) 319-4644 | Mobile: (916) 402-8121 | Fax: (916) 447-4781

pebrahimzadeh@stoel.com | www.stoel.com

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Please consider the environment before printing this email.

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42949-1c

Ross, Tammy

From: Brenner, Barbara A.
Sent: Thursday, October 04, 2012 4:38 PM
To: McCarthy, Matthew@Waterboards
Cc: Douglas Cole; Ross, Tammy
Subject: RE: A029449/Diversion Rights in Stanshaw Creek Siskiyou County

Matt-

We are seeking recognition from the Board of the Cole’s right to divert under its pre-1914 claim. In the past there has been some suggestion by Board staff that the pre-1914 right has been diminished. As indicted in my correspondence, there is no evidence to support this suggestion. Consequently, we would like confirmation that Board staff agrees the Cole’s have an existing pre-1914 right of up to 4 cfs to avoid any future confusion.

Thanks-
Barbara A. Brenner
STOEL RIVES LLP
babrenner@stoel.com | www.stoel.com

New! [California Environmental Law Blog](#)

From: McCarthy, Matthew@Waterboards [<mailto:Matthew.McCarthy@waterboards.ca.gov>]
Sent: Tuesday, October 02, 2012 11:53 AM
To: Brenner, Barbara A.
Subject: FW: A029449/Diversion Rights in Stanshaw Creek Siskiyou County

Ms. Brenner,

Thank you for your letter.

After review of the letter, it appears that your client believes he can divert under a claim of pre-1914 right and no longer needs the application. If so, please submit a request for cancellation of Application 29449, available here:
http://www.waterboards.ca.gov/waterrights/publications_forms/forms/docs/can_request.pdf

Please let me know if you have any questions.

Sincerely,
Matt McCarthy
Division of Water Rights
916-341-5310

From: Ross, Tammy [<mailto:TLRoss@stoel.com>] **On Behalf Of** Brenner, Barbara A.
Sent: Monday, October 01, 2012 2:05 PM
To: McCarthy, Matthew@Waterboards
Cc: Crader, Phillip@Waterboards; Douglas Cole (guestranch@marblemountainranch.com); Brenner, Barbara A.
Subject: A029449/Diversion Rights in Stanshaw Creek Siskiyou County

Please see my attached letter.

Barbara A. Brenner | Attorney
STOEL RIVES LLP | 500 Capitol Mall, Suite 1600 | Sacramento, CA 95814

New! [California Environmental Law Blog](#)

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October 1, 2012

BARBARA A. BRENNER
Direct (916) 319-4676
babrenner@stoel.com

VIA E-MAIL AND FIRST-CLASS MAIL

Matt McCarthy
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

**Re: MMcCarthy: A029449/ Diversion Rights in Stanshaw Creek in Siskiyou County:
63:MC:262.0(47-40-01);A029449**

Mr. McCarthy:

Marble Mountain Ranch (the "Ranch"), located in Skiskiyou County, is owned and operated by Douglas and Heidi Cole (the "Coles"). The Coles have diverted water from Stanshaw Creek since purchasing the property in 1994 and continue to use the water to support the Ranch. Previously, the Coles have informed staff for the State Water Resources Control Board ("Board") that the right to divert the water is based on their pre-1914 appropriative rights. Accordingly, the Coles are already entitled to divert water from Stanshaw Creek for irrigation and domestic use and hydroelectric production.

Board staff contends that the Coles do not have a valid pre-1914 claim to the water rights because there is insufficient evidence that the diversion of water has been continuously maintained as to the amount diverted since December 19, 1914. (Letter from Board, September 15, 1998.) However, there is no basis for this assertion and the Coles have enclosed evidence of continuous diversion and use of water from Stanshaw Creek since the 1860's.

Moreover, under California Water Code section 1202, the Board has no jurisdiction over Marble Mountain's pre-1914 water rights. Numerous Board water right decisions and orders confirm that the Board has no authority to adjudicate a pre-1914 water right. (See Board Decisions, D934; D1282; D1290; D1324; D1379.) The Board has conceded to this fact in a letter to the Coles dated August 22, 2002, in which Edward C. Anton, Chief of the Division of Water Rights states,



Matt McCarthy
October 1, 2012
Page 2

“Regardless of past letters sent by the Division containing estimates of what could be diverted pursuant to a pre-1914 appropriative right claim, the Division has no adjudicatory authority to quantify such a claim. Only the courts can make this determination. ... All available evidence suggests that the diversion and use has been maintained in a diligent and continuous fashion ever since. Consequently, we believe that a court would find that the Coles have a valid claim of a pre-1914 appropriative right to divert water for the full irrigation and domestic uses currently maintained, including reasonable conveyance losses.”

Accordingly, the Board's arguments regarding the validity of the Coles pre-1914 appropriative rights are moot and Board staff has no authority to make this determination. Once the claimant of a pre-1914 water rights presents prima facie evidence of the existence of a pre-1914 right, the burden shifts to the petitioner, or in this instance Board staff, to show that the pre-1914 right was lost. Board staff has not met this burden and in fact, the evidence establishes a pre-1914 water right, none of which has been lost or diminished.

Board staff argues that the Coles are limited to 0.49 cubic feet per second (cfs) and relies solely on information obtained in a 1965 bulletin by the Department of Water Resources entitled “Land and Water Use in the Klamath River Hydrographic Unit” (Bulletin No. 94-6). Bulletin 94-6 identifies the total amount diverted for irrigation, domestic, stockwatering, and power production of 362 acre-feet, annually. Board staff further states that the information was confirmed by Mr. Marvin Goss, Forest Service Hydrologist, who lived on the property under prior ownership. Mr. Goss inappropriately claimed the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel and that water had been used at a rate of 0.49 cfs for many years.

There is no sound evidence which demonstrates the Department of Water Resources' basis for the total amount of diverted water. In addition, the information documented by Mr. Goss is insufficient. His reading was based on a one-time analysis during a relatively dry season, using a leaf to measure the water flow. It is also well-known in the community that Mr. Goss had a contentious relationship with Lue and Agnes Hayes, the owners of the property at the time of Mr. Goss' reading. That fact, in conjunction with historic canal dimensions and the vast use of water at that time, dispute Mr. Goss' reading. The enclosed details the history of use which evidence prior use of at least 3.6 cfs from Stanshaw Creek (see Attachment A, “Summary of Continuous Water Use at Marble Mountain Ranch”). Furthermore, the Board has previously determined that



Matt McCarthy
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Page 3

evidence introduced in support of a pre-1914 water right must be considered in the light most favorable to the claimant. (Board Order No. WR 95-10.)

It is also established in common law that the quantity of water to which an appropriator is entitled is determined by quantifying the maximum amount of water reasonably and beneficially used by the appropriator within the five previous calendar years. (*Smith v. Hawkins* (1898) 120 Cal. 86, 87.) The Coles have presented evidence that their use of water from Stanshaw Creek amounts to 3.6 cfs over the past five years, consistent with the amount of water diverted and put to use under previous Ranch ownership.

On these bases, the Coles have the right to divert water from Stanshaw Creek for all their irrigation and domestic consumption as well as hydroelectric power production at a minimum of 3.6 cfs. If you have any questions please contact me at 916-447-0700.

Best regards,

Barbara A. Brenner
Counsel for Marble Mountain Ranch

BB:jhc
Enclosure

cc: Phillip Crader
Doug and Heidi Cole

Attachment A
Summary of Continuous Water Use
At Marble Mountain Ranch

In 1867, the United States of America granted a parcel located in Dillon's Township, Klamath County, California to Samuel Stanshaw who hired Chinese laborers to dig canals on the parcel of land that measured approximately 3.5 feet deep, 2 feet across the bottom, and 10 feet across the top, creating a cross section of 21 feet. (See Sean Bagheban, P.E.) In 1867, Samuel Stanshaw filed a claim for water rights amounting to 600 inches to be used for a gold mining operation and irrigation purposes on several areas of the Stanshaw property, including what is now known as the Marble Mountain Ranch. (Water Notice recorded March 25, 1867 in Book of Mining Claims 232 at Page 397.) Samuel Stanshaw hired 600 miners to mine for gold and created a community for the miners to work and live on the ranch with their families. In 1870, the mining rights were leased to Bow & Company, certain "Chinamen" to take gold ore from the Stanshaw Mining Company who also mined for gold. A requirement under the mining lease was that Bow & Company purchase their eggs from the ranch operating at the Stanshaw Mining Company. Commencing in 1867 water was diverted from Stanshaw Creek to Marble Mountain for reasonable and beneficial use.

In 1911, Samuel Stanshaw patented his mining claim which granted water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with those water rights. This patent granted him the pre-1914 appropriative water rights that continued to be diverted and put to use at Marble Mountain. Commencing in 1911 approximately 15 cubic feet per second (cfs) of water from Stanshaw Creek was diverted to Marble Mountain.

During this time, the State commenced construction of State Highway 96 and the construction crew lived on the site while the mining, ranching and domestic operations were ongoing. Each of these operations relied on Samuel Stanshaw's appropriative water rights until 1922 when the Stanshaw mine/homestead ranch was sold to Guy McMurtry, a state road engineer. Mr. McMurtry was assigned by the State to complete construction of the last unfinished section of Highway 96, between Orleans and Happy Camp. The water distribution system on Marble Mountain Ranch was utilized to support the construction work and soon, Mr. McMurtry built additional housing for these crew members and their families. The Stanshaw Creek pre-1914 water diversion was continuously relied upon and was the sole source of water for all water demands at the ranch.

The population burst prompted the State to build a school on site to service the children of all the people living on the ranch. The first school was a log building with one classroom, situated over Stanshaw Creek. In 1935 the County Superintendent of Schools in Siskiyou County determined that the one room classroom was insufficient to support the 52 children and made arrangements to construct a supporting school house adjacent to Marble Mountain Ranch. The new school house included bathrooms, a kitchen, dining room, and housing for the two teachers on site.

Meanwhile, Mr. McMurtry operated a dairy farm and provided milk and milk delivery services to the community on the ranch. There is some testimony by past residents and locals of a DC powered light system being used to illuminate/heat the main ranch house and the hen house on the ranch then owned by McMurtry. Further evidence of a DC hydroelectric power system is the remnant abandoned penstock system leading to the current powerhouse location and the knob and post electrical remnants removed from the original ranch house during renovations by the Coles in 2006. A single ditch line carrying approximately 4 cfs provide adequate sufficient water for all domestic and agricultural water uses. Although the original mining operation had ceased, the property still demanded water for the agricultural operations and domestic consumption by the residents and school. At this time the water was also used to generate power and the hydropower was and remains as the sole source of power generation.

The McMurtry's utilized the ditch for domestic consumption, as well as agricultural purposes to raise hay, fetch, vegetable garden, and the dairy farm until 1958 when it was sold to Lue and Agnes Hayes. The Hayes operated a cattle ranch with one hundred cattle from 1958 to 1994. The ranch sustained 16 homes and outbuildings and housed State road workers, United States Forest Service employees and transient recreational fisherman. The ditch lines and foundational domestic/agricultural water lines that are in place today were the same lines that existed when the Hayes' purchased the property. The lines carried approximately 4 cfs and supported all the people living on the ranch at that time, the cattle ranch operation and continued agricultural production.

The Hayes' continued to use the water for domestic consumption to support the many residents on the property. In addition, they irrigated hay and alfalfa pastures by turning out water from the ditch in various places and flooding the pastures. Some of the diverted water was returned to Stanshaw Creek. The dimensions of the ditch remained the same from the time the Hayes' purchased the property to the time the Ranch was sold to the Cole's. The Hayes also operated a pelton wheel generator for electricity, still in use today. The wheel generator was a 4 inch line, then increased to a 14 inch line utilized to create electricity for the occupants on the Ranch.

After diverted water was funneled into the domestic water line and hydropower penstock, remaining flows and power plant effluent continued through the lower elevation canals and were diverted at appropriate spots to flood irrigate alfalfa hay pastures, vegetable gardens, fruit trees, and lawns. Per Lue Hayes, there were times in his ownership that virtually every available bit of Stanshaw Creek water was diverted into the canals and used in power generation and irrigation of crops at the ranch. During the Hayes family occupation, the power plant was upgraded to a facility that produced about 40 KW of AC power that was needed for an increasing ranch residency population.

During these years, the Hayes' family maintained the ditch to ensure that any gravel and silt that settled in the ditch was excavated and the flume was kept in good condition particularly because the wood would deteriorate and branches would clog the flume. The Hayes family removed redwood plank ditch linings that had rotted in various places in the canal system and maintained and replaced a wooden flume section at various times during their occupation of the

ranch. The agricultural uses of the ranch continued through the Hayes family era with flood irrigation as the primary agricultural water distribution system.

The Hayes' measurement of the ditch at that time ranged from 2 -1/2 feet to 5 feet wide and from 2-1/2 feet to 1-1/2 feet deep, depending on the water flow. The abandoned ditch, which has now been inactive for approximately 140 years, is the same size as the original ditch in use today. The ranch was then sold to the Young family in 1972 when the Young's licensed the ranch as a state licensed mobile home/RV park with a permitted capacity of 57 mobile home hook-ups. The continuing rental of the 10 previously constructed cabins and three homes also added to the ranch population. Much of the water use was directed at domestic consumption and power generation to support ranch residents. However, the ranch still sustained alfalfa pastures, fruit and nut orchards, and large vegetable gardens.

The Young's Ranch Resort had a resident population between 100 – 200 persons consuming ranch water and hydroelectric power. Past Young's ranch visitors returning to Marble Mountain ranch recant stories of Young's ranch management needing to patrol the ranch routinely to chastise those ranch residents using more than their allotted share of power and water during low Stanshaw Creek stream flow periods during the summer months. Again, during this period, the original Stanshaw Creek canal system carried water at full capacity during periods of available flow, and carried nearly all of Stanshaw Creek flows during periods of diminished low Summer flows.

When the Cole family purchased the ranch in 1994, the infrastructure load requirements for power production and consumption were beyond the capacity of the ranch in the Cole's estimation. A change in business model was implemented at this time to reduce the ranch residency to a smaller population by targeting short term residents on a full service recreational visit. The target guest population now at Marble Mountain Ranch is 30 – 35 visitors on a full service short term guest ranch visit. Guided rafting, fly fishing, trail rides and other recreational activities along with food/meal service provide higher income returns per resident with fewer residents on location to deplete power and water resources. Additional water distribution improvements have been implemented by switching the agricultural uses from flood irrigation to sprinkler irrigated pastures, drip irrigated gardens and by installing culverts in the canal systems to reduce seepage of captured water. Additionally, the hydroelectric power plant was upgraded in 1997 to allow for more efficient power production with available Stanshaw Creek stream flows. Ongoing efforts to improve efficiency of Stanshaw Creek water and reduce demand include grant applications for canal system piping/culverting, and power plant upgrades.

Marble Mountain Ranch, since the Cole's ownership, has beneficially used approximately 4 cfs maintained by the Marble Mountain Ranch predecessors and current occupants. There has been no 5 year continuous lapse of water transport, or truncated use (despite seasonal variations in flow), that might suggest a diminished capacity. In fact, the historical growth and development of the ranch operations over 150 years speaks to the undeniable maintenance of the canal systems and beneficial use of all water diverted from Stanshaw Creek.

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – Docs from K. Fisher

- 01-04-79 DFG to SC
- 02-04-93 Youngs to TB
- 03-17-90 MG to JM
- 06-22-01 SWRCB to KF
- Assessors Parcel Map
- Cole_Goldsmith_8.20.2001
- Copy of NMFS_3.8.2000
- DFG_11.20.01
- Fisher_Protests_3.15.2000
- KFA_Mooney_6.24.2002
- KFA_Mooney_11.30.2001
- NMFS_3.8.2000
- NMFS_11.15.01
- SWRCB_5.23.2002
- SWRCB_5.23.2002_B
- SWRCB_9.15.1998
- USFS_Grunbaum_3.9.2000

Mar 10 20 02:37p

Eureka Headquarters

(530) 841-2551

P.2

WR-193

cc, 1/10/79

State of California

The Resources Agency

Memorandum

To : Steve Conger

Date: January 4, 1979

From : Department of Fish and Game - Region 1, Eureka

Subject: Stangshaw and Sandy Bar Creeks

Thanks very much for your survey information on the above creeks. I had no information whatsoever on either creek in the Eureka files. Rogers agrees with your analysis, that steelhead probably cannot negotiate the culverts. He also says that there is little or no steelhead habitat above the culverts because of very steep gradient.

This will be of great help at the next Project Development Team meeting with Caltrans about the culvert repairs.

Thanks, again.

Don A. La Faunce
Assoc. Fishery Biologist

DAL:km

cc: Rogers

005842

DEPARTMENT OF FISH AND GAME
FIELD CORRESPONDENCE

FROM: S. L. Conger, Orleans

PLACE: Stanshaw, Sandy Bar Creek

TO: Don La Londe

DATE: 12-30-78

SUBJECT: Surveys of Stanshaw, Sandy Bar Creek, Siskiyou Co.

On this date I made cursory surveys of Stanshaw Cr. and Sandy Bar Cr., from Hwy. 96 culvert downstream to mouth.

Culverts: Stanshaw Cr. - Twin, 6' dia. C.M.P. with concrete lining bottoms.

Culverts approx. 150' long or longer, with dogleg in center.

Sandy Bar Cr. - Twin, 6' dia. C.M.P. with concrete lining bottoms.

Length approx. 50'-75', fairly steep drop.

Riparian vegetation: Both streams well shaded with alder overstory. Sandy Bar Cr. overstory mixed with firs, madrone and alder.

Stanshaw Creek had heavy understorey of brambles & blackberries.

Fish Life: None observed in either stream. Stanshaw Cr. appears barren in area checked. It is improbable that fish migrate up from Klamath. Mouth of creek bifurcates, drops 8 ft. to Klamath.

Sandy Bar Creek probably has run of steelhead during normal flows. Flows now will impale upstream migrants. It is possible that SH might be able to traverse culvert at Sandy Bar Cr. during "normal" winter flows.

Flows: Stanshaw Cr., 1 c.f.w.; Sandy Bar Cr. - 5-7 c.f.w. Both streams are extremely low, possibly reflecting drought flows.

If flows increase, it is possible that SH will migrate into Sandy Bar Cr. and attempt to spawn in upper stream from culvert at Hwy. 96.

S. L. C.

RECEIVED
FEB 13 1979
and a note to transmission
center

C.C. - Dave Rogers

CALIFORNIA DIVISION OF FISH AND GAME STREAM SURVEY

FILE FORM

No. _____

NAME Stanshaw CreekCOUNTY SiskiyouSTREAM SECTION FROM Mouth To 1/4 mile upstream LENGTH 0.5 mileTRIBUTARY TO Klamath River Twp. 13N R. 6E Sec. 33OTHER NAMES _____ RIVER SYSTEM Klamath RiverSOURCES OF DATA Stream survey by G. Itano and P. Kalvass, Cal. DFG, 8/4/75.

Observations through entire section surveyed.

EXTENT OF OBSERVATION
 Include Name of Surveyor, Date, Etc.
 LOCATION
 RELATION TO OTHER WATERS
 GENERAL DESCRIPTION
 Watershed
 Immediate Drainage Basin
 Altitude (Range)
 Gradient
 Width
 Depth
 Flow (Range)
 Velocity
 Bottom
 Spawning Areas
 Food
 Shelter
 Barriers
 Diversions
 Temperature
 Food
 Aquatic Plants
 Winter Conditions
 Pollution
 Springs
 FISHERY PRESENT AND SUCCESS
 OTHER WATERWAYS
 FISHING INTENSITY
 OTHER RECREATIONAL USE
 ACCESSIBILITY
 OWNERSHIP
 POSTED OR OPEN
 EMPLOYMENTS
 FISH STOCKING
 GENERAL ESTIMATE
 RECOMMENDED MANAGEMENT
 SKETCH MAP
 REFERENCES AND MAPS

Altitude: At mouth- 600 feet; Headwaters originate at 4720 feet.

Gradient: 20%

Width: Average of 8 feet, narrowing to 4 feet in upper reaches surveyed.

Depth: To 3 feet in pools; averaging 6- 10 inches.

Flow: Estimated at between 2- 5 cfs.

Velocity profiles: From mouth to 50 feet above culverts under hiway 96 flow is rapid; Velocity becomes cascading further upstream as gradient of stream increases and depth decreases.

Bottom: Much of the stream bed is rubble, with little gravel and some sand in pools.

Spawning areas: Due to a lack of adequate spawning gravels there are few good spawning areas. Occasional gravelly pools observed below culverts, however some of these were silted and inordinately sandy.

Pools: Pool to riffle ratio of about 1:1; many pools of 2- 3 feet deep above hiway 96 culverts; large pool 3 feet deep and 6 feet long below twin culverts under 96.

Shelter: Entire section surveyed densely overgrown with local hardwoods and bushes.

Barriers: Two large U- shaped culverts under hiway 96, approximately 150 feet in length are probable barriers to anadromous salmonid migrations upstream. Gradient of culverts is long and gradual slope with a generally smooth concrete bottom. Stream survey of summer 1964 (Clark and Bugbee) reports that local residents observed steelhead just below culverts but none above them. Approximately 50 feet above culverts area of cascades and shallow water leading to a 5 foot, 50 degree gradient waterfall constitute a possible barrier to migrating fish, though in higher flows fish may be able to bypass waterfall.

Diversions: Many abandoned and inoperative rubber-tube type and steel piping diversions observed above hiway 96 crossing.

Aquatic plants: None observed.

Pollution: None observed.

Food: Caddis, Stone, and Dragon fly observed in larval stages, but not plentiful.

Fishes present: Salmonid fry observed below culverts, probably steelhead smolts, though not numerous. No fry of any type seen above culverts.

Fishing intensity: Light; though inoperative, abandoned dwellings observed near mouth of creek on south side, aptly referred to as the 'Old Man River Lodge'.

Accessibility: State route 96 crosses Stanshaw Creek 1/4 mile upstream from mouth; dirt road from 96 near crossing parallels creek to the mouth at lodge referred to above. Upper section is accessible only by foot due to dense riparian growth, however forestry road 13N12 from 96 crosses headwaters of creek.

Ownership: From State Route 96 to mouth land is privately owned. ^{East} ~~West~~ of hiway is
USFS land.
Posted or open: Open.

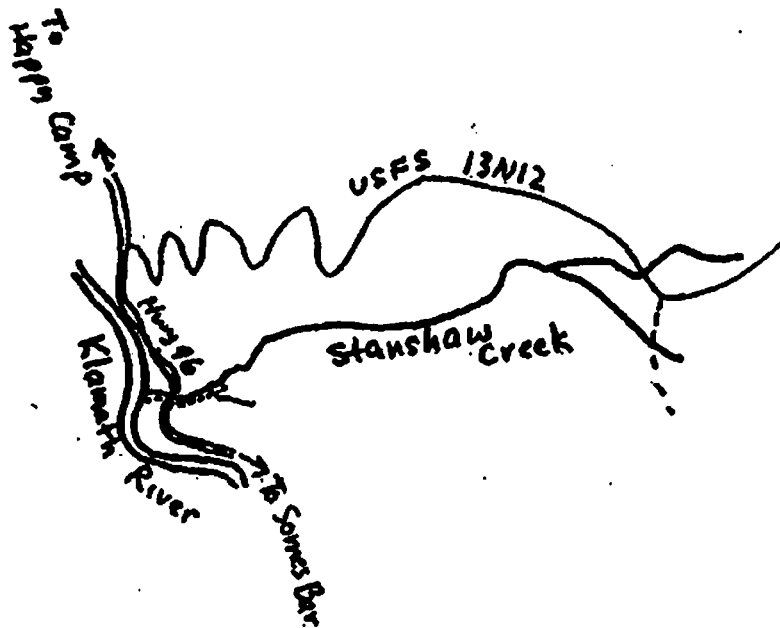
Station Data

Station:	1.	2.
Location:	Mouth.	$\frac{1}{2}$ mile up from mouth.
Width:	8 feet.	8 feet.
Depth:	6 inches.	2 feet.
Bottom:	Rubble to gravel.	Sand, gravel, rubble.
Spawning area:	No.	No.
Flow and velocity:	Rapid, II.	Slow, II.
Stream condition:	Clear.	Clear.
Water temperature:	60F.	62F.
Air temperature:	90F.	82F.
Time:	1430.	1530.
Date:	8/4/75.	8/4/75.
Weather:	Clear.	Clear.
Altitude:	600 feet.	850 feet.

Recommended management: Possible modification of culvert bottoms (ie. baffling, etc.) could open up western section of stream for anadromous salmonids. Due to good canopy over stream, upper reaches above route 96 could be managed for resident rainbow trout, though they would probably have to be introduced. Manage lower section of stream as adequate anadromous salmonid stream.



Stanshaw Creek
Siskiyou County (Orleans & Forks of
Salmon Quadrangle)



Legend

Scale: 1 inch = 2 mile

Portion surveyed - - - -

REPAIRED BY 1211 YRD 1211

REPAIRED BY 1211 YRD 1211



REPAIRED BY 1211 YRD 1211

Stanshaw Creek

October 2⁴, 1969

At mouth @ 1000

51°F

1 cfs

crystal clear

Mouth easily accessible from Klamath River for steelhead; not enough flow for king salmon. First 75 yards of stream flat and sandy-gravel bottom - good steelhead spawning area. A culvert is present under Highway 96 about 250 yards up-stream from its mouth. Steelhead can ascend stream to culvert, but cascades and almost no spawning area make stream past flat delta area unattractive to steelhead.

Culvert is about 70 yards long with flat concrete bottom - impossible for fish to pass. Stream above culvert becomes more steep and bottom changes to mostly boulders.

Rel
Asst. F.B.

Stanshaw Creek

February 2, 1968

at mouth @ 1230

H₂O temperature - 42°F

Estimated flow - 20 cfs

Water clarity - Turbid

Salmon do not enter stream, save possibly for a few silver salmon. Steelhead probably ascend as far as a few hundred yards above Highway 86. Passage under Highway 96 is guaranteed by a unique split culvert, which has for its bottom, the natural stream bottom and for its sides cemented rock. Actually, it is probably more of a budy than a culvert.

Ril

Dist. F.B.

STANSHAW CREEK
Siskiyou County

Aug. 5, 1964

Location of Mouth: R6E, T13N
Tributary To: Klamath River
Stream Section: From the mouth to 3 miles upstream to the forks.
Accessibility: State 96 crosses the stream and there is also a U.S. Forest Service road which leaves 96 between Stanshaw Creek and Sandy Bar Creek and crosses Stanshaw Creek three miles upstream at the Forks.
Ownership: U. S. Forest Service.

DRAINAGE DESCRIPTION

1. Topography - The stream flows for $4\frac{1}{2}$ miles through a steep canyon and is primarily cascading water.
2. Vegetation - The canyon walls exhibited various hardwoods and firs, the stream had vegetation that was mainly berry vines and heavy brush.

STREAM CONDITIONS

1. Depth - Average depth was 6-8 inches.
2. Width - Average width was 3-4 feet.
3. Flow - the estimated flow was 2-3 c.f.s.
4. Pool-riffle ratio - cascading water.
5. Altitude - Headwaters originate at 4720 feet and the mouth is situated at 600 feet above sea level.
6. Gradient - 20%
7. Shape of Stream - The stream bottom is composed of coarse rubble and boulders.

SPAWNING CONDITIONS

1. Anadromous fish would probably be unable to utilize this stream for spawning, however, resident trout apparently do spawn in the upper reaches of the stream.

HABITAT SUITABILITY

1. The insects were scarce, but stone fly and caddis fly were present in small numbers.
2. There is good shelter throughout the stream with low hanging trees and pools.

STREAM OBSTRUCTIONS

1. Due to the steepness of the stream, the chances of anadromous fish getting beyond the culvert on Hwy. 96 are very slim. Local residents report that steelhead do make it up the road, but not beyond.
2. About $1\frac{1}{2}$ miles upstream from the road there is an extremely steep area about 200 yards in length that would have to be considered a definite barrier.

FISHERIES

1. Only three salmonids were observed during the survey. These were located

about $\frac{1}{4}$ mile down from the Flume take-off (see below), fish seen were from 4-6 inches in length, and were assumed to be resident trout.

DIVERSIONS

1. Approximately 1 mile upstream from the road, a flume takes-off from the creek. Average width - 12 inches; average depth 4 inches; its flow was estimated between 0.5 and 1 c.f.s. Its purpose - unknown.
2. Approximately $\frac{1}{4}$ mile upstream, a 4 inch pipe line removes some of the stream flow.

RECOMMENDATIONS

1. Manage the stream for a resident trout population.

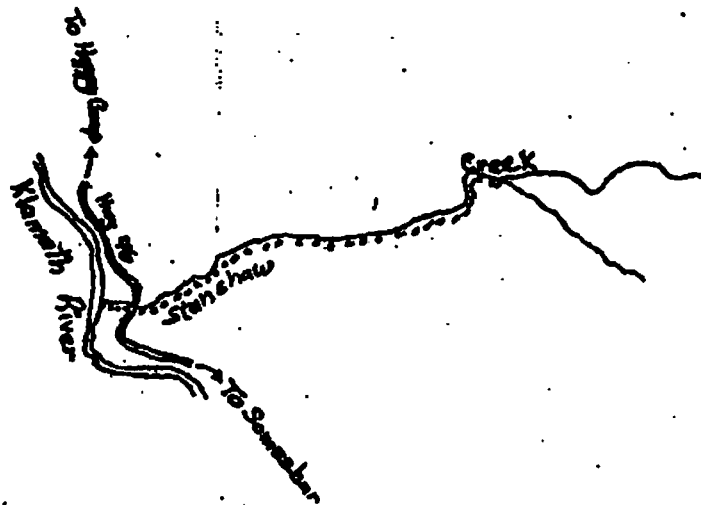
SUMMARY

1. Stanshaw Creek is approximately $4\frac{1}{2}$ miles in length with a flow of 2-3 c.f.s.
2. The stream gradient is 20% with headwaters at 4,720 feet and the mouth at 600 feet above sea level.
3. The stream is primarily cascading water with little or no spawning area for anadromous fish.
4. Three salmonids were observed during the survey.
5. Manage the stream for a resident trout population.

SURVEY CREW: Jack Clark, Steve Bugbee

SURVEY DATE: 8/5/64

Stanshaw Creek
Siskiyou County (Orleans & Forks of Salmon
Quadrangles)



Legend

Scale: 1 inch = 1 mile
Portion surveyed

JKE

XERO
COPYXERO
COPYXERO
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May 25, 1961

STANSHAW CREEK

Tributary to: Klamath River

Mouth Location: T. 13 N., R. 6 E., Section 15, S. W. Quarter

DRAINAGE

Stanshaw Creek, a tributary to the Klamath River, has a drainage area of approximately 3,000 surface acres. The drainage extends in an easterly direction from its mouth for about 4 miles. Seven small tributaries empty into the drainage area.

The drainage is characterized by steep, heavily forested mountains covered primarily with fir, pine, maple, alder and poison oak.

STREAM CONDITIONS

Physical Profile: The average flow of Stanshaw Creek was estimated at 40 cfs. This estimate was made at Highway 96. The average width was about 15 foot and the average depth was 7 inches.

The pool-riffle ratio was estimated at 60:20. The entire stream is a series of pools that cascade down the stream bed. Riffles were observed in limited areas but were more common above the water diversion pipe located about 200 yards above the highway.

The bottom is predominately rubble and boulders although some gravel was observed in areas of less torrential flow.

HABITAT SUITABILITY

Shelter is abundant along Stanshaw Creek in the form of boulders, brush, pools, and logs.

Spawning area is quite limited on Stanshaw Creek especially in the lower and upper portions. The area above the water diversion pipe contains some riffle area suitable for spawning anadromous fish. Some spawning potential is located from the mouth to the highway.

Nursery area is available along the entire stream. Pools with back-eddies are quite common.

STREAM OBSTRUCTIONS

Log Jams: Six partial barriers of debris accumulations were recorded on Stanshaw Creek below the upper limits to anadromous fish. These barriers

contained about 730 cubic feet of material. None of these barriers are a total barrier and at present, removal does not seem to be pressing.

Natural Barriers: A 75 yard long series of high falls creates an impassable barrier to anadromous fish about one mile above the mouth. These falls should be considered as the upper limits to anadromous fish.

FISHERIES

Salmonid fry were observed in many pools along Stanshaw Creek. The fry were too small to make an identification.

A local resident of this area says he used to see steelhead running up Stanshaw Creek although not for several years.

SUMMARY

Stanshaw Creek has a drainage area of about 3,000 surface acres.

The stream has a pool-riffle ratio of about 8:20.

Spawning area is limited on the stream although some areas contain gravel suitable for anadromous fish.

Six partial barriers were located below the upper limits to anadromous fish. The upper limits to anadromous fish is about 1 mile above the mouth and consist of a high series of falls.

RECOMMENDATIONS

1. Remove partial barriers although they are not a pressing problem.
2. Manage lower portions below series of falls as an anadromous fishery.
3. Manage area above falls as a resident trout stream.

Surveyed by: Tom Cawner and Mike Kruse

Surveyed on: May 25, 1961

(916) 657-1951

FAX: (916) 657-2388

	Youngs request	SWRCB recommended
domestic	.22 cfs	.02
irrigation	.12	.09
total	.34 cfs	.11

In Reply Refer
to:333:KDM:29450

FEBRUARY 04 1993

Robert E. and Mary Judith Young
c/o Thomas W. Birmingham
770 L Street, Suite 1200
Sacramento, CA 95814

Dear Mr. Birmingham:

APPLICATION 29450 OF ROBERT E. AND MARY JUDITH YOUNG--STANSHAW CREEK IN SISKIYOU COUNTY

On July 22, 1992, Division of Water Rights (Division) staff wrote to inform your clients, Robert and Mary Judith Young, that additional information is required before Division staff will be able to complete the initial review of Application 29450. No response was received. The issues which require a response are listed below.

The first issue which must be addressed is the quantities of water which were requested for both domestic and irrigation purposes. The application requests a right to directly divert 0.22 cubic feet per second (cfs) for domestic purposes. 3 residences, 44 recreational vehicle hookups, 11 housekeeping cabins, 14 mobile homes and one lodge will be served. Based on the quantities considered reasonably necessary pursuant to Title 23, California Code of Regulations Section 697, Division of Water Rights (Division) staff calculates the total beneficial use for these facilities to be 0.02 cfs.

Beneficial use was calculated using 75 gallons per day (gpd) per person for the residences, and an average of 4 persons in each house. The recreational vehicles are estimated to use 30 gpd for 2 people. The housekeeping units would require 55 gpd for four people, and the mobile homes would require a similar amount of water. No information was provided about the lodge. Thus, Division staff estimates that 20 people would use the lodge, and each person would require 55 gpd. If any of these estimates are incorrect, please provide information regarding actual occupancy rates and water duties. Based upon these estimates, Division staff recommends that domestic use under Application 29450 be reduced to 0.02 cfs. The 0.02 cfs was calculated by multiplying the number of each type of facility, such as 3 residences, times the estimated daily usage (75 gpd), times the number of persons (4 people), then multiplying by the conversion factor of 1 cfs per 646,317 gpd.

SURNAME
DWR 540 REV. 1-88

2-3-93

Kassel 2/3/93

EXHIBIT I

005854

4-10-68

005855

FEBRUARY 04 1993

Robert E. and Mary Judith Young

-2-

Irrigation water duty of 1 cfs for each 80 acres of irrigated area is considered reasonable for Siskiyou county. Thus, irrigation of the 7 acres of alfalfa listed in the application should require 0.09 cfs. The application requests 0.12 cfs. Thus, Division staff recommends that Application 29450 be reduced to 0.09 cfs for irrigation purposes. Please respond and state whether your client concurs with these recommendations.

Additional information is also required to complete the environmental supplement to the application. The following information is required:

Question 4 of Environmental Supplement

Indicate whether or not any permitting agency prepared any environmental documents for the project. If so, please complete the answers to the last part of questions number 4.

Question 7b

Please describe the types of existing vegetation (such as grasslands, pine forest, oak-grass foothills, etc.) at the point of diversion, immediately downstream of the point of diversion, and at the place where the water is to be used. Please be sure to include photographs of these areas with the vegetation types showing in the photographs.

Question 8

Indicate what changes in the project site and surrounding area will occur or are likely to occur because of construction and operation of the project.

Question 16

Indicate whether or not your client is willing to make the changes in the project as recommended by the Department of Fish and Game.

A response is requested within the next 30 days. Please note that failure by an applicant to comply with a written request for information within a reasonable time may be cause for the Division to cancel an application pursuant to Government Code Section 65956(c). Division staff is available to answer any questions you might have. I can be contacted at (916) 657-1951.

Sincerely,

ORIGINAL SIGNED BY

Katherine Mrowka
Associate WRC Engineer
Hearings Unit

cc: Robert E. and Mary Judith Young
Young's Ranch
Somes Bar, CA 95568

March 17, 1990

Marvin Goss
1881 Fieldbrook RD
Arcata, CA 95521

Mr. Jeffrey A. Meith
PO Box 1679
Oroville, CA 95965

Re: Information Needed from Hydrologist (Ms. Short, 11/27/89)

Dear Mr. Meith,

The following is in response to information you requested in your letter to Ms. Short, dated 11/27/89:

1. Watershed Areas:

Stanshaw Creek watershed area at Young's Ranch diversion: 2285ac(3.57 mi²).

Mountain Home Ranch sub-watershed area: 190ac(0.30 mi²), or 8% of the Stanshaw Creek watershed area.

Source: Forks of the Salmon NW, USGS Topo. Quad. (1955).

2. Comparable Streams in Region used for Extrapolation:

Indian Creek (Happy Camp, CA)

Salmon River (Somes Bar, CA)

Source: "Runoff Depth-Duration Frequency in Selected California Watersheds", DWR Memo Report 1/73;

"Klamath River Investigation", DWR Bulletin No. 83(1980).

3. History of the Young Diversion:

Since 1858: 0.49 cfs

Source: "Descriptions of Surface Water Diversions in Klamath River Hydrographic Unit", Pg. 58,
Table 4 (Continued).

I do not have the necessary information to address the specific consumptive and non-consumptive water use requirements at Young's Ranch.

4. Irrigation and domestic requirements for Mountain Home Ranch:

I do not have the necessary information to address the specific consumptive and non-consumptive water use requirements at Mountain Home Ranch.

5. Current Diversion Capability of Young's Ranch: 1.25 cfs

Source: Physical measurements and Text-Book on Hydraulics, Russell, Pgs. 147-153 (1915).

6. Other Available Sources of Supply:

There do not appear to be any other adjacent sources of water that can be feasibly developed for either Mountain Home or Young's ranches.

7. Substantial Accretions to Flow in Stanshaw Creek:

There are no substantial accretions to flow in Stanshaw Creek downstream of Mountain Home Ranch, other than very short duration events with resulting immediate stream runoff.

Mr. Meith
Re: Information Needed from Hydrologist
March 17, 1990
Page -2-

Myanmar
- some history

8. Estimated Flow Characteristics of Stanshaw Creek: (All estimates in cfs)

a. Average:

1) Stanshaw Creek (Annual: 12.9 cfs)

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
30	20	15	29	26	10	4	2	2	2	4	20

2) Mountain Home Ranch Drainage (Annual: 1.0 cfs)

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2.4	1.6	1.2	1.8	2.1	0.6	0.3	.15	.15	.15	0.3	1.8

3) Net-flow at Young's Ranch Diversion, Stanshaw Creek (Annual: 11.9 cfs)

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
27.6	18.4	13.8	21.2	23.9	9.2	3.7	1.85	1.85	1.85	3.7	18.4

b. Low-flow: (Probability: 1 in 50 yrs. using the 1976-77 drought as a model)

1) Stanshaw Creek

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
1.2	2.0	1.2	5.8	9.0	10.0	4.0	1.7	1.0	1.3	1.0	1.2

2) Mountain Home Ranch Drainage

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
0.10	0.15	0.10	0.50	0.70	0.80	0.30	0.13	-0.1	0.10	-0.1	0.10

3) Net-flow at Young's Ranch Diversion, Stanshaw Creek

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
1.1	1.8	1.1	5.3	8.3	9.2	3.7	1.6	0.9	1.2	0.9	1.1

c. Instantaneous Peak Flow of Stanshaw Creek for given Return Period:

Annual	5-Year	10-Year	25-Year	50-Year	100-Year
225	350	550	800	1000	1250

Source: "Runoff Depth-Duration Frequency in Selected California Watersheds", DWR Memo Report 1/73.

9. Incremental Increases or Decreases in Flow along Stanshaw Creek:

It is highly unlikely that the flow in Stanshaw Creek Varies between the outlet of the Mountain Home subwatershed and the diversion for Young's Ranch, since the diversion is immediately downstream from the tributary's outlet. There are no other diversions in this short reach and the surface water and geologic characteristics are homogeneous. Any effect from groundwater characteristics would merely add to the overall flow.

Mr. Meith
Re: Information Needed from Hydrologist
March 17, 1990
Page -3-

Synopsis:

The Young's Ranch diversion and earth-channel/fume capacity exceeds only the lowest flows which rarely occur on Stanshaw Creek between August and December during drought years. The only time this condition has been documented was in 1977 when the flow available for diversion was 0.9 cfs (0.35 cfs below diversion capability), but still 1.75 times greater than historic use (0.48 cfs). Less than 0.1 cfs was available for use (and used) by the Mountain Home Ranch during this period.

During at least 98.4 percent of the time, too much, not too little flow at the Young's Ranch diversion is the primary concern due to the sediment-carrying characteristics of both Stanshaw Creek and the earth-channel/fume. Neither the earth-channel/fume, albeit poorly designed and maintained, nor flow characteristics of Stanshaw Creek have limited the availability of water at Young's Ranch during the documented period of use (since 1958).

* Prior claims (or rights) for more water by Young's Ranch (Ref: Protest to Appl. 25446) appear to have long-since been abandoned through documented non-use, in accordance with California State Water Law administrative procedures.

Basis for the foregoing statements are as follows:

1. I was the District Hydrologist at the Ukonom Ranger District, USFS between June 1974 and September 1977.
2. I lived at Young's (nee Hayes) Ranch between June 1974 and September 1977.
3. Between 1974 and 1977, I did, on several occasions, evaluate the design and inspect the condition of the Young's Ranch diversion and earth-channel/fume.
4. I was the State Water Rights coordinator for the Bureau of Land Management's State Office in Phoenix, AZ between September 1979 and December 1981.
5. I hold a B.S. Degree in Geology and an M.S. Degree in Watershed Management.

I hope this information is useful to you. Please contact me if you have any further questions on this matter or desire clarification.

Sincerely yours,



Marvin Goss
HYDROLOGIST

cc: Ms. Barbara Short -



State Water Resources Control Board

WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5300
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>

Gray Davis
Governor

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>.

JUN 22 2001

Mr. Konrad Fisher
3210 Kingle Road NW
Washington D.C. 20008

Dear Mr. Fisher:

APPLICATION 29449 OF DOUG COLE ET. AL. TO DIVERT 3.0 CUBIC FEET PER SECOND (CFS) OF WATER FROM STANSHAW CREEK TRIBUTARY TO KLAMATH RIVER IN SISKIYOU COUNTY FOR GENERATION OF 33.9 KILOWATTS OF ELECTRICITY

Per our phone conversation on 21 June, 2001, I have enclosed text, tables, and a map from the May, 1965 bulletin authored by the Department of Water Resources (DWR) entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6) that is pertinent to the above mentioned application. As you will see in Table 4 on page 58 of the copied report, the type of apparent water right is incorrectly listed as riparian. Page 31 states, "Those [diversions] which have been neither adjudicated nor based on appropriations [water right applications or pre-1914 appropriations], but for which the area of use is apparently riparian to the streams or which the owner claims to be riparian are listed as 'riparian.'" Either DWR incorrectly came to this conclusion or the owner incorrectly stated that it was a riparian right. It is interesting here to note that neither the owner at the time, L.H. Hayes, nor the previous owner, McMertree, listed this right as a pre-1914 appropriation even though the indicated date of first use on the table is "About 1800."

As you will also see in the enclosures, 362 acre-feet (af) was *measured* at the nozzle in 1958; this would be the amount of water that was put to beneficial use. This calculates to a daily average beneficial use of:

$$\begin{aligned} 362 \text{ af/yr} \div 365 \text{ days/yr} &= 0.99 \text{ af/day} \\ 0.99 \text{ af/day} \div 1.98 \text{ af/day/cfs} &= 0.50 \text{ cfs} \end{aligned}$$

Average instantaneous flow per month could also be calculated using data from Table 5. Small domestic use is not calculated in this figure, although that would be negligible at less than 10 af/yr. I also assume that seepage losses are not figured into this since this is measured at the nozzle rather than the point of diversion, but I would not expect seepage losses to nearly approach 2.5 cfs.

JUN 22 2001

Mr. Konrad Fisher

2

Please also note that: 1) 1958 was an "unusually wet year," with Klamath River flows nearly double that of the average annual flow, and 2) 6 kilowatts of electricity were generated by the diversion in question. Hence, an average rate of 0.5 cfs through the nozzle was probably all that was needed to generate 6 kilowatts, and this lower rate was not the result of low flows available for diversion from Stanshaw Creek.

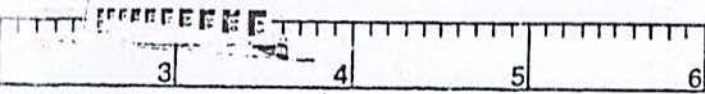
If I can be of further assistance, please call me at (916) 341-5392.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. E. Miller', with a stylized, cursive script.

Robert E. Miller
Environmental Specialist II
Environmental Review Unit 2

Enclosures



SCALE IN 1/10 OF AN INCH

WR-193

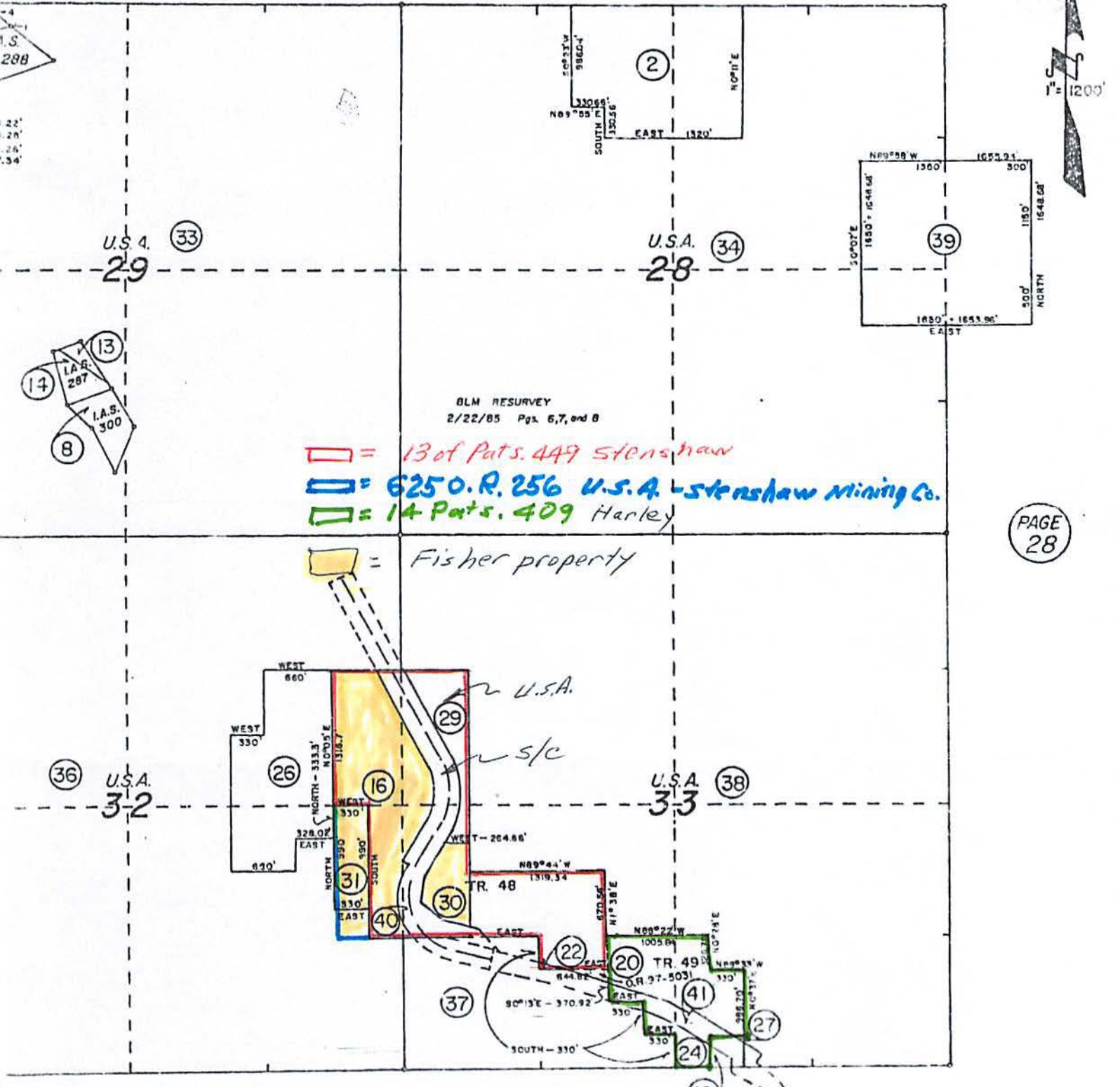
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PAGE 26



BLM RESURVEY
2/22/85 Pgs. 6, 7, and 8

□ = 13 of Pats. 449 Stenshaw
□ = 6250 R. 256 U.S.A. - Stenshaw Mining Co.
□ = 14 Pats. 409 Harley
□ = Fisher property

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BOOK 33

Assessor's Map
County of Siskiyou, California

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

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KRONICK
MOSKOVITZ
TIEDEMANN
& GIRARD
A PROFESSIONAL CORPORATION

JANET K. GOLDSMITH

August 20, 2001

VIA HAND DELIVERY

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, CA 95812-2000

Attn: Michael Contreras

Re: Water Right Complaint Against Douglas and Heidi Cole;
Stanshaw Creek, Siskiyou County

Dear Mr. Schueller:

This letter responds to the letter dated June 14, 2001 from Donald Mooney on behalf of the Klamath Forest Alliance ("KFA") complaining of diversions by Heidi and Douglas Cole from Stanshaw Creek in Siskiyou County. In essence the letter asserts that the Coles have not provided evidence that the pre-1914 water right filing by Samuel Stenshaw pertained to their land, and that their diversions harm coho salmon and steelhead in Stanshaw Creek and the Klamath River. This letter provides the evidence requested concerning the basis of the Coles' claim of pre-1914 water rights. The KFA allegations that the Coles' diversions constitute a "take" of coho or steelhead salmon are unsupported and incorrect. The Coles' diversion is not harming either the coho or steelhead (or any other) fishery in either Stanshaw Creek or the Klamath River.

A. HISTORY OF USE

Attached as Exhibit A to this letter is Patent 186169¹ from the United States to Samuel Stenshaw dated March 27, 1911. Because the handwritten description in the Stenshaw patent is difficult to read, I have verified the property description using the BLM Master Township Plat and Historical Index.² The description of the land patented to Stenshaw includes forty acres of what is now known as Marble Mountain Ranch, owned by the Coles.³

¹ The patent number appears at the bottom of the page, below the signatures.

² The land is described as a patent granted pursuant to a Homestead Entry: "W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, and the N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, and E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T 13 N, R 6 E, Humboldt Meridian. Because

Harry M. Schueller, Chief
 Division of Water Rights
 August 20, 2001
 Page 2

10987.2-1

According to Edwin Gustave Gudde, California Gold Camps (U.C. Berkeley Press, 1975), the Stanshaw Mine was in operation at the turn of the century and was reported in Mining Bureau reports as late as 1935. A mining pit is located on the Marble Mountain Ranch.

Water was also used for domestic purposes and irrigation. The notice of appropriation states that it was in part "for irrigating purposes" and describes the ditch and flume as running "to my upper field." (See Exhibit D, Notice of Appropriation, Liber 1 of Water Rights, page 397, Siskiyou Official Records)

Violet Anderson, who moved to the area shortly after Stanshaw conveyed a portion of his property to Guy and Blanche McMurtry, recalls that she cooked in an old cookhouse on the property for up to two shifts of workers who boarded there, and that the McMurtrys ran a small dairy. (Exhibit E.) She recalls that electricity was already in use at that time in connection with the dairy. Among other purposes, it was used to sterilize the bottles into which milk was transferred for sale.⁴ Minerva Starritt, one of the early schoolteachers at the Irving Creek schoolhouse recalls that when she arrived in 1935, Guy McMurtry was the Superintendent for the State Highway 96 and "had cabins where the state highway workers lived with their families." (The Siskiyou Pioneer (Siskiyou County Historical Society, Vol. 6, No. 2, 1989). (Exhibit F.))

The McMurtrys owned the property until Lue and Agnes Hayes purchased it in 1955. At the time of the purchase, Mr. Hayes recalls that 30 acres were under irrigation and there was an existing 4 KW pelton wheel and an existing 12" main water line on the property. (Exhibit G.) The pelton wheel was described by William M. Heitler of the U.S.F.S. as "the 85-year old pelton wheel" (Exhibit H). Mr. Hayes identified it as "an old C-3 HP generator."⁵ The power generating facilities have since been upgraded several times by Mr. Hayes and successive owners, including the Coles, but the evidence is that power was being generated from a very early date. The engineer retained by the Coles to upgrade the power facilities described the pelton wheel as dating from perhaps the first decade of the last century. The old pelton wheel remains available for inspection at the Ranch.

Domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. The Hayes' use has been described in the 1963 DWR Bulletin 94-6 "Land and Water Use in Klamath River Hydrographic Unit." (Table 4, at p. 55.) Mr. Hayes believes that the demand estimated at that time may have underestimated his existing uses because it was based on a single flow measurement taken in late fall when he was not irrigating. (See Exhibit G.)

the Historical Index page is 24" x 28" it is difficult to reproduce and is not included as an Exhibit to this letter. It is available for your inspection and verification on request.

The patented land was resurveyed by the Bureau of Land Management in 1985 and designated "Tract 48" on that resurvey. A portion of Sheet 1 of 8 of that resurvey is attached as Exhibit B.

³ A copy of the Coles' deed is attached as Exhibit C.

⁴ Personal communication, 8/19/01.

⁵ Personal communication, 8/16/01.

Harry M. Schueller, Chief
 Division of Water Rights
 August 20, 2001
 Page 3

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The Hayes conveyed the Ranch to the Youngs, whose uses are documented in your files. The Youngs conveyed the Ranch to the Coles in 1994. The Coles' residence is the same house originally occupied by Samuel Stenshaw.

While there has been an evolution of uses for the Stanshaw Creek appropriation since the early days of the Stanshaw Mine, it is clear that year-round uses of water were in practice from early in the last century. Mining, domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. While mining may no longer be pursued, changes in purpose of use of pre-1914 appropriations have been permissible so long as no other user is injured. The very long history of the current uses of water on Marble Mountain Ranch belie any assertion that others have been harmed by the shift in purpose of use of this water.

B. CALCULATION OF WATER DUTY

The estimate of water demand for the documented uses on Marble Mountain Ranch, as set forth in the SWRCB letter of February 4, 1993 from Katherine Mwroka (Exhibit I) appears questionable for several reasons.

First, it is based on use *at the point of use*, and therefore does not take into account conveyance losses in the ditch leading from Stanshaw Creek. This ditch is seven tenths of a mile long⁶ and is constructed of flumes and earthen materials. While the Coles have taken steps to improve conveyance efficiency (see Exhibit H), there remain reasonable losses that should be considered in calculating the amount of diversion necessary to satisfy their pre-1914 appropriative right.

Second, the calculation completely ignores water demand for power production. As explained above, power use began early in the last century and has been continuous throughout the history of the Ranch.

Third, the water duty used by Ms. Mwroka for calculating irrigation demand is questionable. Ms. Mwroka based her estimate of irrigation demand on a water duty of one cfs per eighty acres of irrigated land. This is the most conservative water duty proposed in the SWRCB guidelines concerning reasonable use for irrigation. While it may be appropriate for other areas of Siskiyou County, it is not appropriate for calculating irrigation water demand on Marble Mountain Ranch. The porous nature of the soil on the Ranch and the slopes involved suggest that a higher water duty should be used.

C. LACK OF JUSTIFICATION FOR A CEASE AND DESIST ORDER

The complainant fails utterly to provide any factual evidence that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. The sole allegation of adverse impact is a single paragraph in the middle of page 3 of the KFA letter that alleges that the National Marine Fisheries Service ("NMFS") and California Department of Fish and Game ("DFG") "are concerned." No specifics are given of just how the long-standing diversions of the Ranch are affecting either coho salmon or steelhead. No statements of either the DFG or NMFS are attached to the KFA letter.

⁶ DWR Bulletin 94-6, Table 4, p. 55.

Harry M. Schueller, Chief
 Division of Water Rights
 August 20, 2001
 Page 4

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The only evidence offered by KFA is a letter from the U.S. Forest Service District Ranger, William Heitler reporting such "concerns," again without specifics. The USFS letter related to the question whether the Coles had, or needed, a fee permit for the ditch. Subsequently, based on the age of the ditches, it was determined that no fee permit was required. (See Exhibit H.) In a subsequent memo, Mr. Heitler also comments on the responsiveness of the Coles to DFG's direction concerning fish passage at the century-old rock and rubble diversion dam. (*Ibid.*)

In a March 8, 2000 letter concerning the Coles' water right application for 3 cfs diversion for power production, the following *general* concerns were listed by NMFS concerning coho salmon: migration delay, loss of habitat due to dewatering, stranding of fish due to dewatering of the stream, entrainment in poorly screened diversions, and increased water temperatures. None of the issues was raised based on any site specific investigation or concern.

None of the issues mentioned in the NMFS letter are being significantly exacerbated, if at all, by the Coles' diversions under their existing rights. Stanshaw Creek is not a migration or spawning resource for coho salmon, nor is it available for juvenile rearing, since the culverts at Highway 96 prevent passage upstream into the creek. There are no pools in the 600' reach of Stanshaw Creek below the highway to serve as "preferred" rearing habitat for juveniles (according to the NMFS letter). However, coho habitat has been documented in Irving Creek to which the Coles' diverted water is ultimately returned. The addition of flow to that creek may well benefit the coho resource of concern to the KFA.

Temperature at the mouth of Stanshaw Creek was measured at 65° F in the afternoon of August 17, 2001 by Douglas Cole, within the reported range of suitability for coho juveniles and within the range of "best" suitability for the steelhead trout that inhabit the creek (Klamath Resource Information System).

Water in Stanshaw Creek is bypassed through the rock and rubble diversion dam. The diversion is maintained pursuant to a Five Year Maintenance Agreement between the Coles and the California Department of Fish and Game, dated January 21, 1999. There is continuous flow bypassing the Ranch diversion, and fish passage has been observed in both directions. As reported by Mr. Heitler in his April 6, 2001 e-mail memo, "The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction." (Exhibit H.) The flow in Stanshaw Creek extends to the mouth, even in this dry month of a dry year.

The mere fact that coho are a listed species and steelhead are a candidate species is no evidence that the decades-long diversions for the Ranch are harming the fishery. The above data refute the allegation that the current diversions by the Coles violate the Endangered Species Act. The complainants have produced no evidence of harm to protected species from a continuation of diversions.

Beyond the Endangered Species Act, however, the KFA has raised a claim of public trust violation. In any public trust evaluation, the harm to the public trust resource (if any) must be balanced against the reliance on the diversions. In this instance, there is clear evidence of a century of reliance on the water and a good faith belief that the diversions are justified under the pre-1914 appropriation by Samuel Stanshaw. The Coles' water use is reasonable and beneficial, and the Coles and their predecessors have continually improved the efficiency of use. No other water source is available to the Coles, whose entire livelihood depends on the continued availability of water from Stanshaw Creek. This

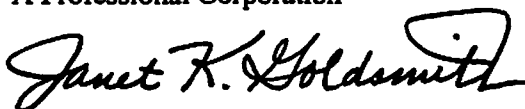
Harry M. Schueller, Chief
Division of Water Rights
August 20, 2001
Page 5

10987.2-1

great reliance, balanced against the lack of any specific allegation or evidence of harm to public trust resources by continuation of diversions pending SWRCB action on the Coles' pending application, should militate against any enforcement action at this time.

Please feel free to contact me if you have further questions.

Sincerely,
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation



Janet K. Goldsmith
Attorneys for Douglas and Heidi Cole,
Marble Mountain Ranch

JKG/mm

Attachments

cc: Douglas Cole
Donald Mooney
Michael Contreras



WR 293
29449

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

March 8, 2000 F/SWR4:WH

Harry Schueller
Chief, Division of Water Rights
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

00 MAR 10 PM 4:38
DIV. OF WATER RIGHTS
SACRAMENTO
Received
fixed copy
on 3/8/00

Dear Mr. Schueller:

By this letter the National Marine Fisheries Service registers its protest to the application for appropriative water right 29449 filed by Doug Cole, et al. to divert water from Stanshaw Creek, which is tributary to the Klamath River. The Project proposes to divert 3 cfs for the purpose of hydroelectric generation. Stanshaw Creek, which lies within the Klamath River watershed, may support or contribute to sustaining populations of the Central California Coast Evolutionarily Significant Unit (ESU) of coho salmon.

Background

Coho salmon (*Oncorhynchus kisutch*) comprising the Central California Coast ESU are listed as threatened (61 Fed. Reg. 56138; Oct. 31, 1996) under the Endangered Species Act (ESA). Protective regulations were published for coho on October 31, 1996. These protective regulations make it unlawful to "take" coho under section 9 of the ESA. "Take" as defined in the ESA, includes, in part, to harm or harass the species. These protective regulations describe certain activities that may impact coho and result in legal liability. These activities include, in part:

Unauthorized destruction/alteration of the species' habitat, such as removal of large woody debris or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flow.

In contrast to the life history patterns of other anadromous salmonids, coho salmon in California generally exhibit a relatively simple 3-year life cycle. Adult salmon typically begin the freshwater migration from the ocean to their natal streams with the first fall rains. Upstream migration will continue from October to March, generally peaking in December and January (Shapovalov and Taft 1954).

accept
5/9/00
ym



Coho fry emerge from redds, in 38 to 101 days depending on stream temperature (Laufle et al. 1986). After emergence, the stream flow conditions and water temperature play a large role in survival. Low summer flows reduce potential rearing areas, may cause stranding in isolated pools, and increase vulnerability to predators (Sandercock 1991). Also the combination of reduced flows and high ambient air temperatures can raise the water temperature to the upper lethal limit of 25°C for juvenile coho (Brett 1962). Later in the year, high winter flows in typical coastal streams may be hostile to juvenile coho, causing displacement and disrupting their habitat and food sources. Juvenile coho show a preference for habitat containing deep pools (1 m or more), logs, rootwads, or boulders in heavily shaded sections of stream. Structurally complex streams that contain stones, logs and bushes in the water support larger numbers of fry (Scrivener and Andersen 1982). Although coho juveniles are found in both pool and riffle areas of a stream, they are best adapted to holding in pools (Hartman 1965).

Proposed Diversion

Appropriation of water will be accomplished by directly diverting 3 cfs from Stanshaw Creek for hydroelectric power generation via flume of 12-inch deep, 24-wide, and 5,200 ft long, then through a penstock of 16-inch diameter, 455 ft long steel pipe. The penstock uses a 200 ft fall to generate a maximum of 33.9 kilowatts at 80% efficiency at a powerplant just above Irving Creek. After use, the water will be returned to Irving Creek through a ditch, and thence to the Klamath River. The applicant has requested to divert water year-round, from January 1 through December 31. Stanshaw Creek, like other Northern California streams, is subject to critical, low flows during much of the year. Granting the proposed diversion will reduce flows in these streams and may degrade habitat necessary to the existence of certain life stages of coho salmon. Alteration of stream flows can result in salmonid mortality for a variety of reasons: migration delay resulting from insufficient flows or habitat blockages; loss of sufficient habitat due to dewatering and blockage; stranding of fish resulting from rapid flow fluctuations; entrainment of juveniles into poorly screened or unscreened diversions; and increased juvenile mortality resulting from increased water temperatures (Bergen and Filardo 1991; California Advisory Committee on Salmon and Steelhead Trout 1988; California Department of Fish and Game 1991; Columbia Basin Fish and Wildlife Authority 1991; Palmisano et al. 1993; Reynolds et al. 1993).

Based upon the need to protect and recover runs of listed coho salmon in the Klamath River watershed, we find it necessary to protest the proposed project because:

- 1) The Klamath River watershed supports federally listed coho salmon. Stanshaw Creek, upon which the proposed diversion would occur, lies within the Klamath River watershed and may support or contribute to the survival of this species.

structures also have the potential to entrain fishes, with resulting mortality.

Recommendations

Based upon the above concerns and potential impacts of the proposed project, we recommend that the project be modified to include the following mitigative provisions:

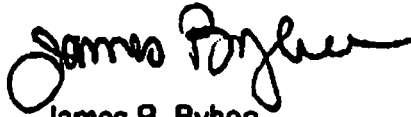
- a) Provide a minimum bypass flow that adequately protects coho salmon in reaches downstream from the point of diversion during all days of the year. The determination of the bypass flow's adequacy can be based on site specific biological investigations conducted in consultation with CFG and NMFS staff. Given the historically low flows during summer months and high temperatures in the Klamath River, we recommend that diversions not occur during the period June 1 through October 1.
- b) the plan should avoid construction or maintenance of a dam or diversion barrier across Stanshaw Creek.
- c) natural, periodic, intermediate and high flows should be maintained immediately below the project. This is a complex issue that concerns potential cumulative impacts of this and other upstream permitted and licensed water diversions within the Stanshaw Creek watershed. Protection of intermediate and high flows can be accomplished through an assessment of cumulative impacts and placing limits on the rate of instantaneous water withdrawals from the stream.
- d) the potential effect of the project on upstream and downstream movements of anadromous salmonids must be addressed. If anadromous salmonids ascend Stanshaw Creek or have the likely potential to ascend this tributary then adequate passage facilities and screening at the diversion intake should be provided.
- e) the proposed project should provide California Department of Fish and Game personnel access to all points of diversion and places of use for the purpose of conducting routine and or random monitoring and compliance inspections.

Because of the presence of federally and state listed species in the Klamath watershed, continued development of the watershed without a coordinated watershed plan would be inconsistent with the purposes of the California Endangered Species Act, the Federal Endangered Species Act, sections 100, 1243, 1243.5, and 275 of the State Water Code and the State Water Resources Control Boards's obligations and authorities under the Public Trust Doctrine.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning

the contents of this letter please contact Dr. William Hearn at (707) 575-6062.

Sincerely,



James R. Bybee
Protected Habitat Manager
Northern California

References Attached

cc: Doug Cole, et al., Applicants
R. Hight, CDFG, Sacramento
D. Koch, CDFG, Redding

References

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State of California

Memorandum

To: Mr. Edward C. Anton, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-2000

Date: November 20, 2001

From:  Donald B. Koch, Regional Manager
Northern California-North Coast Region
Department of Fish and Game
601 Locust Street, Redding, California 96001

Subject: Complaint Investigation Relating to Application 29449 Doug Cole – Stanshaw Creek,
Tributary to Klamath River, Siskiyou County

The Department of Fish and Game has reviewed the subject application and attended two site visits with State Water Resources Control Board (Board) staff. The first field investigation was conducted by the Board's application and environmental section on July 26, 2000, and the latest complaint inspection was held on October 17, 2001. On March 17, 2000, we submitted a protest on the application which was accepted by the Board on April 4, 2000. Our protest is based on adverse environmental impacts which could result from reduced flows in Stanshaw Creek. Both the complaint and application refer to an existing unpermitted diversion of water from Stanshaw Creek.

At the time our protest of this application was filed in March 2000, our primary concern was protection of anadromous fish habitat in about a 0.25 mile reach of Stanshaw Creek from the Highway 96 crossing to the stream's confluence with the Klamath River. On April 27, 2001, the California Fish and Game Commission (Commission) accepted a petition to list coho salmon north of San Francisco Bay as an endangered species. Consequently, coho salmon are now considered as a candidate species pursuant to the California Endangered Species Act (CESA). On April 26, 2001, emergency regulations adopted by the Commission pursuant to Fish and Game Code Section 2084 went into effect. These regulations remain in effect during the 12-month candidacy period and authorize the incidental take of coho salmon resulting from diversion of water. The Commission will likely make its final listing decision in early June 2002 and if they decide to list the species, the current Section 2084 incidental-take authorization for water diversions will terminate. After listing, take of coho salmon will be prohibited unless authorized under Fish and Game Code Section 2081(b) or 2080.1. We urge the Board to consider the implications of their actions regarding subject complaint and final decision on water rights application #29449 in light of Fish and Game Code Section 2053 and the potential listing of coho salmon next year.

During the complaint inspection, we were told that the merits of the complaint would be reviewed within 30 days and, therefore, we are submitting these comments and recommendations for the Board's consideration. Formal protest dismissal terms will be submitted to the application unit at a future date.

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Federally Listed coho salmon (*Onchorhynchus kisutch*) are known to exist in Stanshaw Creek. Coho salmon were listed as threatened under the Federal Endangered Species Act effective June 5, 1997, and as a candidate under the California Endangered Species Act on April 27, 2001. On two recent occasions, the Department has collected field information within Stanshaw Creek below the subject diversion in the area near its confluence with the Klamath River. On May 25, 2000, we collected 8 young of the year and 18 yearling steelhead trout in this area of Stanshaw Creek. On July 26, 2000, we sampled and found one juvenile coho salmon in Stanshaw Creek below the culverts which run under Highway 96. We believe the Highway 96 culverts are currently a barrier to upstream migration of fish and have, therefore, focused our concerns and mitigation measures on the 0.25 mile stream reach downstream of these culverts. This stream reach is characterized by deep pools, large woody debris, dense overhanging riparian cover shading the stream and generally cool water temperatures and thus provides good rearing and refuge habitat for juvenile coho salmon and steelhead trout. Coldwater habitats such as those provided by Stanshaw Creek are important refuges for juvenile coho salmon which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical cold water refuge habitats for coho salmon and steelhead in lower Stanshaw Creek need to be accessible to the fish so sufficient water needs to stay in the stream to maintain connectivity to the Klamath River all year.

The Department currently proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

It is our understanding from discussions with Board staff that water is currently diverted from Stanshaw Creek even when there is not enough flow to run the hydroelectric generators. We believe this procedure results in water being wasted and not being put to beneficial use. This procedure typically occurs during critically dry periods when natural flows are needed to maintain salmonid access from the Klamath River to cooler water, rearing and refuge habitat found in Stanshaw Creek. If the stream flow in Stanshaw Creek is less than the amount needed to run the hydroelectric plant (3 cfs), then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed to maintain the downstream fishery resources.

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During both inspections, various options were discussed which could help satisfy the required downstream flow conditions. We believe two options have merit for the Board and the owner to consider. One option would be returning diverted flows back to Stanshaw Creek after the water is used to generate electricity. Currently, tailwater is discharged to the adjacent drainage of Irvine Creek. Second, improvements to the open ditch system and/or updating the hydroelectric generation system may also allow the applicant to divert less water while still meeting the needs for domestic purposes and electric generation.

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

cc: Mr. James R. Bybee
National Marine Fishery Service
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

Mr. Doug Cole, et al.
92520 Highway 96
Somes Bar, California 95568

Ms. Jane Vorpapel
Department of Fish and Game
601 Locust Street
Redding, California 96001

PROTEST

Based on Prior Filed Application or Injury to Prior Rights
(Protests based on OTHER considerations should be completed on other side of form.)

APPLICATION 29449

- I, (We) T. James Fisher; J.W. Fisher Logging Company; Phyllis Fisher
Name of Protestant(s)
of 1721 Court Street, Redding, CA 96001, (530) 244-0909 have read carefully a
Mailing address and zip code of protestant(s) Telephone Number
copy of, or a notice relative to, Application of Doug Cole, Heidi Cole, Norman Cole &
Name of applicant
Caroline Cole to appropriate from Stanshaw Creek
Name of source
at a point 2,500 feet W, 1,500 feet NE Corner 785,300'N, 1,589,300'E Cal Coord. Zone 1
Describe location of applicant's point of diversion
(S33 T.13N R. 6E, H.B.M.)
- I, (We) desire to protest against the approval thereof because to the best of our information and belief the proposed appropriation
My or our
will result in injury to us as follows: (See attachment, Item 2.)
Me or us State the injury which will result
- Protestant claims an interest in the use of water from the source from which applicant proposes to divert which is based upon: Riparian rights
Prior application; appropriative permit or license; notice posted or use began prior to December 18, 1914; riparian claim; etc.
Please provide application, permit, license, or statement of water diversion and use numbers which cover your use of water, or state "none":
None
- Where is your diversion point located? NW 1/4 of SW 1/4 of Section 33, T. 13N, R. 6E, H. B&M
Is your point of diversion downstream from applicant point of diversion? Yes
Yes, No, or at same point
- The extent of present and past use of water by protestant or his predecessors in interest from this source is as follows (leave blank if protest based on prior filed application): Year round uses, including domestic and irrigation.
(a) approximate date first use made unknown
(b) amount used unknown
(c) time of year when diversion is made January 1 - December 31
(d) purpose(s) of use Drinking water, domestic uses, garden and fruit tree irrigation.
- Under what conditions may this protest be disregarded and dismissed? (See Attachment, Item b.)
(Conditions should be of a nature that the applicant can address, such as minimum by-pass flows, measuring devices required, acknowledgement of prior rights, etc.)
- A true copy of this protest has been served upon the applicant's attorney by mail.

Date: March 15, 2000

Notes: Attach supplemental sheets as necessary.

Protests must be filed within the time specified in the notice of application.

Jeffery J. Swanson, Attorney
Protestant(s) or authorized representative sign here
Type or print name and title of representative, if applicable

2515 Park Marina Drive, Suite 102
Street Address

Redding, California 96001
City and State

(530) 225-8773

Telephone Number

COPY

**ATTACHMENT TO PROTEST OF APPLICATION 29449
BY JAMES FISHER AND J.W. FISHER LOGGING
(BASED ON INJURY TO PRIOR RIGHTS)**

ITEM 2:

Applicants' appropriation causes, and will cause, a drastic reduction in the natural flow of Stanshaw Creek, particularly during the dry season. This results in insufficient water for Protestants' domestic and irrigation needs, and causes an aesthetic impact to Protestants' riparian property. The diversion also impacts the Stanshaw Creek anadromous fishery.

Applicants should not be given a water right simply because they have operated an illegal and unlicensed diversion for the past few years.

ITEM 6:

This protest may be dismissed if the applicants (1) guarantee minimum year-round stream flows in Stanshaw Creek to meet Protestants' needs as well as those of the instream fishery, (2) agree to stop diverting water to ensure minimum stream flows are satisfied, (3) acknowledge Protestants' prior rights, (4) contribute funding to restore the Stanshaw Creek fishery and to assist with the fish passage project under Highway 96, (5) submit evidence to show availability of water in Stanshaw Creek in excess of those needed for the instream fishery and existing riparian rights (6) submit evidence to support their claimed pre-1914 water right, including evidence of continuous use.

PROTEST

Based on Environmental Considerations, Public Interest, Public Trust, and Other Issues.

(Protests based on prior rights or prior filed applications should be completed on other side of form.)

APPLICATION 29449

1. I, (We) Konrad Fisher
of 1721 Court Street, Redding, California 96001, (530) 244-0909 have read carefully a
copy of, or a notice relative to, Application of Doug Cole, Heidi Cole, Norman Cole
& Caroline Cole to appropriate from Stanshaw Creek
at a point 2,500 feet W, 1,500 feet NE Corner 785,300'N, 1,589,300'E Cal Coord. Zone 1
(S33 T.13N R. 6E, H.B.M.)

2. I, (We) protest the above application on:

☒ **ENVIRONMENTAL ISSUES, ETC.:**

The appropriation will not best conserve the public interest, will have an adverse environmental impact and/or will adversely affect a public trust use of a navigable waterway.

(a) Public interest protests should clearly indicate how the appropriation will affect the public.

(b) Environmental protest should identify specific impacts and provide supporting recitals on issues such as: plants, animals or fish affected, erosion, pollution, aesthetics, etc.

(c) Public trust protests must identify the navigable waters to be affected and how the project will impact public trust values.*

Protests of a general nature (not project specific) or opposed to constitutional or legislated state policy will not be accepted. A request for information or for studies to be conducted is not a protest.

☐ **OTHER ISSUES:**

The appropriation will be contrary to law, will require access rights, will not be in Board's jurisdiction, or concerns other issues.

Facts and, if applicable, points of law which support the foregoing allegations are as follows: (See Attachment, Item 2.)

3. Under what conditions may this protest be disregarded and dismissed? (See Attachment, Item 3.)

(Conditions should be of a nature that the applicant can address and either accept or submit mitigating measures.)

* For the purpose of filing a protest, navigable waters include streams and lakes that may be seasonally navigable in small recreational watercraft.

Date: March 15, 2000

Notes: Attach supplemental sheets as necessary.

Protests must be filed within the time specified in the notice of application.

Jeffery J. Swanson, Attorney
Type or print name and title of representative, if applicable

2515 Park Marina Drive, Suite 102

Redding, California 96001

City and State

(530) 225-8773

Telephone Number

WR 10 (3/93)
COPY

**ATTACHMENT TO PROTEST OF APPLICATION 29449
BY KONRAD FISHER
(BASED ON INJURY TO ENVIRONMENTAL CONSIDERATIONS, ETC.)**

ITEM 2:**Relevant facts:**

- 1) Stanshaw Creek is tributary to the Klamath River. During certain times of the year, Stanshaw Creek is navigable by small recreational watercraft. The Klamath River is also navigable by watercraft.
- 2) Protestant has personally observed salmon at the mouth of Stanshaw Creek that were unable to migrate upstream due to low water levels in the creek. Protestant is willing to provide a sworn declaration or to testify in this regard. Applicants' diversions will likely have a negative impact on the Stanshaw Creek fishery.
- 3) Michael David Fellows, caretaker for Protestant's family ranch, has personally observed salmon in Stanshaw Creek between the mouth and the point where the creek passes beneath State Highway 96. The viability of a fishery in that stretch of the creek is affected by Applicants' appropriation in that it reduces creek flows. Mr. Fellows is willing to provide a sworn declaration or to testify in this regard.
- 4) Lucille Albers, a 69 year old Native American who grew up in the vicinity of Stanshaw Creek has personal recollections of salmon in the creek when she was younger. Ms. Albers is willing to provide a sworn declaration or to testify in this regard.
- 5) The California Dept. of Fish & Game is investigating the feasibility of restoring the anadromous fishery in Stanshaw Creek above its intersection with Highway 96. Protestant is informed that DFG has submitted a letter to the SWRCB regarding the proposed project. The application should not be decided until DFG has evaluated the fish passage project and minimum flows required for instream purposes.

Legal Authority: The State Water Resources Control Board has broad authority to establish minimum flows and take other measures needed for protection of fisheries and other public trust resources. That authority is provided by Article X, Section 2 of the California Constitution, Water Code Sections 100 and 275, the public trust doctrine as articulated by the California Supreme Court in *National Audubon Society v. Superior Court*, (1983) 33 Cal.3d 419, 189 Cal. Rptr. 346, and Water Code Sections 1243 and 1253.

ITEM 3 (dismissal conditions):

This protest may be dismissed under the following conditions: (1) guaranteed minimum year-round stream flows in Stanshaw Creek to enhance the anadromous fishery and to ensure fish survival throughout the dry season, (2) Applicants' agreement to stop diverting water at any time to ensure minimum stream flows are satisfied, (3) Applicants' contribution of funds to restore and enhance the Stanshaw Creek anadromous fishery and to assist with the proposed fish passage project under Highway 96, (4) Applicants must submit evidence to show the availability of water in Stanshaw Creek in excess of those needed for the instream fishery and existing riparian rights and (5) Applicants must submit evidence to support their claimed pre-1914 water right, including evidence of continuous use.

LAW OFFICES OF DONALD B. MOONEY

DONALD B. MOONEY
Admitted in California and Oregon

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Davis, California 95616
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June 24, 2002

VIA FACSIMILE

Mr. Michael Contreras
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Water Rights Complaint Submitted by the Klamath Forest Alliance Alleging Unlawful Diversion of Water From Stanshaw Creek*

Dear Mr. Contreras:

The Klamath Forest Alliance ("KFA") disagrees with the Complaint Unit's conclusions and recommendations contained in your letter dated May 23, 2002, regarding Doug and Heidi Cole's unlawful diversion of water from Stanshaw Creek. The Complaint Unit's conclusions and recommendations are not supported by the evidence or by California water law.

I. **THE SWRCB COMPLAINT UNIT'S CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE OR CALIFORNIA WATER LAW**

A. **Response to Conclusion Number 1**

Conclusion Number 1 states that:

A court of competent jurisdiction would most 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

The primary problem with Conclusion Number 1 is that it states that the Coles' have a pre-1914 appropriative water right "for full domestic and irrigation purposes." This statement fails to quantify the pre-1914 appropriative water right and is inconsistent with the SWRCB staff's previous conclusions regarding the Cole's pre-1914 appropriative water right. Moreover, this statement implies that the Coles may increase their pre-1914 appropriative water right so long as it is used for domestic and irrigation purposes. Such a conclusion is in direct conflict with California water law. Additionally, the conclusion contradicts the

Complaint Unit's May 23, 2002, Memorandum to File which states that "[t]his right has not been quantified. . . ." Thus, if the right has not been quantified and the SWRCB does not know the current or historical demand for domestic and irrigation, a conclusion that a court would find that the Coles have a valid right for "full domestic and irrigation purposes" simply cannot be supported by either the evidence or the law.

"The right of priority . . . attaches to the definite quantity of water that the appropriator has put to reasonable beneficial use in consummating his appropriation." (Hutchins, *The California Law of Water Rights*, at p. 132.) The specific quantity of water is one of its most distinctive features. (*Id.*) Therefore, assuming that the Coles' have a pre-1914 appropriative water right for Marble Mountain Ranch, the Coles are only entitled to the quantity of water that has been continuously diverted and put to a reasonable and beneficial use.

The SWRCB staff has concluded on two separate occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1998 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, Land and Water Use in Klamath River Hydrographic Unit, Table 4 at p. 55) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists. Although the Coles questioned the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles failed to provide any evidence to dispute the estimated demand and they provided no alternate estimate of a higher demand.

When the Coles' predecessors sought an application to appropriate water for domestic and irrigation, the SWRCB staff assessed the ranch's overall domestic requirement to be 0.02 cfs, or approximately 14-acre feet per year. (See Letter dated February 4, 1993, from Katherine Mrowka to Robert E. and Mary Judith Young.) The SWRCB staff further concluded that the water demand for irrigation is that which is required to irrigate 7 acres of alfalfa. (*Id.*) Based upon these assessments and utilizing standard conversion equations, the Coles' combined domestic and irrigation water uses can be met with 0.11 cfs.¹

| | |
|-------------|--|
| Domestic: | 0.02 cfs multiplied by the conversion factor of 1.98 multiplied by 365 days per year equals approximately 14.4 acre feet per day. |
| Irrigation: | The SWRCB staff has previously determined that 1 cfs for each 80 acres of irrigated area is considered reasonable for Siskiyou county. (See letter dated February 4, 1993, from Katherine Mrowka SWRCB staff, to Robert E. and Mary Judith Young, Coles' predecessors-in-interest.) Using the SWRCB staff's methodology, irrigating 7 acres would requires approximately 0.09 cfs. |
| Combined: | Combining the irrigation demand of 0.09 cfs with the domestic demand of 0.02 cfs results in an overall demand rate of 0.11 cfs. |

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Therefore, if a court of competent jurisdiction held that the Coles had a valid pre-1914 appropriative water right, it would most likely quantify that any such right does not exceed 0.11 cfs. The highest amount that the Coles could show that either they or their predecessors have put to a reasonable and beneficial use.

To the extent the Coles rely solely on the historic Stanshaw pre-1914 appropriative water rights, the Coles rights may be further diminished as the Coles' predecessors did not acquire all of the interests in land and water from Stanshaw. (See Exhibit C to letter dated August 20, 2001, from Janet Goldsmith to Harry M. Schueller.) The Coles only obtained a small portion of the original Stanshaw property. Moreover, the Coles have presented no evidence as to the quantity of Stanshaw's pre-1914 appropriative water right that was used on the property now owned by the Coles, or the quantity of water right that was transferred to the Coles.

Thus, neither the evidence nor California water law supports the Complaint's Unit's Conclusion Number 1. As the Complaint Unit failed to address the quantity of water that may be diverted under a claim to a pre-1914 appropriative water right for irrigation and domestic uses, the subsequent conclusion regarding the incidental use of water for power generation amounts to pure speculation.

B. Response to Conclusion Number 2

KFA agrees with Conclusion Number 2 which states in part that "[e]vidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes . . ."

C. Response to Conclusion Number 3

KFA disagrees with Conclusion Number 3, which states that:

With the current irrigation system, most diversions for power purposes during the low-flow periods of the year are incidental to domestic and irrigation needs.

The primary problem with Conclusion Number 3 stems from the Complaint Unit's Conclusion Number 1, which failed to quantify the pre-1914 appropriative water right. By providing an "open ended right", there is no way to determine or conclude that the diversions for power purposes are incidental to the Coles' domestic and irrigation needs.

Based upon the Coles' Application (A029449), the Coles claim a need for 3 cfs for power production. As the Coles' pre-1914 appropriative water right does

not exceed 0.11 cfs, such power generation cannot be characterized as incidental to the Coles' domestic and irrigation needs. If the Coles' diversion for power purposes were incidental to their diversion for consumptive uses, there would not be the significant "return flow" from the Coles' property into Irving creek that exceeds the amount of water flowing in Stanshaw Creek below the Coles' diversion.

The Coles have indicated that if they limit their diversion from Stanshaw Creek to the amount used only for domestic and irrigation, it is not enough water to operate their hydroelectric generator. This is supported by the fact that on the day of the October 16, 2001, field investigation, the Coles were diverting 50 percent of the stream flow and none of it was being applied towards power generation. Therefore, the evidence simply cannot support a finding that the Coles' purported need for 3 cfs for power generation is incidental to any pre-1914 right they may have for domestic and irrigation uses. In fact, the evidence, and the Coles' own admissions support the conclusion that in order for the Coles to generate power, they must divert water from Stanshaw Creek at a rate substantially higher than any rate they may claim under a pre-1914 appropriative water right for domestic and irrigation purposes.

D. Response to Conclusion Number 4

Klamath Forest Alliance agrees with the Conclusion Number 4. It should be noted, however, that more than just *prima facie* evidence supports the conclusion that lower Stanshaw Creek provides critical habitat. Uncontested expert opinions from the California Department of Fish and Game ("DFG"), the National Marine Fisheries Service ("NMFS"), Toz Soto, a fisheries biologist with the Karuk Tribe, and Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University, support Conclusion Number 4. Despite repeated opportunities, the Coles have submitted no evidence to the contrary.

E. Response to Conclusion Number 5

It is the responsibility of the public agencies to protect public trust resources. (See *National Audubon Society v. Superior Court* (1983) 33 Cal. 419, 426 ("before . . . agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests").) The letter and intent of public trust doctrine cannot, nor was it intended to be upheld only by public agencies demanding proof from the non-profit sector when a public trust resource is in jeopardy of being harmed. A private individual or entity seeking to appropriate a public trust resource must bear the burden of demonstrating compliance with the public trust doctrine.

The SWRCB's complaint unit provides no evidence to support a bypass flow recommendation of .7 cfs, or the assertion that, "Bypass flows on the order of 1/2 to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2-3 cfs." (See May 23, 2002, Memorandum to File from Charles A. Rich and Michael Contreras, at p. 10.) Flow connectivity and the presence of juvenile fish on a given day, do not, in and of themselves, prove that a habitat has not been degraded.

Federal, state, tribal and independent fisheries biologists have indicated that the Coles' current diversion decreases the availability and quality of habitat in Stanshaw Creek. The California Department of Fish and Game, (DFG), recommended a year-round bypass flow of 2.5 cfs to be measured at the culverts below Highway 96. DFG acknowledged that steelhead and coho exist in the portion of the creek below Hwy 96, and stated that factors considered in making their recommendation included a desire to maintain cold temperatures in the creek, and an "adequate channel" for fish to access the creek from the Klamath River. DFG also stated that it, "may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek."

DFG rightfully retained the right to change the bypass flow recommendation because the mouth of Stanshaw Creek naturally forms at least 3 channels before it enters the river. When combined with naturally low flows during dry months, the Coles' diversion would, in the absence of periodic manual channeling of the creek's mouth, prevent salmonids from traveling between Stanshaw Creek and the Klamath River. With unimpeded flows however, fish can access the creek from the Klamath River year-round without manual channeling.

The National Marine Fisheries Service, (NMFS), recommended a minimum bypass flow of 1.5 cfs downstream of the point of diversion, requested that tailwater from the Coles' hydroelectric plant be returned to Stanshaw Creek and reserved the right to modify their recommendation, "when CalTrans provides salmonoid passage through the Highway 96 culvert." NMFS cited the preservation of "Thermal refugia" at the mouth of Stanshaw Creek as a primary concern. NMFS also noted that an 8-inch salmonid was stranded in the Coles' diversion flume during the field investigation and requested that measures be taken to prevent such strandings.

Toz Soto, a Fisheries Biologist for the Karuk Tribe's Department of Natural Resources has addressed several concerns associated with the Coles' diversion. In a November 30, 2001 statement about Stanshaw Creek, Mr. Soto wrote:

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Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for out migrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids.

Mr. Soto went on to address a number of other problems with the diversion. These include, but are not limited to, 1) the possible dewatering of established spawning sites, 2) limited access to the creek for adult and juvenile fish, 3) the entrapment of resident fish in the Coles diversion ditch, 4) reduced flows and stream velocity which limit adult spawning and nest building opportunities in lower Stanshaw Creek, and 5) the release of sediment into Stanshaw Creek from the diversion ditch.

The SWRCB's complaint unit disregarded all of the aforementioned expert input and based its bypass flow recommendations on an arbitrary assessment of the flow sufficient for the movement of juvenile fish below the culverts.

According to Dr. Terry D. Roelofs, a renowned professor of fisheries biology at Humboldt State University, reducing summer flow in the portion of Stanshaw Creek between highway 96 and it's confluence with the Klamath River, "decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species."

The Complaint Unit's conclusion and recommendation for a 0.7-cfs is based upon staff's field observation and completely ignores the evidence and recommendations provided by the agencies responsible for protecting the resources in lower Stanshaw Creek.

The SWRCB's actions allowing the unlawful diversion of water from Stanshaw that results in a take of a protected species constitutes a violation of

take prohibition of section 9 of the Endangered Species Act, 16 U.S.C. § 1538. (See *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997), cert. denied, 119 S.Ct.81, and cert. denied, 119 S.Ct. 437 (1998) (when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition); (*Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999) (the failure of government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act).) The same rationale that caused the court in *Strahan* to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the Complaint Unit's decision to allow the Coles to continue an unlawful diversion that is likely to result in a take of a listed species.

F. Response to Conclusion Number 6

KFA disagrees with Conclusion Number 6 which states that "[m]easuring flows on a regular basis in Stanshaw Creek is not practical. All the protestants to the Coles' Application to Appropriate water, including NMFS and DFG, have demanded the instillation of a flow-measuring device as a dismissal term. Such devices are inexpensive, and locations such as the culverts under Highway 96 and the rock flumes above and below the Coles' point of diversion are conducive to their use.

G. Response to Conclusion Number 7

KFA agrees that all sides in this dispute would benefit if a physical solution were implemented, but not if the solution entails the frivolous use of hydropower to the detriment of rare and threatened species. KFA proposes that the Coles use water and power more efficiently, and that they adopt a method of power generation that does not adversely impact critical habitat. To this end, the SWRCB should direct the Coles to research the alternatives to the current operation.² If the Coles cannot devise a way to produce hydropower without adversely impact habitat, then the Coles must adopt an alternative to hydropower. The Coles' property is situated in an exposed, south facing location ideal for solar power. Some combination of solar, wind and/or efficient internal combustion generators are all viable alternatives.

² It should be noted that the Coles' could have halved their water consumption by merely utilizing all 400 feet, rather than 200 feet of the drop available between their 1,200 foot point of diversion and the 800 foot low-point on their property.

Whatever the ultimate source of the Coles' water, the Coles must take steps to utilize it more efficiently. Following recommendations from the SWRCB's Complaint Unit, water should be transported by pipe to prevent loss, and to the diversion to be halted when water is not in use. This also permits the use of sprinklers, which are far more efficient than flood irrigation.

One of the most effective ways for people living off the grid to conserve power is to utilize a battery bank to store power when excess is being produced. Peak energy needs can then be met by combining the use of stored power and produced power. This allows residences and businesses to maintain power production facilities that produce a fraction of the watts they need during peak usage. And a large portion of the time, a residence or business can operate exclusively off of a battery bank.

With the exception of the Marble Mountain Ranch, all residences and businesses known to KFA which operate off the grid, utilize most, if not all of the aforementioned power conservation methods. According to NMFS officials, grants are available for reallocation of power generation capacity. Tribal, SWRCB and DFG employees have offered to help the Coles locate and apply for grants to bring their operation into compliance with the law. It appears that many options are available to the Coles if they would pursue them. Considerable benefit would accrue to the public trust resources of Stanshaw Creek if the Coles' implemented an appropriate physical solution.

II. THE COMPLAINT UNIT'S RECOMMENDATIONS ARE NOT SUPPORTED BY EVIDENCE

A. Recommendation Number 1

The Complaint Unit's recommended actions allow the Coles to continue their unlawful diversion of water from Stanshaw Creek unless the Coles maintain a flow in lower Stanshaw Creek below Highway 96 of approximately 0.7 cfs. The 0.7 cfs bypass requirement, however, is not based upon any scientific evaluation of the needs of Stanshaw Creek and the public trust resources that rely upon flow from Stanshaw Creek, including coho salmon, a threatened species. (See 50 C.F.R. § 102(a)(4).) The 0.7 cfs bypass requirement is based solely upon the SWRCB staff's observations of the flows at the time of the field investigation. In contrast, DFG stated that a 2.5-cfs bypass flow must be required in order to maintain existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead. (See November 21, 2001, Memorandum from Donald B. Koch, Regional Manager, to Edward C. Anton, at p. 2.) Additionally, NMFS' investigation resulted in a recommendation that a 1.5 cfs bypass flow be maintained at all times.

Recommendation 1 is also not supported by the evidence as it references a post-1914 appropriative right derived from Application 29449. The Coles have derived no right to divert water from this application as the SWRCB has not approved the application. Prior to approving the application, the SWRCB must make a determination as to whether unappropriated water is available, and whether the diversion would impact public trust resources and/or other vested water rights.

B. Recommendation Number 2

Recommendation 2(a) provides for the Coles to visually estimate the bypass requirement. Not only is the recommended bypass not supported by evidence, but even if it were implemented, a visual estimation of the bypass provides no ability to ensure compliance with the requirement, or any other appropriate bypass requirement. The SWRCB's recommendation does not indicate how the 0.7 cfs would be monitored or enforced. This is a particular concern to KFA and others as the Coles have expressed their disagreement with any bypass requirements. NMFS recommended that the Coles should be required to install and maintain permanent staff gages at the point of diversion. The installation of such gages would also allow for further investigation as to whether the quantity of water diverted for power generation is in fact simply incidental to the Coles' domestic and irrigation needs.

With regards to recommendation 2(b), any diversion, full diversion of the of the Creek into the Coles ditch would have significant impacts to Stanshaw Creek from the point of diversion to Highway 96. Approval of any such diversion facilities must undergo environmental review under CEQA, and may require formal consultation with the U.S. Forest Service under section 7 of the ESA. (16 U.S.C. § 1536.)

C. Recommendation Number 3

Recommendation 3 states that KFA's complaint against the Coles should be closed. For the reasons stated throughout this response, KFA strongly disagrees with this recommendation. As the Complaint Unit's conclusions and recommendations fail to adequately address the issues raised by the SWRCB staff, NMFS, DFG, and KFA, the complaint should not be closed.

III. The SWRCB Has Failed to Rule on the Coles' Pending Application

The Coles' current Application (A029449) was accepted by the SWRCB on March 27, 1989. In 13 years, however, the SWRCB has failed to conduct a hearing on this application or conduct any environmental review pursuant to the California Environmental Quality Act, Public Resources Code, section 21000 *et seq.* Moreover, despite the current controversy regarding the Coles' diversion

and the impacts to a federally listed species, the SWRCB has provided no indication as to when it intends to conduct hearings on the application or release an environmental document for public review. In the meantime, the SWRCB is allowing the Coles to continue diverting water from a watershed that provides critical habitat to a threatened species.

Quite frankly, much of the current controversy surrounding the Coles' unlawful diversion from Stanshaw Creek can be attributed to the SWRCB's delay in processing the Coles' application and the Coles' lack of diligence in pursuing the application and completely any necessary environmental review. Had the SWRCB acted upon this application in a timely fashion, then the environmental impact report would have been prepared and circulated for public review. Instead, the SWRCB's decision to indefinitely allow the Coles' to continue the unlawful diversion amounts to *de facto* approval of the application without any necessary environmental review.

If the SWRCB does not have the financial resources to conduct the necessary environmental impact report for the Coles' application, then the SWRCB should direct the Coles to deposit an appropriate sum of money for the SWRCB to hire an outside consultant to prepare the EIR. If the Coles or the SWRCB decide not to conduct the environmental review, then the application should be immediately dismissed and the Coles directed to cease all unlawful diversions of water from Stanshaw Creek.

IV. CONCLUSION

The Complaint Unit's May 23, 2002, Memorandum to File states in part that:

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion. (Memorandum to File at p. 8.)

Although in the present action, the Coles have a pending application to appropriate water for power generation, the pending application has not been diligently pursued by either the Coles or the SWRCB. The Coles' application has languished for over 13 years, no environmental review has been conducted, no hearings have been conducted, and no hearing date has been set. Additionally, as demonstrated in this response, as well as in KFA's November 30, 2001, letter, and in DFG and NMFS's respective comment letters, *prima facie* evidence exists to support a finding that the Coles' unlawful diversion adversely impacts public

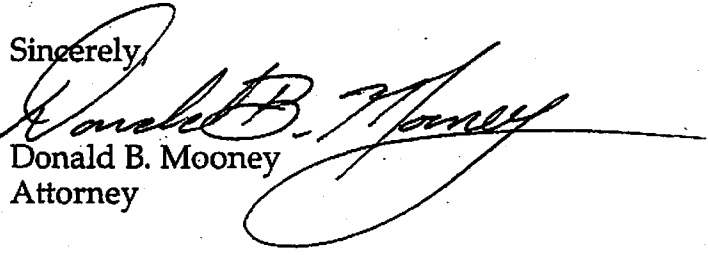
Mr. Michael Contreras

June 24, 2002

Page 11

trust resources, including coho salmon, a federally listed species. Moreover, the Complaint Unit's recommendation for a 0.7 cfs bypass is not supported by any evidence, and in fact directly contradicts the evidence and recommendations submitted by DFG and NMFS. Therefore, based upon the foregoing, the SWRCB should direct the Coles to cease and desist all unlawful diversions.

Sincerely,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Doug and Heidi Cole
Ron Prestly, Department of Fish and Game
Tim Broadman, National Marine Fisheries Services
Margaret Tauzer, National Marine Fisheries Services
William M. Heitler, United States Forest Service, Orleans Ranger District
Jim De Pree, Siskiyou County Planning Department
Konrad Fisher
T. James Fisher, Fisher Logging Co.
Toz Soto, Karuk Tribe, Department of Natural Resources
Mr. Edward C. Anton, Chief, SWRCB Division of Water Rights

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November 30, 2001

VIA FACSIMILE AND
REGULAR MAIL

Charles Rich
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Unlawful Diversion of Water by Doug and Heidi Cole from Stanshaw
Creek, Siskiyou County*

Dear Mr. Rich:

This letter serves as the Klamath Forest Alliance's ("KFA") response to Janet Goldsmith's letter dated August 20, 2001 on behalf of Doug and Heidi Cole, and as a follow-up to the October 17, 2001, site visit to the Marble Mountain Ranch and Stanshaw Creek. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. The Coles' unlawful diversion of water from Stanshaw Creek poses a risk to these public trust resources, primarily coho salmon and steelhead. To this end, KFA requests that the State Water Resources Control Board ("SWRCB") take all appropriate action to curtail the unlawful diversions and to protect the public trust resources that are at risk from the unlawful diversions.

The unauthorized diversion of water subject to appropriation under the provisions of the Water Code is a trespass. (Water Code, § 1052.) Moreover, Water Code, § 1825 provides that "[i]t is the intent of the Legislature that the state should take vigorous action to . . . prevent the unlawful diversion of water. In the present case, the SWRCB staff has already determined that the Coles' diversion of water in excess of 0.11 cfs constitutes an unauthorized diversion of water. Additionally, the SWRCB staff has determined that any diversion of water for the generation of hydroelectric generation requires an appropriative water right permit. Thus, the Coles' current diversion of water from Stanshaw Creek constitutes an unlawful diversion of water.

The Coles' current diversion practices can be separated into two areas. First, the extent of the Coles' pre-1914 appropriative water rights for domestic and irrigation uses and whether their current diversion from Stanshaw Creek and water use exceed any claim to a pre-1914 appropriative water right, and thus constitutes an unlawful diversion. Second, whether the Coles' diversion of water for hydroelectric generation constitutes an unlawful diversion of water. If it does

Mr. Charles Rich
November 30, 2001
Page 2

constitute an unlawful diversion of water, then should the SWRCB take action to prevent the unlawful diversion of water as provided for in Water Code sections 1052 and 1825? As discussed below, the Coles' current diversion of water exceeds any pre-1914 appropriative right for domestic and irrigation uses. Additionally, the Coles' do not possess a pre-1914 appropriative water for hydroelectric generation. Finally, and most importantly, the Coles' unlawful diversion harms coho salmon and steelhead.

1. The Coles' Current Diversions for Domestic and Irrigation Exceed Any Claim to a Pre-1914 Appropriative Water Right

Assuming the Coles can establish that they are the successors in interest to the Stanshaw pre-1914 appropriative water right, any pre-1914 appropriative water right is limited to the amount of water put to a reasonable and beneficial use. (Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) The SWRCB staff has concluded on at least two occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1993 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, *Land and Water Use in Klamath River Hydrographic Unit*, Table 4 at p. 55.) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists.

Although the Coles question the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles provide absolutely no evidence to dispute the estimated demand and they provide no alternate estimate of a higher demand. The Coles argue that Mr. Hayes believes that he *may* have underestimated his existing uses because it was based upon a single flow measurement at a time when he was not irrigating. The Coles, however, provide no evidence to support a higher demand rate at that time. Moreover, as indicated in the SWRCB's September 15, 1998, letter, the information contained in DWR Bulletin 94-6 was verified by Marvin Goss, Forest Service hydrologist, who lived on the Coles' property while it was under prior ownership. "Mr. Goss evaluated the capacity of the ditch as well as measuring the actual amount of water put to generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel." (Schueller Letter at p. 1.)

The SWRCB's September 15, 1998, letter indicates that in 1998, the Coles constructed a reservoir upon their property. Any claim the Coles may have to a pre-1914 appropriative water does not support the diversion of water to a reservoir constructed in 1998. Such use constitutes an expansion of the water right for which an application to appropriate water must be filed. Even though the SWRCB brought this matter to the Coles' attention over three years ago, it is KFA's understanding that the Coles continue to use of the reservoir and have not

filed any application to appropriate water for such use. This constitutes an unauthorized diversion of water for which the Coles have made no attempt to remedy. Thus, the SWRCB should direct the Coles to cease and desist from diverting water to this storage facility, unless and until the Coles obtain a permit for such use.

At the site visit on October 16th, the SWRCB staff measured the flow of Stanshaw Creek at the point of diversion ("POD") to be approximately 1.6 cubic feet per second ("cfs"). The Coles were diverting approximately 50 percent of stream flow. At the time, however, the Coles were not generating any power from the diverted water. Thus, the entire diversion was for domestic and irrigation uses. This quantity of diversion exceeds the Coles' pre-1914 appropriative water right for domestic and irrigation purposes. As indicated in the SWRCB's September 15, 1998, letter, the Coles' pre-1914 appropriative water right for domestic and irrigation use is limited to 0.11 cfs. This amount is supported by Katherine Mrowka's February 4, 1993, letter to the Robert and Mary Young, the Coles' predecessors' in interest.

Based upon the substantial evidence, and essentially, uncontested evidence, any quantity of water diverted from Stanshaw Creek used for domestic and irrigation that exceeds 0.11 cfs constitutes a trespass and unlawful diversion of water

2. The Coles' Do Not Possess the Right to Divert Water For Hydroelectric Generation

The Coles' August 20th letter implies that the Coles have a pre-1914 appropriative water right to divert 3.0 cfs from Stanshaw Creek. The substantial evidence, however, indicates that no such water rights exist and that the Coles' current diversions constitute a trespass and unlawful diversion of water. In fact, the evidence submitted by the Coles, as well as Doug Cole's own admissions, demonstrate that hydroelectric generation began after 1945 and has increased since that time. In a letter dated April 9, 2000, from Doug Cole to Konrad Fisher, Mr. Cole stated that:

Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

(A copy of Mr. Coles' April 9, 2000, letter is attached as Exhibit A.)

Mr. Hayes' April 30, 2000, Declaration submitted with the Coles' August 20th letter also supports the conclusion that hydroelectric generation has been expanded over the years. Mr. Hayes' Declaration indicates that in 1945, there existed a 4 kw pelton wheel which was upgraded to a 9 kw pelton wheel, and in

1965, upgraded to a 100 kw pelton wheel. It should be noted also, as discussed above, in 1963, the quantity of water being diverted from Stanshaw Creek was 0.49 cfs and the ditch capacity was only 1.25 cfs.

The evidence supports Mr. Coles' statement that in about 1945, the ranch began hydroelectric generation. Mr. Cole's contention, however that no increase in stream contention that such use did not increase the quantity of water diverted from Stanshaw Creek is not supported by the evidence, in light of the fact that the Coles seek to divert up to 3 cfs for hydroelectric generation: an amount six times greater than previously documented uses from Stanshaw Creek.

The Coles' August 20th letter provides a description of the history of uses in which it describes hydroelectric generation as one of the historical uses of water on the ranch. This discussion, however, fails to state when such hydroelectric uses commenced. The Coles' letter implies that since an old pelton wheel was used for the generation of power, the date power generation commenced can be traced to the age of the pelton wheel. This does not allow for the possibility that when power generation began in 1945 as acknowledged by Doug Cole, that the previous owners used an older pelton wheel. Without some type of corroborating evidence, the mere existence of an old pelton wheel does not establish a pre-1914 appropriative water right. Additionally, the mere existence of a pelton wheel does not establish that any claimed water right has been continuously used since 1914. Finally, the old pelton wheel, along with Mr. Hayes' Declaration does not address the issue that since 1955, the ranch has increased its use of water for the hydroelectric generation. A trend followed by the Coles in their current diversions.

3. The SWRCB Should Direct the Coles to Cease All Unlawful Diversions

The Coles state that KFA failed to provide any factual basis that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. Additionally, the Coles' assert that no specifics are given of just how their unauthorized diversion of the waters of Stanshaw Creek are affecting either coho salmon or steelhead.

These questions were answered unequivocally at the site visit, as well as in the National Marine Fisheries Service's ("NMFS") November 15, 2001, letter to Charles Rich. There is uniform agreement among the fisheries biologists that have visited the Stanshaw Creek and analyzed the impacts of the Coles' diversions that the thermal refugia at the mouth of Stanshaw Creek is an important habitat element. (See NMFS' Letter dated November 15, 2001, Memorandum dated November 29, 2001 from Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University (Exhibit B); and Memorandum dated November 30, 2001, from Toz Soto, Fisheries Biologist, Karuk Tribe, Department of Natural Resources (Exhibit C).) As indicated in NMFS' letter, and by Mr. Soto, the natural flows from Stanshaw Creek provide

the necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek.

Currently there exists no instream flow requirements for Stanshaw Creek. As a result, without any regulatory oversight, the Coles have diverted up to 3.0 cfs from Stanshaw Creek regardless of amount of instream flow remaining in Stanshaw Creek. The United States Forest Service's flow data from September 2000, indicates that the Coles were diverting nearly 3.0 cfs from Stanshaw Creek when there averaged only 3.26 cfs above the point of diversion. Thus, flow at the culvert averaged less than 0.4 cfs. (See Select Middle Klamath Tributary Flow Summary, Table 1: 2000 Low Flow Discharge Rates, Exhibit D)

According to Mr. Soto's review and analysis, "Stanshaw Creek provides important thermal refugia habitat for anadromous salmonids in the Klamath River." (See Exhibit C.) Additionally, "[w]ith proper flow, habitat in Stanshaw Creek is suitable for summer and winter rearing coho salmon." (*Id.*) The Coles' current diversion limits thermal refugia habitat at the mouth of Stanshaw Creek. (*Id.*) In order to maintain a properly functioning thermal refugia habitat at the mouth of Stanshaw Creek, the water diverted from Stanshaw Creek must be returned to Stanshaw. (*Id.*)

In Professor Roelofs' analysis, he concluded that::

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkel) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. (Exhibit B.)

The reduced stream flows also limit access to the creek for adult and juvenile salmonids. (Exhibit C.) The reduced flows and velocity also reduce adult spawning and nest building opportunities in lower Stanshaw Creek. (*Id.*) Another problem with the Coles' current diversion practices is that the diversion intake is not screened and salmonids are being entrained in the diversion ditch. (*Id.*) Finally, the Coles' rock dam has no ability to control or measure the amount of flow diverted from Stanshaw Creek. (*Id.*)

Based upon the foregoing, substantial evidence demonstrates that the Coles' current diversion practices have a direct impact on coho and steelhead, as well as their habitat. The Coles, however, have offered no expert opinion or analysis as to the harm and potential harm resulting from their unlawful

diversions. Such harm to and potential harm to coho salmon and steelhead justify, and in fact mandate, that the SWRCB direct the Coles to cease their unlawful diversions unless and until the Coles obtain an appropriative water right and have taken appropriate steps to ensure that the downstream resources are not harmed by their diversion.

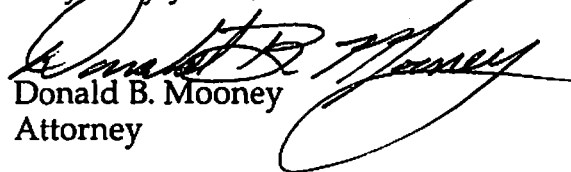
4. Conditions to Protect Public Trust Resources Must Be Imposed Upon Any Future Diversions

If the SWRCB does not direct the Coles to cease their unlawful diversions, then the SWRCB must require that the Coles maintain a minimum instream flow in Stanshaw Creek below the point of diversion and below the Highway 96 culvert.

If the SWRCB allows the Coles to continue their unlawful diversions, then, at an absolute minimum, it must impose the conditions outlined in NMFS' November 15, 2001, letter, in order to reduce any harm to downstream habitat and public trust resources. Such conditions include returning the flows to Stanshaw Creek before creek crosses Highway 96; install a fish screen at the point of diversion, install a diversion structure at point of diversion in order to control and limit the quantity of water diverted, install stream flow measuring device at the point of diversion and the point of return on Stanshaw Creek; provide access to Department of Fish and Game and NMFS for monitoring. Finally, the SWRCB should impose minimum instream flow and bypass requirements as recommended by NMFS.

As any instream flow and bypass requirements at this time would only be interim, pending the SWRCB's consideration of the Coles' application to appropriate water, KFA retains the right to reevaluate the minimum bypass and instream flow recommendations, as well as the point of return to Stanshaw Creek, KFA determines that such activities raise creek temperature and/or harm fish and public trust resources.

Very truly yours,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Felice Pace
Michael Contreras

Attachments

EXHIBIT A

April 9, 2000

Konrad Fisher
1721 Court Street
Redding, California 96001

Dear Mr. Fisher:

We have received a copy of your protest of water rights application #29449 and hereby wish to respond to your concerns.

Our application has resulted from the process of the State's ongoing review of water usage in the State of California and the consequent updating and refining of all water usage permits. We currently operate a sixty-acre, year-round guest ranch which borders on the Klamath River and which lies between Irving Creek to the east and Stanshaw Creek to the west. Water has been continuously diverted from Stanshaw Creek to this property since about 1865. Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

In the second paragraph of the application notice, the wording is such as to suggest that we have the intention of diverting new water from Stanshaw Creek when, in fact, we are not. Apparently, the wording here is standard for all water rights applications, regardless of the specific nature of the project(s) involved. This application is being made for the sole purpose of satisfying a requirement of the State that any hydroelectric generation plant such as ours, regardless of how long it has been in operation, must now be formally permitted.

Approval of this permit application will

- not injure any existing water rights, since no reduction in Stanshaw Creek flow will result.
- not result in any adverse impact on the environment since nothing in the project description calls for any changes in the habitats bordering on the existing project. The power plant in question is situated within a waterway closed to migratory fish by a culvert under highway 96 and cannot, therefore, have any adverse effect on migratory fish. The existing project has been carefully studied by representatives of the State Department Of Fish And Game (Yreka office), the

(Page 1 of 2 pages)

Federal Department Of Forestry, and the State Water Resources Control Board and ~~no complaints have been registered by any of~~ these agencies regarding the health of the ecosystems adjoining the project.

- ~~not~~ work counter to public interest. In fact, the existance of the water canal along which the generation plant is situated provides for a better year-round flow in Irving ^{tree} Creek, thus aiding fish spawning there. In addition, property immediately to our southwest, owned by a Mr. Neil Tocher, is supplied by water diverted from our system. Mr. Tocher has responded favorably to our permit request. Finally, the operation of our hydroelectric plant eliminates the need for our dependence on over-burdened public utilities. *we want*
- ~~not~~ be contrary to any laws, either county or state. Our current diversion of water from Stanshaw Creek is authorized under a pre-1914 water rights agreement which is on file in the Siskyou County offices. .

Please reconsider your protest of our application to preserve (~~not expand~~) a project which has been in existence for over 55 years and which is essential to our livelihood. If you have any questions or further concerns, please contact us directly at the address or phone number given below.

Sincerely,

Douglas & Heidi Cole

Marble Mountain Ranch
Douglas and Heidi Cole, owners
92520 Hwy 96
Somes Bar, Calif. 95568
(530) 469-3322



Department of Fisheries Biology

29 November 2001

To: Whom It May Concern

Terry D. Roelofs
 From: Terry D. Roelofs, Professor

Subject: Appropriative Water Rights Application 29449 on Stanshaw Creek

Several months ago I was asked by Mr. Konrad Fisher to render an opinion regarding a water rights application to divert water from Stanshaw Creek, a Klamath River tributary in Siskiyou County, California. On 17 November 2001 I inspected the portion of Stanshaw Creek between Highway 96 and the Klamath River. Joining me on this site visit were Dr. Walt Duffy, Leader, California Cooperative Fisheries Research Unit at Humboldt State University, Mr Toz Soto representing the Karuk Tribe of California, and Mr. Michael David Fellows, caretaker of the Fisher Ranch. I have read an Environmental Field Report written by Robert E. Miller of the California State Water Resources Control Board describing a site visit to Stanshaw Creek attended by representatives of the National Marine Fisheries Service, California Department of Fish and Game, Karuk Tribe of California, and several non-agency personnel. I have also reviewed a letter dated 15 November 2001 by James R. Bybee of the National Marine Fisheries Service addressed to Mr. Charles Rich of the California State Water Resources Control Board.

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkle) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. I believe that these concerns should be addressed before Application 29449 is approved.

EXHIBIT C

Karuk Tribe of California



Department of Natural Resources
Post Office Box 282
Orleans, CA 95556
(530) 627-3446 Fax (530) 627-3448

Administrative Office
Post Office Box 1016
Happy Camp, CA 96039
(530) 493-5305 Fax (530) 493-5322

Karuk Tribal Health Clinic
Post Office Drawer 249
Orleans, CA 95556
(530) 627-3452 Fax (530) 627-3445

Karuk Department of Natural Resources
Comments on the Stanshaw Creek Diversion

November 30, 2001

Stanshaw creek provides important thermal refugia habitat for anadromous salmonids in the Klamath River. Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for outmigrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids. Spawning and nest building sites for adult coho and steelhead are limited by the diversion. With augmented flows, established spawning sites are at risk of being dewatered.

Problems

1. The current diversion limits thermal refugia habitat associated with cold water input to the Klamath River. Diverted water must be returned to maintain properly functioning thermal refugia habitat at the mouth and in the lower reach of the creek.
2. Access to the creek for adult and juvenile salmonids is limited because of the diversion. Connectivity to the temperature-impaired Klamath River must be maintained to allow migration of cold-water dependant salmonids into Stanshaw Creek.
3. The diversion intake is not screened and salmonids are being entrained in the diversion ditch. A fish screen is needed to keep fish from being trapped and harmed by the hydro generator.
4. Reduced flows and reduced stream velocity limits adult spawning and nest building opportunities in lower Stanshaw Creek.
5. Flow below the diversion intake is not adequate for salmonid migration and rearing.
6. Slope failures associated with overtopping along the diversion ditch are a sediment sources to Stanshaw Creek.
7. The primitive nature of the rock dam type intake has no provision to control the amount of flow diverted.

For questions pertaining to these comments please contact the director of Karuk Department of Natural Resources, Leaf Hillman or fisheries biologist, Toz Soto at (530) 627-3446.

Sincerely,



Toz Soto, Fisheries Biologist

EXHIBIT D

Select Middle Klamath Tributary Flow Summary
Table 1: 2000 Low-Flow Discharge Rates

| Stream | Location | Date | Flow #1 | Flow #2 | Average |
|--------------|---|------|---------|---------|---------|
| Portuguese | above culvert | 9/19 | 1.50 | 1.84 | 1.67 |
| Indian | at mouth | 9/19 | 56.71 | 54.68 | 55.70 |
| Walker | first bridge | 9/19 | 6.14 | 5.60 | 5.87 |
| Grider | near bridge across Grider | 9/19 | 22.15 | 20.29 | 21.22 |
| Independence | 300' up from mouth | 9/20 | 15.52 | 13.78 | 14.65 |
| Oak Flat | under the bridge | 9/20 | 1.49 | 1.46 | 1.48 |
| Elk | near mouth, near bridge | 9/20 | 42.61 | 40.27 | 41.44 |
| China | near culvert | 9/20 | 1.70 | 1.66 | 1.68 |
| Clear | under bridge | 9/20 | 43.66 | 45.25 | 44.46 |
| Swillup | 400' up from Highway 96
(under hanging water line) | 9/21 | 3.40 | 3.33 | 3.37 |
| Coon | 300' up from culvert | 9/21 | 1.06 | 1.08 | 1.07 |
| Dillon | 200' downstream from 96
bridge | 9/21 | 27.00 | 26.23 | 26.62 |
| Ti | 200' upstream from
water filling station | 9/21 | 4.91 | 5.40 | 5.16 |
| Sandy Bar | 300' from mouth | 9/21 | 3.05 | 2.88 | 2.97 |
| Irving | at end of foot trail | 9/21 | 7.41 | 7.59 | 7.50 |
| Stanshaw | at culvert | 9/22 | 0.35 | 0.40 | 0.38 |
| Stanshaw | above water intake | 9/27 | 3.09 | 3.42 | 3.26 |
| Rogers | 200' from mouth | 9/22 | 4.38 | 4.71 | 4.55 |
| Fort Goff | below culvert | 9/26 | 4.27 | 4.00 | 4.14 |
| Seiad | *not surveyed | | | | |
| Thompson | at bridge | 9/26 | 10.56 | 12.15 | 11.36 |
| Rock | at mouth | 9/27 | 12.02 | 11.87 | 11.95 |

* not surveyed due to private property
source: USFS Happy Camp Fisheries Dept.

| DATE | TIME | LOCATION | WIND | TEMP | REL. HUM. | SEA | WAVE | WIND | TEMP | REL. HUM. | SEA | WAVE |
|------|------|----------|------|------|-----------|-----|------|------|------|-----------|-----|------|
| 12/1 | 0800 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/1 | 1200 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/1 | 1600 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/1 | 2000 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/2 | 0400 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/2 | 0800 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/2 | 1200 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/2 | 1600 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/2 | 2000 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/3 | 0400 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/3 | 0800 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/3 | 1200 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/3 | 1600 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/3 | 2000 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/4 | 0400 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/4 | 0800 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/4 | 1200 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/4 | 1600 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/4 | 2000 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/5 | 0400 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/5 | 0800 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/5 | 1200 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/5 | 1600 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/5 | 2000 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/6 | 0400 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/6 | 0800 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/6 | 1200 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
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| 12/6 | 2000 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/7 | 0400 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/7 | 0800 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/7 | 1200 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/7 | 1600 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |
| 12/7 | 2000 | 10N 155E | 10 | 28 | 85 | S | 2 | 10 | 28 | 85 | S | 2 |





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

March 8, 2000 F/SWR4:WH

Harry Schueller
Chief, Division of Water Rights
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

Dear Mr. Schueller:

By this letter the National Marine Fisheries Service registers its protest to the application for appropriative water right 29449 filed by Doug Cole, et al. to divert water from Stanshaw Creek, which is tributary to the Klamath River. The Project proposes to divert 3 cfs for the purpose of hydroelectric generation. Stanshaw Creek, which lies within the Klamath River watershed, may support or contribute to sustaining populations of the Central California Coast Evolutionarily Significant Unit (ESU) of coho salmon.

Background

Coho salmon (*Oncorhynchus kisutch*) comprising the Central California Coast ESU are listed as threatened (61 Fed. Reg. 56138; Oct. 31, 1996) under the Endangered Species Act (ESA). Protective regulations were published for coho on October 31, 1996. These protective regulations make it unlawful to "take" coho under section 9 of the ESA. "Take" as defined in the ESA, includes, in part, to harm or harass the species. These protective regulations describe certain activities that may impact coho and result in legal liability. These activities include, in part:

Unauthorized destruction/alteration of the species' habitat, such as removal of large woody debris or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flow.

In contrast to the life history patterns of other anadromous salmonids, coho salmon in California generally exhibit a relatively simple 3-year life cycle. Adult salmon typically begin the freshwater migration from the ocean to their natal streams with the first fall rains. Upstream migration will continue from October to March, generally peaking in December and January (Shapovalov and Taft 1954).

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DIV. OF WATER RIGHTS
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Coho fry emerge from redds, in 38 to 101 days depending on stream temperature (Laufle et al. 1986). After emergence, the stream flow conditions and water temperature play a large role in survival. Low summer flows reduce potential rearing areas, may cause stranding in isolated pools, and increase vulnerability to predators (Sandercock 1991). Also the combination of reduced flows and high ambient air temperatures can raise the water temperature to the upper lethal limit of 25°C for juvenile coho (Brett 1962). Later in the year, high winter flows in typical coastal streams may be hostile to juvenile coho, causing displacement and disrupting their habitat and food sources. Juvenile coho show a preference for habitat containing deep pools (1 m or more), logs, rootwads, or boulders in heavily shaded sections of stream. Structurally complex streams that contain stones, logs and bushes in the water support larger numbers of fry (Scrivener and Andersen 1982). Although coho juveniles are found in both pool and riffle areas of a stream, they are best adapted to holding in pools (Hartman 1965).

Proposed Diversion

Appropriation of water will be accomplished by directly diverting 3 cfs from Stanshaw Creek for hydroelectric power generation via flume of 12-inch deep, 24-wide, and 5,200 ft long, then through a penstock of 16-inch diameter, 455 ft long steel pipe. The penstock uses a 200 ft fall to generate a maximum of 33.9 kilowatts at 80% efficiency at a powerplant just above Irving Creek. After use, the water will be returned to Irving Creek through a ditch, and thence to the Klamath River. The applicant has requested to divert water year-round, from January 1 through December 31. Stanshaw Creek, like other Northern California streams, is subject to critical, low flows during much of the year. Granting the proposed diversion will reduce flows in these streams and may degrade habitat necessary to the existence of certain life stages of coho salmon. Alteration of stream flows can result in salmonid mortality for a variety of reasons: migration delay resulting from insufficient flows or habitat blockages; loss of sufficient habitat due to dewatering and blockage; stranding of fish resulting from rapid flow fluctuations; entrainment of juveniles into poorly screened or unscreened diversions; and increased juvenile mortality resulting from increased water temperatures (Bergen and Filardo 1991; California Advisory Committee on Salmon and Steelhead Trout 1988; California Department of Fish and Game 1991; Columbia Basin Fish and Wildlife Authority 1991; Palmisano et al. 1993; Reynolds et al. 1993).

Based upon the need to protect and recover runs of listed coho salmon in the Klamath River watershed, we find it necessary to protest the proposed project because:

- 1) The Klamath River watershed supports federally listed coho salmon. Stanshaw Creek, upon which the proposed diversion would occur, lies within the Klamath River watershed and may support or contribute to the survival of this species.

structures also have the potential to entrain fishes, with resulting mortality.

Recommendations

Based upon the above concerns and potential impacts of the proposed project, we recommend that the project be modified to include the following mitigative provisions:

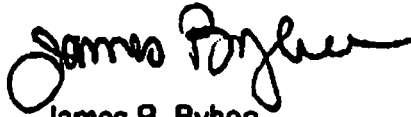
- a) Provide a minimum bypass flow that adequately protects coho salmon in reaches downstream from the point of diversion during all days of the year. The determination of the bypass flow's adequacy can be based on site specific biological investigations conducted in consultation with CFG and NMFS staff. Given the historically low flows during summer months and high temperatures in the Klamath River, we recommend that diversions not occur during the period June 1 through October 1.
- b) the plan should avoid construction or maintenance of a dam or diversion barrier across Stanshaw Creek.
- c) natural, periodic, intermediate and high flows should be maintained immediately below the project. This is a complex issue that concerns potential cumulative impacts of this and other upstream permitted and licensed water diversions within the Stanshaw Creek watershed. Protection of intermediate and high flows can be accomplished through an assessment of cumulative impacts and placing limits on the rate of instantaneous water withdrawals from the stream.
- d) the potential effect of the project on upstream and downstream movements of anadromous salmonids must be addressed. If anadromous salmonids ascend Stanshaw Creek or have the likely potential to ascend this tributary then adequate passage facilities and screening at the diversion intake should be provided.
- e) the proposed project should provide California Department of Fish and Game personnel access to all points of diversion and places of use for the purpose of conducting routine and or random monitoring and compliance inspections.

Because of the presence of federally and state listed species in the Klamath watershed, continued development of the watershed without a coordinated watershed plan would be inconsistent with the purposes of the California Endangered Species Act, the Federal Endangered Species Act, sections 100, 1243, 1243.5, and 275 of the State Water Code and the State Water Resources Control Boards's obligations and authorities under the Public Trust Doctrine.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning

the contents of this letter please contact Dr. William Hearn at (707) 575-6062.

Sincerely,



James R. Bybee
Protected Habitat Manager
Northern California

References Attached

cc: Doug Cole, et al., Applicants
R. Hight, CDFG, Sacramento
D. Koch, CDFG, Redding

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**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE****Southwest Region****777 Sonoma Avenue, Room 325****Santa Rosa, California 95404****November 15, 2001 151416-SWR-01-SR-928:SKL**

Mr. Charles Rich, Chief
Complaints Unit
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

Dear Mr. Rich:

This letter represents our findings and protest dismissal terms of appropriative water rights application 29449. It is based on a State Water Resources Control Board (SWRCB) field investigation attended by Dr. Stacy Li, National Marine Fisheries Service (NMFS), Mr. Chuck Glasgow (NMFS), and Mr. Tim Broadman and Mr. Dave Rielly (NMFS Law Enforcement) on 17 October 2001 in relation to a complaint of an unpermitted diversion on Stanshaw Creek by Doug and Heidi Cole. The Coles have directly diverted up to 3 cubic feet per second (cfs) from Stanshaw Creek (watershed is approximately 3.2 square miles) the year round (when flows are available) for the purposes of domestic use and hydroelectric generation. The water used for hydroelectric generation is diverted into Irving Creek in an adjacent watershed. Irving Creek is also tributary to the Klamath River. The Coles have applied for appropriative rights for the hydroelectric use, but have pre-1914 rights for domestic use. The amount of the pre-1914 use is approximately 0.5 cfs.

NMFS is interested in this project because the Klamath River watershed supports federally threatened Southern Oregon/Northern California coasts Evolutionarily Significant Unit (ESU) of coho salmon (*Oncorhynchus kisutch*).

Existing Project

Typically each year the Coles must manually construct a structure of cobbles and boulders to divert water from Stanshaw Creek. The unscreened diversion delivers water via an earthen ditch approximately 1-foot deep, 2-foot wide, and 5200 feet long. The penstock is a steel pipe 16-inches in diameter and 455 feet long. A head of 200 feet is used to generate a maximum of 33.9 kilowatts with a Pelton wheel. Water not consumed by domestic use is returned to the Klamath River via



Irving Creek. With the diversion active, approximately a mile of Stanshaw Creek has reduced flows; this reach is well shaded by topographic features as well as a thick canopy coverage of about 60%. About 1/4 mile of Irving Creek has augmented flows from Stanshaw Creek.

Stanshaw Creek enters the Klamath mainstem near River Mile (RM) 76. Irving Creek also enters the Klamath mainstem near RM 75. Stanshaw Creek has a smaller watershed than Irving Creek. While both streams are not gauged, the few measurements of Irving Creek and Stanshaw Creek during the summer suggest a summer base flow in Irving Creek as more than double (7 cfs vs. 3 cfs) that of Stanshaw Creek. Both streams provide cooler water than the mainstem Klamath River during the summer. Because water temperatures during the summer in the mainstem Klamath River are stressful to salmonids, it is likely that rearing juvenile anadromous salmonids use each tributary as a thermal refuge. California Department of Fish and Game collected juvenile coho salmon and steelhead with a backpack electrofisher in the portion of Stanshaw Creek 100 yards downstream of Highway 96 in July 2000. There is a culvert under Highway 96 on Stanshaw Creek that may limit anadromous fish access to upstream reaches.

The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage.

At the site we reviewed the project, examined the point of diversion (POD), the flume, the penstock, the reach downstream of the POD, and the reach of Stanshaw Creek between Highway 96 and the Klamath River.

Terms to Remove Protest

NMFS finds that the following conditions are necessary and sufficient to remove our protest:

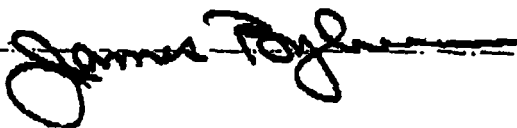
- a) **Diversion Intake:** Limit diversion flow to a maximum of 3 cfs. The applicant proposes to divert a maximum of 3 cfs, but the existing intake has no provision to control the amount of flow diverted. There are a variety of methods of controlling flow including: head gates with adjustable undershot weir, notched weir, orifice, dimensional flume, and the like (See Bureau of Reclamation 1997).
- b) **Fish screen:** The existing diversion is not adequately screened to prevent entrainment. Any diversion should be adequately screened. We saw an 8" salmonid in the flume during the field investigation. The fish screen should follow NMFS/CDFG fish screen criteria. However, these fish screen criteria were developed with large diversions in mind. There may be adequate screening alternatives for smaller diversions such as this one. Please contact Mr. Richard Wantuck, NMFS (707) 575-6063 for technical advice regarding fish screens in small drainages.
- c) **Return flow:** Return the diverted flow from Stanshaw Creek back to Stanshaw Creek instead of to Irving Creek. Thermal refugia during the summer is an important habitat element in the Klamath River. It is our belief that diverted flow returned to Stanshaw Creek will provide necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek without compromising the thermal refuge on Irving Creek. During the field investigation, Mr. Cole,

the applicant, stated that we would be willing to move the hydroelectric generating plant so that the tail race flow would return to Stanshaw Creek. The new return would be located on Stanshaw Creek upstream of Highway 96.

- d) **Bypass flows:** This is based upon the assumption that 3 cfs is a representative summer base flow. The nature of the point of diversion precludes precise bypass flows due to leaf fall or debris accumulation. However, bypass flows are of major concern only at low flows, i.e., 3 cfs. We believe that there is ample canopy that keeps the stream cool downstream of the POD provided that most of the flow is in Stanshaw Creek during low flow periods. Therefore, we recommend that a minimum bypass flow of 1.5 cfs be maintained at all times downstream of the POD. This bypass flow represents 50% of the summer base flow. This bypass flow recommendation assumes tailwater from the hydroelectric plant will be returned to Stanshaw Creek. Therefore, the thermal refuge downstream of Highway 96 will be maintained. This bypass flow recommendation may be modified when CalTrans provides salmonid passage through the Highway 96 culvert. The applicant must install and maintain permanent staff gages at the point of diversion to allow monitoring and facilitate release of bypass flows. Alternatively, the applicant may perform a comprehensive biological and hydrological study to identify an alternate biologically based bypass flow.
- e) **Monitoring:** Regardless of the quality of stream at the point of diversion, the proposed project should provide California Department of Fish and Game personnel access to all points of diversion and places of use for the purpose of conducting routine and or random monitoring and compliance inspections.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning the contents of this letter please contact Dr. Stacy K. Li at (707) 575-6082.

Sincerely,



James R. Bybee
Habitat Manager
Northern California

cc: Doug and Heidi Cole
Irma Lagomarsino, PRD, NMFS, Arcata
Tim Broadman, Law Enforcement, NMFS, Arcata



State Water Resources Control Board

WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
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Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

Memorandum to File

To: File Number 262.0 (47-40-01)

Date:

From: Charles A. Rich Charles A. Rich, Chief
Complaint Unit
Michael Contreras Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 – 200 feet above the terminal

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommend that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for power purposes in her letter of August 20, 2001, Complaint Unit staff are not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believe that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The SWRCB has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Another weighed factor is the extent of injury caused by the water diversion. If an investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide not to take enforcement action. The SWRCB may also consider the degree of hardship enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phylis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. Pre-1914 appropriative claim of right for domestic / irrigation use. This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. Application A029449 – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. Small Domestic Registration D030945R – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "innocent until proven guilty" concept of the law.

- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: *"The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage."* While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of ±50%.

problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of $\frac{1}{2}$ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 – 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of 1/2 to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

CONCLUSIONS

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their 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).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Cole's ditch is not allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) if full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.



State Water Resources Control Board

WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
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Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

In Reply Refer to:
363:MC:262.0(47-40-01)

MAY 23 2002

Klamath Forest Alliance
c/o Law offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Mr. Doug and Mrs. Heidi Cole
c/o Ms. Jan Goldsmith
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Ladies and Gentlemen:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE – ALLEGING UNREASONABLE DIVERSION

Complaint Unit staff of the Division of Water Rights have completed their investigation of the complaint lodged by the Klamath Forest Alliance (KFA) against Doug and Heidi Cole (dba Marble Mountain Ranch). A copy of the Staff Report of Investigation regarding this matter is enclosed. Complaint Unit staff reached the following conclusions:

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Coles' ditch to cover both the diversion and bypass requirement with subsequent measurement and release of a bypass back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

California Environmental Protection Agency

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Based on these conclusions, Complaint Unit staff believe the following actions are appropriate:

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their Point of Diversion to maintain a flow in lower Stanshaw Creek below the Highway 96 culverts similar to that present during the October 16, 2001, field investigation (≈ 0.7 cfs).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Coles' ditch is not allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small, hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or
 - b) if full diversion of the creek into the Coles' ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
4. That the parties give serious consideration to a physical solution similar to that discussed in the Staff Report of Investigation.

If either party to the complaint disagrees with the conclusions reached by Complaint Unit staff, please let me know of the points with which you disagree and the specific evidence you believe is available to substantiate or justify a different conclusion or action. If we do not hear from you within 30 days from the date of this letter, we will assume that you agree with the conclusions and recommendations contained therein. If the Coles are unable to produce evidence to justify a different recommendation, failure on their part to maintain the bypass flows as specified may result in appropriate enforcement action without further notice. Similarly, if the KFA is unable to provide evidence to justify a different course of action, this complaint would be subject to closure without further notice.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,



Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

3

MAY 23 2002

cc: Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
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National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman
Margaret Tauzer
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William M. Heitler, District Ranger
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Orleans, CA 95556-0410

Mr. Jim De Pree
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P.O. Box 1085
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Mr. Konrad Fisher
3210 Klinge Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
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Orleans, CA 95556

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State Water Resources Control Board

John P. Caffrey, Chairman

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 John W. Bates
 Director

J. Verjager

WR-193

SEPTEMBER 15 1998

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 Norman D. Cole, Caroline Cole
 c/o Mr. Doug Cole
 97520 Highway 96
 Sonoma Bar, CA 95568

| | |
|---------------------------|------------------------|
| to: <i>David Fisher</i> | from: <i>M. Tauter</i> |
| subject: <i>1</i> | number: <i>6255174</i> |
| date: <i>530 244 0923</i> | file: <i>825 4840</i> |
| REP. TRANS. 371-1000 | FORM 101 |

GENERAL SERVICES ADMINISTRATION

Dear Mr. Cole:

UNAUTHORIZED DIVERSION--STANSHAW CREEK IN SISKIYOU COUNTY

I understand that you have been involved in an ongoing discussion with the Division of Water Rights (Division) regarding your diversion and use of water from Stanshaw Creek in Siskiyou county. It is my understanding that you have on file with the Division, two pending applications to appropriate water, numbered 29449 and 29450. These applications were filed by the previous owner of your property in Sonoma Bar, California to authorize his diversions from Stanshaw Creek for use upon the parcel which you now own. You claim pre-1914 appropriate rights as a basis for your ongoing and, apparently increasing diversions for domestic use and hydroelectric power production and you have expressed a desire to withdraw your pending applications.

To date, the Division has been unwilling to cancel your pending applications because you do not appear to have a valid pre-1914 claim for the water you are currently diverting. The Division has supplied you and your attorney with evidence to show that the upper limit of your claim of pre-1914 appropriate rights is 0.49 cubic feet per second (cfs), continuous flow and may appropriately be only 0.11 cfs. This assertion is based upon information contained within the May, 1965 bulletin by the Department of Water Resources entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6). This publication lists the property, which you now own and states that the total amount of water diverted for irrigation, domestic, stock watering, and power production totaled 362 acre-feet, annually. This total usage equates to a continuous flow rate of approximately 1/4 cfs. This information was verified by Mr. Marvin Coles, Forest Service Hydrologist, who lived on your property while it was under prior ownership. Mr. Coles evaluated the flow capacity of the ditch as well as measuring the actual amount of water put to use generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Coles determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel.

Please understand that the nature of any appropriative right is such that it is limited to the amount of water put to continuous, reasonable and beneficial use regardless of the original "face value" of the appropriation. Your predecessor in interest, Mr. Young, submitted a copy of a water appropriation notice by Samuel Stanshaw dating well into pre-1914 times, claiming

RECEIVED
JUN 21 1998

OFFICE OF THE REGIONAL

Same to Division 9/21/98

JUN-26-2000 09:39

DFU R1 REDDING

Mr. Doug Cole

-2-

SEPTEMBER 15 1998

600 miner's inches (15 cfs) of water from Stanshaw Creek for mining purposes. You claim to be successor in interest to Mr. Stanshaw's water rights. Although you have submitted no information to suggest that those rights ever pertained to your parcel of land, the Division is willing to accept, given that you are the current operator of an obviously old ditch on Stanshaw Creek, that you are the successor in interest to Mr. Stanshaw's water rights. However, you are not entitled to the entire 15 cfs appropriation described in Mr. Stanshaw's original notice, due to the documented failure of the previous landowners to apply that amount of water to beneficial use; additionally, your ditch is not capable of carrying that much water and expansion of the ditch does not allow you to reclaim water previously lost by nonuse. All appropriative water rights are limited as to both amount and season to the amounts actually used, which has been documented, in your case, as a maximum of 0.49 cfs for power generation and domestic purposes.

On September 23, 1997 an engineer from this office visited your site and observed that you were diverting water from Stanshaw Creek to supply your hydroelectric power plant. No measurements were taken at that time, but it was the opinion of the engineer that your diversions were well in excess of 0.49 cfs. Based upon the observations made during this visit, Division staff has attempted to help you understand the limitations of your claimed right and the need for the two pending applications. This subject has been discussed in considerable detail with your attorney. You continue to maintain that your current diversions are authorized by your "pre-1914 rights". 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 0.11 cfs. On June 3, 1998 an engineer from this Division measured the flow rate in your ditch (located upon public lands) and determined that you were diverting 2.4 cfs from Stanshaw Creek to operate your hydroelectric power plant.

The Division has received a report from the Department of Fish and Game that you have recently constructed a reservoir upon your property. It is difficult to envision how such a reservoir, constructed in 1998, could be authorized by a pre-1914 appropriative right. Although a pre-1914 right may be changed as to purpose of use, place of use, or point of diversion without the approval of this Division, such a change cannot serve to increase the amount of the right. The construction of a new reservoir is generally considered to be an increase in a water right and usually requires the filing of a new application to appropriate water.

At this time, the Division is willing to cancel application 29450, filed for 0.11 cfs for domestic and irrigation use, as soon as you complete and submit the enclosed Request for Cancellation form and the Statement of Water Diversion and Use form. It would appear that the diversion of this water is authorized under your pre-1914 claim of right. There is no information in our files to indicate that any diversion in excess of 0.11 cfs is authorized under your pre-1914 claim. Consequently, I recommend that you work with my staff to process application 29449. In the event you do not wish to process application 29449, please submit evidence to substantiate your alleged pre-1914 claim of right including a discussion of the recently constructed reservoir (capacity, amount and season of use, basis of right). Such evidence should clearly show the extent water was continuously used from the time of the appropriation to the present. Our files indicate that the hydroelectric plant was installed in the 1940's, so you may wish to substantiate the use of this water between 1914 and 1950. Any claim in excess of 0.49 cfs should be accompanied by substantial evidence to refute the Department of Water Resources' Bulletin 94-6 as well as the testimony of Mr. Goss.

Mr. Doug Cole

-3-

SEPTEMBER 15 1998

If the Division fails to receive the following within 45 days of the date of this letter, this matter will be referred to our Complaints Unit to consider appropriate enforcement action which may include the imposition of Administrative Civil Liabilities (fines) of up to \$500 per day for continued unauthorized use of water:

1. Description and location of your reservoir, use thereof, and basis of right to store water. If a basis cannot be documented, submit the enclosed application forms, properly completed along with the required fees.
2. Statement indicating whether you wish to continue processing application 29449; if not, substantial evidence which shows that your diversion of water has been continuously maintained in time and amount since December 19, 1914;
3. Completed Request for Cancellation form relating to application 29450 as well as a completed Statement of Water Diversion and Use for your domestic and irrigation use of water. *Please note that, in accordance with Section 5105 of the Water Code, the Division is authorized to investigate and determine the facts relating to your diversion, at your expense, if you do not submit a properly completed Statement of Water Diversion and Use within 60 days.*

If you have any further questions, Chris Murray, the engineer assigned to this case, can be reached at (916) 657-2167.

Sincerely,

ORIGINAL SIGNED BY:

Harry M. Schueller, Chief
Division of Water Rights

Enclosures

CERTIFIED

cc: Nancy Smith, Esq.
1041 East Green Street, Suite 203
Pasadena, CA 91106-2417

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

TOTAL P.03

005940



United States
Department of
Agriculture

Forest
Service

Klamath
National
Forest

Ukonom Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410
(530) 627-3291
TTY (530) 627-3291

File Code: 2670

Date: 3/09/2000

Route To:

Subject: Application to appropriate water by permit #29449

To: Yoko Mooring - State of California: State Water Resources Control Board

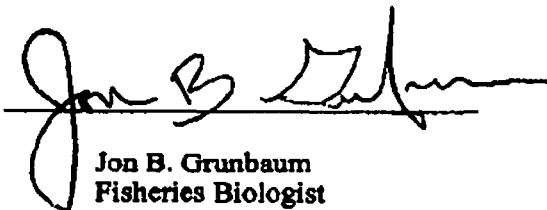
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Although anadromous fish are not documented in Stanshaw Creek on the Klamath National Forest GIS database, there are many anecdotal accounts that anadromous fish once used to access Stanshaw Creek before construction of the current Highway 96. Indeed, fish habitat surveys conducted in Stanshaw Creek have shown that at least several miles of suitable anadromous fish habitat exists in the Stanshaw Creek watershed.

With the listing of coho salmon as Threatened under the Federal Endangered Species Act and the possible future listing of steelhead, I would recommend that you delay any decision on application #29449 until more research on anadromous fish use of Stanshaw Creek is conducted. The overall strategy of restoring anadromous fish in the Klamath Basin and elsewhere depends greatly on restoring anadromous fish access to their historical habitats.

Thanks for your consideration. If you have any questions or need more information on this subject please feel to call me (530) 492-2243 or (530) 627-3291.



Jon B. Grunbaum
Fisheries Biologist



Caring for the Land and Serving People

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**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – Docs from MKWC Files

- 3-9-01 Mooney to USDC, USDA, Cole
- 3-9-2000 Grunbaum to Mooring
- 3-22-01 Heitler USFS site visit and meeting summary
- 3-27-89 SWRBC Water Appropriation Application Notice
- 4-30-99 Presley to Cole Agreement
- 5-8-2001 could be another year Heitler to Pace
- 5-23-02 SWRCB Contreras to KFA and Cole
- 7-2-01 SWRCB Contreras to Cole
- 7-8-02 Bybee to Contreras
- 8-11-10 Kelley to Cole
- 8-17-64 Mays to Slattery
- 10-18-01 USDA Water Right Complaint Meeting
- 10-19-01 Ukonom Ranger District Case Report
- 11-9-05 SWRCB to Cole
- 12-6-06 SWRCB Mrowka to Vorpagel and Mrowka to Cole
- 12-15-94 Siskiyou County to Cole
- Stanshaw Creek Water Conservation Project Issues and Concerns
- Stanshaw Document Index

DONALD B. MOONEY
Admitted in California and Oregon

129 C Street, Suite 2
Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

March 9, 2001

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

The Honorable Don Evans
Secretary of Commerce
Office of Secretary
U.S. Department of Commerce
14th and Constitution Avenues, NW
Washington D.C. 20230

The Honorable Ann Veneman
Secretary of Agriculture
U.S. Department of Agriculture
14th and Independence, NW
Washington D.C. 20250

Doug and Heidi Cole
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

**Re: 60 day Notice of Intent to Sue for Violations of Section 9 of the
Endangered Species Act relating to the Diversion of Water from
Stanshaw Creek.**

Dear Secretary Evans, Secretary Veneman, and Mr. & Mrs. Cole:

This letter serves as a sixty day notice on behalf of Konrad Fisher and the Klamath Forest Alliance ("KFA") of their intent to sue Doug Cole and Heidi Cole both individually and doing business as Marble Mountain Ranch ("Coles") for violations of Section 9 of the federal Endangered Species Act ("ESA"), 16 U.S.C. § 1538, for actions and inaction related to the damming and diversion of water from Stanshaw Creek, a tributary to the Klamath River in Siskiyou County, California. The Coles' actions have resulted or will result in the illegal take and other harm to steelhead (*Oncorhynchus mykiss*) and coho salmon (*Oncorhynchus kisutch*) which are legally protected. This letter also serves as notice of intent to sue the Department of Commerce, National Marine Fisheries Service ("NMFS"), and the Department of Agriculture, United States Forest Service ("USFS"), for failure to take action to protect steelhead and coho salmon along Stanshaw Creek with regard to the diversion of water and impoundment of water by the Coles and Marble Mountain Ranch.

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Page 2

This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of section 11(g) of the ESA, to the extent such notice is deemed necessary by a court. 16 U.S.C. §1540(g).

A. Project Description

The Coles have constructed a reservoir and are currently diverting water from Stanshaw Creek to supply their hydroelectric facility. Stanshaw Creek, as part of the Klamath River system, has been placed under the California and National Wild and Scenic Rivers Systems to protect its outstanding anadromous fishery values. See 16 U.S.C. § 460ss. The reservoir, diversion structure and conveyance ditch are located primarily on lands within the Klamath National Forest, which is administered by the USFS, an agency of the Department of Agriculture.

The Coles have applied to the State Water Resources Control Board ("SWRCB") to divert 3 cubic feet per second (cfs) via a flume which is 12-inches deep, 24-inches wide, and 5,200 feet long then through penstock of 16-inch diameter, 455 foot long steel pipe from Stanshaw Creek, a tributary to the Klamath River, in Siskiyou County (Application to Appropriate Water No. 29449). According to the Cole's application, the penstock utilizes 200 feet of fall to generate a maximum of 33.9 kilowatts at 80 percent efficiency at a hydroelectric plant just above Irving Creek. After use, the water will be returned to Irving Creek and then to the Klamath River. Despite the fact that the Coles have not obtained a water rights permit from the SWRCB for the diversion of water, the Coles continue to divert up to 3 cfs from Stanshaw Creek.

B. The Coles' Project Impacts Federally Protected Species

Stanshaw Creek contains steelhead (*Oncorhynchus mykiss*) which are in the Klamath Mountains Province and are listed as candidate species under the ESA; they are a species of concern to the California Department of Fish and Game ("DFG"). Stanshaw Creek also contains coho salmon (*Oncorhynchus kisutch*) which are in the Southern Oregon/Northern California Coasts ESU and are listed as threatened under the ESA. See 50 C.F.R. § 102(a)(4). Stanshaw Creek lies within the Klamath River watershed and supports and contributes to the survival of these species.

Additionally, the Coles' diversion of water from Stanshaw Creek may potentially impact macroinvertebrate species and their habitat in Stanshaw Creek. These macroinvertebrates constitute the food base for the anadromous and resident fish populations that are protected by the ESA.

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C. The Coles' Diversion of Water Violates Section 9 of the Endangered Species Act and NMFS Section 4(d) Regulations

Section 9 of the ESA prohibits any "person" from "taking" an endangered species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31. Pursuant to section 4(d) of the ESA, the Department of Commerce adopted regulations applying the take prohibitions of section 9(a)(1) of the ESA, 16 U.S.C. § 1538(a)(1), to the threatened species of salmonids, including coho salmon. 50 C.F.R. § 223.203.

The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19). The ESA defines "person" to include any "individual, corporation, partnership, trust, association, or any other private entity...." 16 U.S.C. § 1532(13). Thus, the Coles and their associated business are within the definition of person.

Harm is further defined as:

Harm in the definition of "take" in the Act means an act that actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3.

In 1997, the National Marine Fisheries Service ("NMFS") set out additional rules for the take of coho. 62 Fed. Reg. 38479. NMFS' rules identify the following activities that could potentially harm, injure or kill coho salmon in the subject ESU and thus constitute an unlawful take:

[D]estruction or alteration of coho salmon habitat in this ESU, such as removal of large woody debris and "sinker logs" or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flow.

The Coles diversion and damming activities described above have resulted and will continue to result in take of coho and steelhead. These actions and inaction of the Coles are therefore the direct and proximate causes of an illegal take under section 9 of the ESA and NMFS's regulations. 16 U.S.C. § 1538; 50 C.F.R. § 223.203.

Despite numerous warnings, inquiries, protests, and other filed actions, the Coles have refused to conform their actions/inaction to be consistent with all applicable state and federal laws and are thus, knowingly and willfully undertaking activities that

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 Doug & Heidi Cole
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result in the taking of protected and candidate species. The Coles are therefore in violation of Section 9 of the ESA and can and will be held personally responsible for these violations.

In the present situation, a take of the protected species may only occur pursuant to an ESA Section 10 incidental take permit. No such authorization for take has occurred; thus, all such take is in violation of Section 9 and must immediately cease.

D. The Coles Do Not Have the Right to Divert 3.0 cfs from Stanshaw Creek

Although the Coles divert up to 3.0 cfs from Stanshaw Creek, the Coles do not possess an appropriative water right to divert this quantity of water. To the extent, that the Coles are diverting water based upon a claim to a pre-1914 appropriative water right, such water right must be limited to the amount of water put to continuous, reasonable and beneficial use regardless of the original water right. See Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127. According to a review conducted by the SWRCB's Division of Water Rights, any claim that the Coles may have to a pre-1914 appropriative water right is limited to their domestic and irrigation use which amounts to approximately 0.11 cfs. See letter dated September 15, 1998, from Harry M. Schueller to Doug Cole, Regarding: Unauthorized Diversion – Stanshaw Creek in Siskiyou County). However, the SWRCB's tentative conclusion was based on the assumptions that a 1867 letter by Sam Stanshaw (see notice recorded March 25, 1867 by Sam Stanshaw), proves continuous use of water from before 1914 and that any resulting water right was conveyed along with the property now owned by the Coles. Unless the Coles can substantiate these assumptions, any diversion of water violates California Water Code, sections 1200 *et seq.* If the Coles can substantiate the aforementioned assumptions, any diversion of water in excess of a resulting pre-1914 water right is in violation of California Water Code, sections 1200 *et seq.*

In addition, the Coles' unauthorized diversion of water harms public trust resources in and along Stanshaw Creek, including but not limited to the impacts to coho salmon and steelhead.

E. The Coles Do Not Possess a Special Use Permit from the USFS for the Diversion Facilities on USFS Property

Although the Coles' diversion structure and ditch are located on land belonging to the Klamath National Forest, the Coles have not obtained a Special Use Permit from the United States Forest Service. In order for the Coles to maintain the diversion structure and conveyance ditch, the Coles must first obtain a Special Use Permit. Moreover, prior to issuing a Special Use Permit, or allowing any diversion of water to

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Doug & Heidi Cole
March 9, 2001
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continue, the USFS must comply with the section 7 consultation requirements of the ESA. 16 U.S.C. § 1536. This requires the preparation of a Biological Assessment by the USFS and the issuance of Biological Opinion from NMFS.

USFS must comply with its substantive and procedural obligations under section 7 of the Endangered Species Act, 16 U.S.C. § 1536, and the National Environmental Policy Act. 42 U.S.C. §§ 4321 *et seq.* If USFS allows diversions of water and diversion facilities on land within the Klamath National Forest, such action may result in USFS authorizing a take of coho salmon in violation of the ESA. Moreover, USFS's failure to develop a plan that prevents take of coho salmon may result in USFS's own "take liability" under the ESA. Therefore, in processing a Special Use Permit, or allowing the Coles' diversion of water to continue, USFS must assess the impacts to coho salmon.

Section 7(a)(1) of the ESA also imposes on USFS a duty to conserve which obligates USFS to affirmatively and actively pursue methods to conserve the coho salmon. 16 U.S.C. § 1536(a)(1). Thus, in allowing the diversion of water from and across USFS property, USFS must take affirmative steps to conserve and protect coho salmon.

USFS has the statutory and regulatory authority to regulate the use of land owned by USFS. In allowing the diversion of water, USFS must also take into account its legal obligations to prevent incidental take of sea otters under section 9 of the ESA. 16 U.S.C. § 1538. *See Defenders of Wildlife v. Environmental Protection Agency*, 882 F.2d 1294 (8th Cir. 1989).

F. The Parties Must Correct the ESA Violations Within 60 Days

If the Coles, NMFS and USFS do not act immediately to correct these violations of the ESA the Fishers and KFA may seek immediate relief under section 11(g)(2)(c) of the ESA. 16 U.S.C. §1540(g)(2)(C). If the Coles, NMFS, and USFS do not act within 60 days to correct these violations of the ESA, the Fishers and KFA will pursue litigation in Federal Court against one or more of the parties named in this letter. The litigation will seek injunctive and declaratory relief, and legal fees and costs against one or more of you regarding these violations.

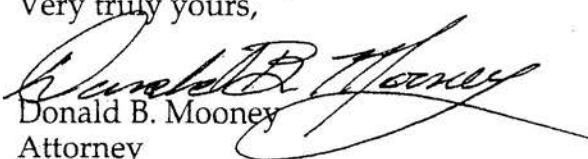
The Honorable Don Evans
The Honorable Ann Veneman
Doug & Heidi Cole
March 9, 2001
Page 6

An appropriate remedy that would prevent litigation would include the following:

1. Guaranteeing optimal year-round stream flows of a quantity in Stanshaw Creek that would repair anadromous fish habitat and to ensure fish survival.
2. Agree to cease diverting water anytime it becomes necessary to ensure optimum stream flows are satisfied.
3. Contribute funds to restore and enhance the Stanshaw Creek anadromous fishery and to assist with the Proposed fish passage project under Highway 96.
4. Document the availability of water in Stanshaw Creek in excess of that needed for instream fishery and existing riparian rights.
5. Removal of all impediments to migrating anadromous fish in Stanshaw Creek.

If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me at (530) 758-2377.

Very truly yours,


Donald B. Mooney
Attorney

cc: Konrad Fisher
Felice Pace, KFA
Rebecca Lent, Regional Administrator, NMFS
Margaret Tauzer, National Marine Fisheries Service
William M. Heitler, District Ranger, United States Forest Service



United States
Department of
Agriculture

Forest
Service

Klamath
National
Forest

WR-193
Ukonom Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410
(530) 627-3291
TTY (530) 627-3291

File Code: 2670
Route To:

Date: 3/09/2000

Subject: Application to appropriate water by permit #29449

To: Yoko Mooring - State of California: State Water Resources Control Board

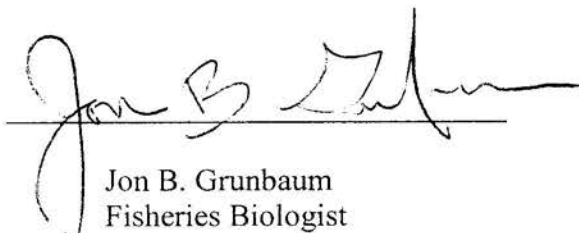
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With the listing of coho salmon as Threatened under the Federal Endangered Species Act and the possible future listing of steelhead, I would recommend that you delay any decision on application #29449 until more research on anadromous fish use of Stanshaw Creek is conducted. The overall strategy of restoring anadromous fish in the Klamath Basin and elsewhere depends greatly on restoring anadromous fish access to their historical habitats.

Thanks for your consideration. If you have any questions or need more information on this subject please feel to call me (530) 492-2243 or (530) 627-3291.



Jon B. Grunbaum
Fisheries Biologist



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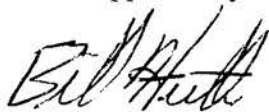
STANSHAW DIVERSION MEETING
MARCH 22,2001

The purpose of the meeting was to familiarize the landowner, Karuk Tribe of California, and the Forest Service with the diversion and related issues. We met at the Marble Mountain Ranch at 9:30 AM, March 22,2001. We met to determine if it was possible to increase flow in Stanshaw Creek while meeting the needs of the Marble Mountain Ranch. Attendees were: Doug Cole, owner, Marble Mountain Ranch, Toz Soto, Mid-Klamath River Sub-Basin Coordinator, Ron Reed, Karuk Tribal Fisheries, and Bill Heitler, District Ranger, Orleans Ranger District.

Mr. Cole has done a considerable amount of work to improve the efficiency of his hydropower plant. He recently replaced the 85-year-old pelton wheel and military surplus generator with a state of the art unit, and upgraded about 100 feet of the penstock with new PVC pipe. He estimates that about 25% less water will be used to generate the same amount of power as the old system. Water from Stanshaw Creek flows from the generator, is used for irrigation and eventually ends up in Irving Creek. Blue Heron Ranch uses the water for hydropower and irrigation.

After looking over the hydro plant, we walked the ditch to Stanshaw Creek. The ditch is in good overall condition and shows signs of regular maintenance. Portions have been reinforced with open topped culvert to reduce exfiltration and minimize the chance of a failure. The diversion structure on Stanshaw Creek is rock rubble reinforced with plastic sheeting. The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction. We did not estimate how much water was by passing the diversion. There is a possibility of additional downstream flow if the ditch can be lined or piped. Currently the Cole's do not have the resources to take on a project such as this. Ron explained the tribal position to Doug. The tribe is concerned about coho survival and feels that adequate flows in Stanshaw Creek are critical to providing refugia. I explained that the Forest Service will not require a fee permit for the ditch and diversion structure since use has been continuous prior to the proclamation of the Klamath National Forest. We do need to document the use in a no fee permit. There is also a question as to whether the ditch is a legal easement included in the deed to the property based on a proclamation signed by President Howard Taft. Toz, in his position as Mid-Klamath River Sub-Basin Coordinator, feels there is a good chance that grants are available to pay for improving the ditch. He will begin looking for funding sources for this project. Ron offered tribal support for the grant.

I left the meeting about 11:00 AM. Ron, Toz and Doug continued the discussion looking for other ways to direct water back into Stanshaw Creek. Ron and Toz will look into the amount of water that is being diverted by other users on the Stanshaw Creek. There may be an opportunity to gain additional water from these users.



Bill Heitler

Site Visit

Stanshaw Creek Water Diversion
NE1/4, Section 33 R7W,T13N

Jon Grunbaum, Fisheries Biologist, Happy Camp and Ukonom Ranger Districts, and I visited the diversion and ditch at about 1330 September 26, 2000. The purpose of our visit was to determine whether or not the diversion and ditch are on National Forest land, inspection the ditch, estimate the age of the ditch and estimate the amount of water diverted from the creek to the ditch.

The ditch and diversion structure provide water for a pelton wheel and irrigation at the Marble Mountain Ranch currently owned by Doug and Heidi Cole. They operate an outfitter guide business from the ranch.

A diversion structure has been constructed across the creek at sometime in the past. There is evidence that this has been in use for a considerable period of time, probably more than 50 years. Local anecdotal evidence supports this conclusion and lends credence to stories that the ditch and diversion were constructed and used since the area was mined in the late 1890's-early 1900's. The ditch has been well maintained and shows no signs of failure or other potential problems. There have been several commercial sized conifers and numerous hardwoods felled along the ditch. The age of the ditch would indicate that it predates the proclamation of the National Forest and may be eligible for an easement. The diversion structure is rubble reinforced with plastic tarps and other miscellaneous materials. The head gate to the ditch is concrete with provisions for boards to control flow. A six-inch gate valve of undetermined age was found about 100 feet below the diversion indicating that the diversion may fail during high water.

Jon and I estimated that about 75% of the flow is diverted from the stream to the ditch. John's professional opinion is that the remaining flow is inadequate to support a fish population. It is my opinion, based on maps, that the structures are completely on National Forest land. A diligent search of records at the Orleans District office and the Klamath National Forest Supervisors office could not locate a special use permit for the ditch or diversion structure. A letter will be sent to the Cole's asking them if they have a permit or other legal document for the ditch and diversion structure. If they cannot produce this information, they will have to remove the diversion structure.

15/ Bill Heitler



W. H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Division of Water Rights
901 P Street • Sacramento, California 95814 • (916) 657-0765
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 657-1485 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Sept 98

WR-193



Gray Davis
Governor

NOTICE OF APPLICATION TO APPROPRIATE WATER

RECEIVED
APR 20 2000

BY: _____

APPLICATION 29449

DATE FILED March 27, 1989

Notice is hereby given that Doug Dole, Heidi Cole, Norman D. Cole, and Caroline Cole have filed an application for a water right permit for diversion of water from Stanshaw Creek tributary to Klamath River in Siskiyou county. The State Water Resources Control Board (SWRCB) will determine whether a water right permit should be issued for the application and, if so, whether conditions should be included in the permit to protect the environment and other downstream water users. This notice provides a description of the proposed project and also describes the procedure and time frame for submittal of a protest against the application. This notice and future notices of Applications to Appropriate Water by Permit, may be viewed and printed at the Division of Water Rights web site www.waterrights.ca.gov. Any correspondence to the applicant shall be mailed to:

Doug Cole, et al.
92520 Highway 96
Somes Bar, CA 95568

DESCRIPTION OF THE PROJECT

The applicant seeks a right to directly divert 3 cubic feet per second from Stanshaw Creek for hydroelectric power generation via flume of 12-inch deep, 24-inch wide, and 5,200 feet long, then through penstock of 16-inch diameter, 455 feet long steel pipe. The penstock is utilizing 200 feet of fall to generate a maximum of 33.9 kilowatts at 80% efficiency at a power plant just above Irving Creek. The maximum theoretical horsepower capable of being generated by the works is 56.8. After use, the water will be returned to Irving Creek through the ditch, thence the Klamath River.

The project is located approximately 6 miles north of Somes Bar and 2½ miles west of Marble Mountain Wilderness.

APPLICATION INFORMATION

The applicant proposes to divert water from Stanshaw Creek tributary to Klamath River. The Point of Diversion is located within the projected Section 33, T13N, R6E, HB&M. The Place of Use is at the powerhouse within the projected Section 33, T13N, R6E, HB&M. The diversion and place of use are located within the County of Siskiyou. The discharge will be returned to Irving Creek in projected Section 4 T12N, R6E, HB&M.

APPLICATION 29449

Amount of water applied for: 3.0 cfs (Direct Diversion), not to exceed a total of 2,168.1 AFA.

Water will be used for: Hydroelectric.

The applicant has requested to divert water from: January 1 to December 31.

ENVIRONMENTAL INFORMATION

Based on a preliminary review of information provided by the applicant, the project may have a potential for causing a significant effect on the environment. If you have information which indicates that the project will cause a significant effect on the environment, please send this information immediately to:

Mr. Mike Falkenstein,
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000 Sacramento, CA 95812-2000.

This information will be reviewed in accordance with CEQA.

PROCEDURE FOR SUBMITTING PROTESTS

Any person may file a protest against the application. The protest must be submitted in writing to the SWRCB and to the applicant within **40 days** of the date of this notice. Parties may file protests based on any of the following factors:

- . Injury to existing water rights.
- . Adverse environmental impact.
- . Not in the public interest.
- . Contrary to law.
- . Not within the jurisdiction of the SWRCB.

All protests must clearly describe the objections to approval of the application and the factual basis for those objections. If the objection is based on injury to existing water rights, the protest must describe the specific injury to the existing water right that would result from approval of the application. In addition, the party claiming injury to prior water rights must provide specific information that describes the basis of the existing right, the date the use began, the quantity of water used, the purpose of use and the place of use. Please note that any water right permit issued by the SWRCB is subject to and includes conditions to protect vested water rights.

If the protest is based on environmental grounds, or other factors listed above, the protest must be accompanied by a statement of facts supporting the basis of the protest. If sufficient information is not submitted, the SWRCB may reject the protest or request that the protestant submit additional information.

APPLICATION 29449

A protest should be submitted on a standard protest form available from the SWRCB, but can be submitted in letter form. Protests may be submitted by FAX, but the original(s) must be submitted to the SWRCB. An informational pamphlet is available that provides additional information relating to water rights and the procedure for filing protests. Please contact the person listed below if you would like a copy of the pamphlet or protest forms. For good cause, the SWRCB may grant an extension in time to file a protest. A request for an extension of time must be submitted in a timely manner, must specify the additional time required, and state why additional time is needed to file the protest.

RESOLUTION OF PROTESTS

A copy of the protest shall be sent to the applicant. The protest shall include a description of any measures that could be taken to resolve the protest, including modification of the application (i.e., amount, season of diversion, etc.) or conditions (i.e., fish bypass flow, measuring device, etc.) that could be included in the water right permit. The protestant(s) and the applicant are encouraged to discuss methods that could be used to resolve the protest. If the protest(s) can not be resolved, the SWRCB may conduct a field investigation with all interested parties or may hold a water right hearing.

Please contact the engineer listed below if you would like to request an extension of time to file a protest.

CONTACT PERSON

To obtain additional information regarding this project, or to obtain copies of the protest forms or pamphlet, please call Yoko Mooring at (916) 657-1965.

DATE OF NOTICE: **JAN 23 2000**

AGREEMENT

REGARDING PROPOSED ACTIVITIES SUBJECT TO CALIFORNIA FISH AND GAME CODE SECTIONS 1600/1606

WHEREAS:

1. Mr. Douglas T. Cole, of Somes Bar, California, representing the property owner, Marble Mountain Ranch, of Somes Bar (jointly referred to as "OPERATOR"), on January 21, 1999 notified (99-0040) the DEPARTMENT of Fish and Game (the DEPARTMENT) of the intent to divert or obstruct the natural flow of, or change the bed or banks of, or use materials from Stanshaw Creek, Siskiyou County, a water over which the DEPARTMENT asserts jurisdiction pursuant to Division 2, Chapter 6 of the California Fish and Game Code.

2. Fish and Game Code Sections 1600 et seq. make provisions for the negotiation of agreements regarding the delineation and definition of appropriate activities, project modifications and/or specific measures necessary to protect fish and wildlife resources.

3. The DEPARTMENT has determined that without the mitigative features identified in this agreement, the activities proposed in the OPERATOR's notification could substantially adversely affect fish and wildlife. The DEPARTMENT's representative, Ron Presley, inspected the site on February 16, 1999 and has determined that resident trout and aquatic invertebrates would be the wildlife potentially affected by this project due to loss of stream habitat due to lower flows.

NOW THEREFORE, IT IS AGREED THAT:

1. If this agreement is found to be in conflict with any other provision of law or general conditions of public safety, it is void.

2. This agreement does not constitute or imply the approval or endorsement of a project, or of specific project features, by the DEPARTMENT of Fish and Game, beyond the DEPARTMENT's limited scope of responsibility, established by Code Sections 1600 et seq. This agreement does not therefore assure concurrence by the DEPARTMENT with the issuance of permits from this or any other agency. Independent review and recommendations will be provided by the DEPARTMENT as appropriate on those projects where local, state, or federal permits or environmental reports are required. This includes but is not limited to CEQA and NEPA project review. Any fish and wildlife protective or mitigative features that are adopted by a CEQA or NEPA lead agency or made the conditions for the issuance of a permit, for this project, become part of the project description for which this agreement is written.

3. If the project could result in the "take" of a state listed rare, threatened or endangered species, OPERATOR has the responsibility to obtain from the DEPARTMENT, a California Endangered Species Act Permit (CESA 2081 Permit). The DEPARTMENT may formulate a management plan that will avoid or mitigate take. Pursuant to Fish and Game Code Section 2090, a State lead agency shall consult with the DEPARTMENT to ensure that projects will not jeopardize the continued existence of any listed species. If appropriate, contact the DEPARTMENT CESA coordinator at (530) 225-2300.

4. To the extent that the provisions of this agreement provide for activities that require OPERATOR to trespass on another owner's property, they are agreed to with the understanding that OPERATOR possesses the legal right to so trespass. In the absence of such right, the agreement is void.

5. To the extent that the provisions of this agreement provide for activities that are subject to the authority of other public agencies, such as county use permits, said activities are agreed to with the understanding that all appropriate permits and authorizations will be obtained prior to commencing agreed activities.

6. All provisions of this agreement remain in force throughout the term of the agreement. Any provision of the agreement may be amended at any time provided such amendment is agreed to in writing by both parties. Mutually approved amendments become part of the original agreement and are subject to all previously negotiated provisions. Title 14, California Code of Regulations, Section 699.5(g) requires the OPERATOR to submit the sum equal to 50% of the fee of the existing agreement to amend an existing agreement.

7. The OPERATOR shall provide a copy of this agreement to all project contractors, subcontractors, agents, employees, and project supervisors. Copies of the agreement must be available at work sites during all periods of active work and must be presented to DEPARTMENT personnel upon demand until the project and/or monitoring period(s) are completed.

8. OPERATOR, contractor, or subcontractor are jointly and severely liable for compliance with the provisions of this agreement. Upon the DEPARTMENT'S determination of a violation of the terms of this Agreement, this Agreement shall be suspended or canceled, at the discretion of the DEPARTMENT and all activity must immediately stop until another agreement is made. Failure to comply with the provisions and requirements of this agreement and with other pertinent Code Sections including but not limited to Fish and Game Code Sections 5650, 5652, 5937, and 5948, may result in prosecution.

9. OPERATOR agrees to provide the DEPARTMENT access to the project site at any time, to ensure compliance with the terms, conditions, and provisions of this agreement.

10. It is understood that the DEPARTMENT enters into this agreement for purposes of establishing protective features for fish and wildlife, in the event that a project is implemented. The decision to proceed with

the project is the sole responsibility of OPERATOR, and is not required by this agreement. It is agreed that all liability and/or incurred costs related to or arising out of OPERATOR's project and the fish and wildlife protective conditions of this agreement, remain the sole responsibility of OPERATOR. OPERATOR agrees to hold harmless and defend the State of California and the DEPARTMENT of Fish and Game against any related claim made by any party or parties for personal injury or other damage.

11. OPERATOR assumes responsibility for the restoration of any fish and wildlife habitat which may be impaired or damaged either directly or, incidental to the project, as a result of failure to properly implement or complete the mitigative features of this agreement, or from activities which were not included in OPERATOR's notification.

12. The DEPARTMENT shall have continuing jurisdiction over the project site until all restoration of the site is complete.

13. The notification, project descriptions, all photos, and drawings submitted with the notification shall become part of this agreement, to define the scope of the proposed project. All work shall be done according to plans submitted to and approved by the DEPARTMENT. The OPERATOR shall notify the DEPARTMENT in writing of any modifications made to the project plans submitted to the DEPARTMENT. Any modification to the plans requires an amendment to this agreement. Changes to the original plans done voluntarily may result in the DEPARTMENT suspending or canceling this agreement. The OPERATOR must then submit a new notification.

14. The following provisions including any additional project features resulting from the above, constitute the limit of activities agreed to and resolved by this agreement. The signing of this agreement does not imply that OPERATOR is precluded from doing other activities, at the site. However, activities not specifically agreed to and resolved by this agreement are subject to separate notification pursuant to Section 1601/03.

15. The OPERATOR shall notify the DEPARTMENT of the dates of commencement and completion of operations, three days prior to such commencement or completion, by telephone message to (530) 841-2557.

16. To the extent that the provisions of this agreement provide for the diversion of water, they are agreed to with the understanding that OPERATOR possesses the legal right to so divert such water. In the absence of such right, the agreement is void.

FEDERAL JURISDICTION

The US Army Corps of Engineers (Corps) has permitting requirements for certain instream projects under Section 404 of the Federal Clean Water Act. If this project exceeds one acre of disturbance within the ordinary high-water mark of the stream and/or the stream's average

3 annual flow exceeds five cubic feet per second, a permit may be required
4 by the Corps. A Corps permit may also be required for the installation
5 of rip rap that exceeds 500 linear feet at or over one cubic yard of
6 material per linear foot. If there is any question regarding the
7 possibility of your project meeting the above limitations, you should
8 contact the Corps prior to beginning work. This Agreement in no way
9 represents permitting requirements by the Corps. It is OPERATOR'S
10 responsibility to contact the U.S. Army Corps of Engineers, and to
11 comply with the provisions any 404 Permit issued, if required by the
12 Corps.

13 For information, contact the US Army Corps of Engineers office in
14 your area: San Francisco District, Eureka Office (707)443-0855.
15

16 OPERATOR may have certain other responsibilities pursuant to the
17 Federal Endangered Species Act resulting in mitigative project features
18 required by the U.S. Fish and Wildlife Service or National Marine
19 Fisheries Service.

20 PROVISIONS

21 Agreed work includes activities associated with the diversion of
22 flows from Stanshaw Creek for irrigation, recreation, domestic, and
23 small hydro-electric use. Construction includes the annual construction
24 of a rock diversion dam (by hand) to entrain flows into the diversion
25 ditch, and maintenance of a culvert/flume crossing on an unnamed
26 ephemeral tributary to Stanshaw Creek. The project area is located in
27 Siskiyou County (SW 1/4 of NE 1/4 of S 33, T 13 N, R 6 E) on property
28 administered by the U.S. Forest Service. The diversion structure existed
29 prior to this agreement.

30 EQUIPMENT AND ACCESS

31 Vehicles shall not be driven or equipment operated in water covered
32 portions of a stream, or where wetland vegetation, riparian vegetation,
33 or aquatic organisms may be destroyed. Except as otherwise provided for
34 in the Agreement, all work shall be performed by hand/hand tools.

35 Access to the work site shall be via existing trails.

36 WATER DIVERSION/STRUCTURES

37 This Agreement does not authorize the construction of any temporary
38 or permanent dam, structure, flow restriction or fill except as
39 described in OPERATOR's notification.

40 An adequate fish passage facility shall be incorporated into any
41 barrier that obstructs fish passage.

Except as otherwise specified in this Agreement, fill material for the annual diversion dam shall consist of only native, clean rock which will cause little or no siltation. If tarps, sand bags, or plastic sheeting are used to seal the diversion structure, the tarps, bags, and/or sheeting shall be removed before high seasonal flows return to prevent littering of the stream.

When any dam or artificial obstruction is being constructed, maintained, or placed in operation in the stream bed, flows to downstream reaches shall be allowed to pass downstream to maintain wildlife, plant life, and aquatic life below the dam in a healthy condition, and to allow fish migration, during all times that the natural stream flow would have supported aquatic life, pursuant to Fish and Game Code section 5937 and 5901.

Structures and associated materials not designed to withstand high seasonal flows shall be removed to areas above the normal high-water mark before the return of such seasonal flows.

No excavation in the live stream is allowed. "Live stream" shall be defined as that portion of the stream bed where flowing water is present or anticipated during the term of this agreement.

In ephemeral streams, all construction will be done while the work site is dry. Excavated material shall be placed outside the stream's normal high-water mark.

A culvert exists in the intersection of the diversion flume/ditch and an ephemeral stream. The culvert shall be maintained so as to resist washout. The up stream and down stream fill slopes shall feature rock slope protection (RSP) from the toe to the top of the fill. A fail soft dip shall be maintained where the fill meets original ground to allow topping flows to remain within the ephemeral stream channel. Rock dissipators shall be placed at the culvert outlet to prevent channel bed/bank scour. Upon the next occasion when the culvert washes out, the pipe alignment shall be corrected to remove the skew (It should be straight within the channel rather than pointing at the bank.).

WATER QUALITY

EROSION, TURBIDITY, AND SILTATION

Mud, silt, or other pollutants from diversion maintenance or other project-related activities shall not be discharged into the flowing stream or be placed in locations where it may be washed into the stream by high flows or precipitation.

Silty/turbid water shall not be discharged into the stream. Such water shall be settled, filtered, or otherwise treated prior to discharge back into the stream channel.

The OPERATOR shall install adequate control devices to ensure that turbidity or siltation resulting from the project related activities does not constitute a threat to aquatic life.

Erosion control measures shall be utilized throughout all phases of operation where sediment runoff from exposed slopes threatens to enter waters of the State. At no time shall silt laden runoff be allowed to enter the stream or directed to where it may enter the stream.

Upon DEPARTMENT determination that turbidity/siltation levels resulting from project related activities constitute a threat to aquatic life, activities associated with the turbidity/siltation shall be halted until effective DEPARTMENT approved control devices are installed, or abatement procedures are initiated.

CHANNEL RESTORATION

FILL AND SPOIL

Rock, gravel, and/or other materials shall not be imported to, taken from or moved within the bed or banks of the stream except as otherwise addressed in this Agreement.

Fill length, width, and height dimensions shall not exceed those of the original diversion dam installation.

Fill shall be limited to the minimal amount necessary to accomplish the agreed activities. Except as otherwise specified in this Agreement, fill construction materials shall consist of native, clean, silt-free gravel or river rock.

No fill material, other than clean river rock/gravel, shall be allowed to enter the live stream.

No castings or spoil from the trenching or ditch cleaning operations shall be placed on the stream side of the ditch where it may be washed by rainfall into the stream.

The OPERATOR shall have readily available plastic sheeting or visquine and will cover exposed spoil piles and exposed areas to prevent these areas from losing loose soil into the stream. These covering materials shall be applied when it is evident rainy conditions threaten to erode loose soils into the stream.

CHANNEL BED STABILIZATION

If a stream channel has been altered during the operations, its low flow channel shall be returned as nearly as possible to pre-project conditions without creating a possible future bank erosion problem or a flat wide channel or sluice-like area. The gradient of the stream bed shall be returned to pre-project grade.

3 BANK STABILIZATION

4 Areas of disturbed soils which slope toward a stream, shall be
5 stabilized to reduce erosion potential. The OPERATOR shall plant,
6 seed, and heavily mulch all soils disturbed by the project prior to the
7 return of seasonal rains. The OPERATOR shall consult with the U.S.
8 Forest Service and use the U.S. Forest Service recommended plants,
9 seeds, and mulch.

10 Where suitable vegetation cannot reasonably be expected to become
11 established, rock slope protection (RSP) materials that will resist
12 wash out shall be used for such stabilization. The bank stabilization
13 material shall extend above the normal high-water mark. Any
14 installation of RSP materials not described in the original project
15 description shall be coordinated with the DEPARTMENT. Coordination may
16 include the negotiation of additional Agreement provisions for this
17 activity.

18
19 VEGETATION

20 Disturbance or removal of vegetation shall not exceed the minimum
21 necessary to complete the authorized operations. The disturbed
22 portions of any stream channel within the high water mark of the stream
23 shall be restored to their original condition under the direction of
24 the DEPARTMENT.

25 **CLEAN-UP**

26 Structures and associated materials not designed to withstand high
27 water flows shall be moved to areas above high water before such flows
28 occur.

29 Any materials placed in seasonally dry portions of a stream that
30 could be washed downstream or could be deleterious to aquatic life,
31 wildlife, or riparian habitat shall be removed from the project site
32 prior to inundation by high flows.

33 **CONCURRENCE**

34 Douglas T. Cole 4/28/99
35 (signature) (date)

36 Douglas T. Cole
37 Marble Mountain Ranch
38 OPERATOR

39 Charles Honval
40 Ron Presley (date)
41 California DEPARTMENT of Fish and Game

don R. Presley
4/30/99



United States
Department of
Agriculture

Forest
Service

Six Rivers
National
Forest

1330 Bayshore Way
Eureka, CA 95501
(707) 442-1721 text (TTY)
(707) 442-1721 voice

File Code: 2720

Date: 5/8

Mr. Felice Pace
Klamath Forest Alliance
P.O. Box 820
Etna, California 96027

Dear Felice:

This is in reply to your e-mail concerning activities associated with Klamath National Forest lands adjacent to the property of Doug and Heidi Cole.

Trail

The trail I believe you are referring to in your letter is the Bull Pine Mine Trail, a Forest Service trail. It was a cooperative project between the Forest Service and Mr. Cole completed in 1997. The trail takes off from an abandoned section of old Highway 96, parallels Irving Creek for 500 feet, cross the creek by means of a ford and climbs the slope on the south side of Irving Creek to the vicinity of the Bull Pine Mine.

Deed

Property line location in this area has historically been difficult because many of the original 1882 government survey corners were missing. The Forest Service, in the early 1980s, requested the BLM review the survey in this township. The BLM did a metes and bound survey in this portion of Township 13 North, Range 6 East. The survey was completed and approved in 1985. The survey indicated that portions of three existing structures, three hookup pads and an access road were on National Forest land between the north edge of Youngs Ranch (Mr. Young was the previous owner of the Coles property) and Highway 96. The Coles bought Youngs Ranch in 1995 and applied to the Forest Service for resolution of situation under the Small Tracts Act (Public Law 97-465). The Cole's case met the requirements of the act which included the finding that the improvements were built on land the property owner believed to be theirs but which subsequent surveys revealed to be National Forest. The Forest Service quit claimed 0.57 acres of National Forest land to the Coles under authority of the Small Tracts Act. There is no riparian area associated with the land quit claimed to the Coles.

Ditch and Water Right

A ditch is present on National Forest land adjacent to Stanshaw Creek which takes water from the creek to the Coles property. The ditch has been in existence, to the best knowledge of Forest Service personnel and previous land owners of the property, since built by E. Stanshaw in 1867. The ditch and water use is noticed in a statement recorded by E. Stanshaw March 25th 1867 in the Klamath County records (now part of Siskiyou County). As such, the ditch and water use



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predates the Forest Service which, in this area, was created by Presidential proclamation May 6, 1905. Since it predates National Forest creation, a permit is not necessary. If a permit were issued it would be for no fee, and used solely to document the location and use of the ditch. The Forest does not currently have a special use permit issued to the Coles for the ditch.

I hope this answers the questions raised in your e-mail.

WILLIAM M. HEITLER
District Ranger



State Water Resources Control Board

RECEIVED

WR-198



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

MAY 28 2002

NAT'L MARINE FISHERIES SVC.
SANTA ROSA, CA

Gray Davis
Governor

RECEIVED

JUN 06 2002

Nat'l Marine Fisheries SVC
Arcata, CA

In Reply Refer to:
363:MC:262.0(47-40-01)

MAY 23 2002

Klamath Forest Alliance
c/o Law offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Mr. Doug and Mrs. Heidi Cole
c/o Ms. Jan Goldsmith
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Ladies and Gentlemen:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE – ALLEGING UNREASONABLE DIVERSION

Complaint Unit staff of the Division of Water Rights have completed their investigation of the complaint lodged by the Klamath Forest Alliance (KFA) against Doug and Heidi Cole (dba Marble Mountain Ranch). A copy of the Staff Report of Investigation regarding this matter is enclosed. Complaint Unit staff reached the following conclusions:

1. A court of competent jurisdiction would most 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.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should 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 are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is 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 the Coles' ditch to cover both the diversion and bypass requirement with subsequent measurement and release of a bypass back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."

005964

Based on these conclusions, Complaint Unit staff believe the following actions are appropriate:

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their Point of Diversion to maintain a flow in lower Stanshaw Creek below the Highway 96 culverts similar to that present during the October 16, 2001, field investigation (≈ 0.7 cfs).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Coles' ditch is not allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small, hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or
 - b) if full diversion of the creek into the Coles' ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
4. That the parties give serious consideration to a physical solution similar to that discussed in the Staff Report of Investigation.

If either party to the complaint disagrees with the conclusions reached by Complaint Unit staff, please let me know of the points with which you disagree and the specific evidence you believe is available to substantiate or justify a different conclusion or action. If we do not hear from you within 30 days from the date of this letter, we will assume that you agree with the conclusions and recommendations contained therein. If the Coles are unable to produce evidence to justify a different recommendation, failure on their part to maintain the bypass flows as specified may result in appropriate enforcement action without further notice. Similarly, if the KFA is unable to provide evidence to justify a different course of action, this complaint would be subject to closure without further notice.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,



Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

3

MAY 23 2002

cc: Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman
Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Kingle Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556



State Water Resources Control Board

WR-193



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
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Gray Davis
Governor

JUL 02 2001

Mr. Doug and Ms. Heidi Cole
92250 Highway 96
Somes Bar, California 95568

Dear Doug and Heidi:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE ALLEGING UNREASONABLE DIVERSION

The State Water Resources Control Board's (SWRCB) Division of Water Rights has received a complaint on behalf of the Klamath Forest Alliance (KFA) regarding your diversion of water from Stanshaw Creek, a tributary to the Klamath River. In a letter from their attorney, your water rights are questioned and it is alleged that your diversion is unreasonable in that it compromises the downstream fishery.

Enclosed for your review is a copy of the June 14, 2001 letter, an "Answer to Complaint" form, and an information pamphlet. Please use the form to respond to the allegations within 15 days from the date of this letter. Upon receipt of your responses, all items submitted by each party will be evaluated to determine whether further action is required by the SWRCB.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,

Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."

005967

DONALD B. MOONEY
Admitted in California and Oregon

129 C Street, Suite 2
Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

June 14, 2001

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

*Re: Unlawful Diversion of Water by Doug and Heidi Cole from
Stanshaw Creek*

Dear Mr. Schueller:

This letter is written on the behalf of the Klamath Forest Alliance ("KFA") regarding the unlawful diversion of water from Stanshaw Creek, a tributary to the Klamath River. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. To that end, KFA requests that without any further delay the State Water Resources Control Board's Division of Water Rights ("SWRCB") issue an order that directs Doug and Heidi Cole to cease and desist their unlawful diversion of water from Stanshaw Creek, as such diversion adversely impacts public trust resources, including but not limited to coho salmon, a federally listed species.

Although the Coles divert up to 3.0 cfs from Stanshaw Creek, the Coles do not possess an appropriative water right to divert this quantity of water. (See letter dated September 15, 1998, from Harry M. Schueller to Doug Cole, Regarding: Unauthorized Diversion - Stanshaw Creek in Siskiyou County ("Schueller Letter")) For your convenience a copy of your letter is attached as Exhibit A to this letter.) To the extent that the Coles divert water based upon a claim to a pre-1914 appropriative water right, California water law limits any such water right to the amount of water put to continuous, reasonable and beneficial use regardless of the original water right. (See Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) According to the SWRCB's Division of Water Rights, any claim the Coles may have to a pre-1914 appropriative water is limited to the Coles' historic domestic and irrigation use. The SWRCB has quantified such use to be 0.11 cfs. (See Schueller Letter p. 1 & 2) This quantity is based on the yet unsubstantiated assumption that the Coles are successors in interest to Sam Stanshaw's water rights as established in a March 25, 1867 letter by Mr. Stanshaw. (See copy of the March 25, 1867, Stanshaw Water Rights Notice attached as Exhibit B to this letter.)

The Coles, however, have failed to provide any evidence to the SWRCB that the Stanshaw Water Right Notice applies to their land. Unless the Coles can substantiate the assumption that Stanshaw Water Rights Notice applies to their property, any diversion of water by the Coles from Stanshaw Creek violates

California Water Code, section 1200 *et seq.* It should be noted that former water diversion ditches and pipes, large rock piles and abandoned mining equipment indicate that large scale mining and water consumption from Stanshaw Creek, took place on the land now owned by the Fisher Family, not the Coles. Furthermore, Stanshaw Creek itself flows through the former and not the latter. If the Coles can prove that they are successors to Stanshaw's water rights, then any diversion of water in excess of a resulting pre-1914 appropriative water right of approximately 0.11 cfs violates Water Code, section 1200 *et seq.* In either event, the Coles do not possess an appropriative water right to support their current water diversion practices and such practices are contrary to law.

As the Coles do not possess a valid water right for their current diversion of water, the Coles filed an application to appropriate water seeking to divert 3 cfs from Stanshaw Creek via a flume which is 12-inches deep, 24-inches wide, and 5,200 feet long then through a penstock of 16-inch diameter, 455 foot long steel pipe from Stanshaw Creek, a tributary to the Klamath River, in Siskiyou County (Application to Appropriate Water No. 29449). According to the Cole's application, the penstock utilizes 200 feet of fall to generate a maximum of 33.9 kilowatts at 80 percent efficiency at a hydroelectric plant above Irving Creek. The water is then released into Irving Creek and then into the Klamath River. Despite the fact that the Coles have not obtained a water rights permit from the SWRCB for the diversion of water, the Coles continue to divert up to 3 cfs from Stanshaw Creek.¹

In the Fall of 2000, the California Department of Fish and Game ("DFG") obtained an injunction against the Coles for violating sections 1603 and 5937 of the Fish and Game Code. The injunction required that the Coles remove portions of the dam that they had constructed in Stanshaw Creek. The Coles used this illegal obstruction to pool water in order to assist their diversion from Stanshaw Creek. It must be noted, however, that the injunction obtained by DFG applies only to the illegal obstruction in Stanshaw Creek and does not address the unlawful diversion of water. It is KFA's understanding that even though the Coles or DFG may have modified the diversion structure as required by the injunction, the Coles continue to divert water in excess of any pre-1914 appropriative water right.

In your September 15, 1998, letter to the Coles, you stated that within 45 days of your letter, the Coles must provide information to the Division of Water Rights substantiating their claims to a pre-1914 appropriative water right for their

¹ On November 15, 1999, the SWRCB granted the Coles' request for the registration of a small domestic use pursuant to Water Code section 1228 *et seq.* (Certificate No. R 480, Application 30945R). The Coles' small domestic use registration limits the Coles' diversion to 10 acre-feet per annum ("afa") and does not allow hydroelectric generation as a purpose of use. The Coles' current water diversion practices far exceed the 10-afa limitation. For instance, at a diversion rate of 2.5 cfs, the Coles' exceed the 10-afa limitation in just 4 days. Additionally, the Small Domestic Use Registration requires that the Coles obtain all necessary federal, state and local approvals which the Coles have failed to do.

current water diversion. If the Coles failed to provide the requested information, the matter would be referred to the Division of Water Rights' Complaint Unit to consider appropriate enforcement action. It is our understanding that although two and one-half years have passed since your letter to the Coles, the Coles have not provided the requested information. Despite the Coles' failure to comply with your request, this matter has not been referred to the Complaints Unit and the Coles continue to unlawfully divert water from Stanshaw Creek.

In many instances the unlawful diversion of water may not have a significant impact to public trust resources and other legal users of water while an application to appropriate is reviewed and considered by the SWRCB. In such instances, it is our understanding that the SWRCB's informal practice is to allow such diversions to continue until the application to appropriate has been denied or approved. In the present situation, however, the Coles' unlawful diversion has significant impacts to public trust resources and may result in a violation of section 9 of the federal Endangered Species Act, 16 U.S.C. § 1538.²

Stanshaw Creek and the Klamath River contain coho salmon (*Oncorhynchus kisutch*) which are in the Southern Oregon/Northern California Coasts ESU and are listed as threatened under the federal ESA. See 50 C.F.R. § 102(a)(4). In a letter dated October 5, 2000, from William M. Heitler, District Ranger to Doug and Heidi Cole, Mr. Heitler stated that the National Marine Fisheries Service ("NMFS") and DFG are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting coho salmon. (A copy of Mr. Heitler's October 5, 2000 letter is attached to this letter as Exhibit C.) Stanshaw Creek also contains steelhead (*Oncorhynchus mykiss*) which are in the Klamath Mountains Province and are listed as candidate species under the ESA and a species of concern to DFG.

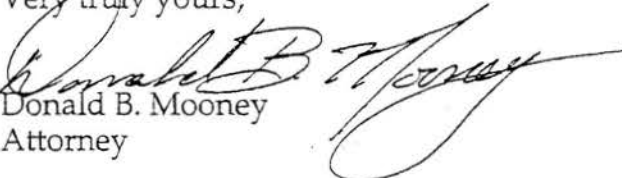
As the Coles' unauthorized diversion of water poses a significant risk to public trust resources in and along Stanshaw Creek and the Klamath River, including but not limited to the impacts to coho salmon, a federally listed species, KFA respectfully requests that the SWRCB follow through on its September 15, 1998, letter and immediately refer this matter to the Complaint Unit. KFA also

² The courts have ruled that when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition. (*Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997), cert. denied, 119 S.Ct. 81, and cert. denied, 119 S.Ct. 437 (1998).) The same rationale that caused the court in *Strahan* to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the SWRCB's decision to allow the Coles to continue diverting water from Stanshaw Creek, even though the SWRCB has concluded that Coles do not possess an appropriative water right. In addition, recent case law confirms that the failure of government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act. (*Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999).)

requests that the SWRCB direct the Coles to cease and desist from any further diversion of water from Stanshaw Creek in excess of an established pre-1914 water right until the SWRCB has the opportunity to review and consider the Coles' Application to Appropriate Water and the associated protests as well as any biological assessment prepared by the United States Forest Service and a biological opinion prepared by NMFS.

Please do not hesitate to contact me if you have any questions regarding this matter. I can be reached at (530) 758-2377.

Very truly yours,


Donald B. Mooney
Attorney

cc: Felice Pace
Robert Miller
Charles Rich
Larry Allen



WR-193
UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

In Response Refer To:

July 8, 2002 151416- SWR-02-SR-6338:SKL

Elk in 1/5/04
Blue Heron do they have
beneficial use over time

Can't find any project that's unlawful

Above undisturbed waters, may
do without a screen

Cole. Documentation of maintenance
rights on S land.

Mr. Michael Contreras
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

1/4/04
potentially enclosed pipe
: No diminishing
: Fish screen is a maintenance
issue
- Seen 2 fish over 10 years.
- Any structural
- Argue loss of habitat

Dear Mr. Contreras:

Thank you for extending the comment period for your letter in regards to your investigation into water rights complaint submitted by the Klamath Forest Alliance alleging unreasonable diversion.

The National Marine Fisheries Service is surprised that SWRCB Complaints Unit has not fully considered the comments by either NMFS or the California Department of Fish and Game (CDFG) in this case. We are forced to disagree with the SWRCB Complaint Unit's conclusions.

NMFS has not been presented any evidence that the Coles have pre-1914 water rights for domestic, irrigation, and hydroelectric generation. It is our understanding that only 0.11 cfs has been used historically, whereas 3 cfs is required for hydroelectric generation. If this is not the case, NMFS requests that documentation.

instantaneous flow Young's Ranch
summer flow
in ditch

The SWRCB bypass flow of 0.7 cubic feet per second (cfs) is based solely on a single measurement of the stream at the time of the site visit last October. It therefore does not account for long term stream discharge pattern of Stanshaw Creek and is clearly inadequate. While Stanshaw Creek is not gaged, its flow magnitude, frequency, duration, and timing can be estimated by prorating by area a nearby gaged stream. Margaret Tauzer of NMFS Arcata has estimated the median, minimum, and average flows in cfs of Stanshaw Creek during August, September, and October (the driest months) based upon prorated estimates from the USGS gage records of Ti Creek. They are:

| | August | September | October |
|---------|--------|-----------|---------|
| Median | 2.99 | 2.58 | 3.05 |
| Minimum | 2.58 | 2.04 | 1.02 |
| Average | 3.16 | 2.63 | 4.09 |

Change of Materials can be challenged



In addition to inadequate bypass flows, the SWRCB complaint unit's proposed conditions do not protect federally listed species. First, there is no provision to return the diverted flow back to Stanshaw Creek. Without these flows, the summer thermal refuge at the mouth of Stanshaw Creek will warm sooner and be warmer, degrading its value to juvenile coho salmon. These degraded conditions increase the likelihood of take of a federally listed species. The Coles verbally offered to return flows to Stanshaw Creek during the field site visit, so NMFS does not understand why this provision is not included. NMFS' bypass recommendation was contingent upon returning diverted flow to Stanshaw Creek to maintain the thermal refuge at its mouth. Therefore, we reiterate our recommendation to return diverted flow back to Stanshaw Creek.

The SWRCB Complaints Unit proposed solution also does not mention adequate fish screening at the point of diversion (POD) to prevent entrainment of fish. Adequate fish screening was included as conditions to remove our protest.

Finally, NMFS does not see how visual estimation of flow in the creek can be implemented as a condition. This would make any monitoring or compliance meaningless.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning the contents of this letter please contact Dr. Stacy K. Li at (707) 575-6082.

Can apply for Salmon Restoration Funds Leah Mahan
Sincerely,

James R. Bybee

James R. Bybee
Habitat Manager
Northern California

707-575-6077

cc: Doug and Heidi Cole

Margaret Tauzer, PRD, NMFS, Arcata

Tim Broadman, Law Enforcement, NMFS, Arcata

Ron Prestly, CDFG, Redding

William Heitler, USFS

Jim De Pree, Siskiyou County Planning Department

Konrad Fisher

Karuk Tribe of California

825-5174 Primary NMFS contact

F. P. Moore
Don Mooney Ph# 530-758-2377 call

Gary Black # -
- Self-Cleaning Headgate

Ph# 530-758-2377 Fish Screens on small diversions



United States
Department of
Agriculture

Forest
Service

Six Rivers
National Forest

1330 Bayshore Way
Eureka, CA 95501-3841
(707) 442-1721 Text (TTY)
(707) 442-1721 Voice

File Code: 2770

Date: August 11, 2010

Mr. Douglas Cole
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole: •

This is in response to your proposal as presented to George Frey on July 8, 2010, to develop a new power plant and penstock in association with your existing hydro power project.

The project as described would use the same water intake source on Stanshaw Creek but the existing penstock would be extended, bypassing the current hydro power plant on your property. The penstock would continue down slope where it would leave your property, go under Highway 96 and continue down a non-system road on National Forest System lands to a point on a low bench above the Klamath River. The penstock would enter a new hydro plant which would generate approximate the same or slightly more power than the old system produced. Your old power plant would be bypassed and kept intact as an emergency back-up. Additional ancillary improvements would include a pole line to transmit power back to the Marble Mountain Ranch, improvements to the lining of the ditch carrying water to the penstock and construction of an outtake pipeline that would disperse the water from the power plant either to an existing pond ¼ mile upriver or directly to the Klamath River. You stated that only half the water currently diverted from Stanshaw Creek would be needed for this proposal. You also stated that if the outflow water from the new power plant is directed to an existing pond then it may be possible to create a fishery in the pond.

This project falls under the authority of the Federal Energy Regulatory Commission (FERC). FERC regulates power plants, both large and small on federal lands. As your proposal will include a new penstock, power plant and out take pipeline on National Forest System lands FERC is the regulating agency. Because this proposal is below 5 mega watts it will be under its small hydro regulations and exempt from licensing. Although exempt from licensing it will still require a Forest Service special use permit authorization. George Frey provided you with a copy of the FERC Small Hydro Handbook.

You need to submit an application to FERC for this project. The Forest Service will work with you and FERC to complete the processing of this proposal. An environmental analysis and Section 7 Wild & Scenic River determination for the proposed project will be required before permit issuance. Costs for processing the permit will be subject to recovery by the Forest Service.

Enclosed is a sketch map of your existing and proposed hydro system. It may be helpful as you develop the proposal for FERC. When George reviewed the proposal on the ground he noted



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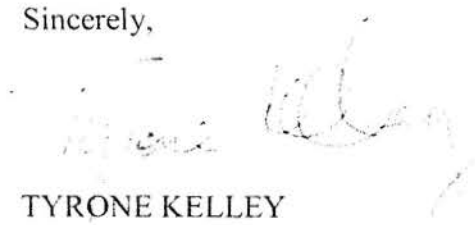


several issues that will need further investigation.

- You will need an accurate map of the proposal in both plan and profile views showing property lines, the diversion location in Stanshaw Creek, ditch line, existing penstock, existing power plant, proposed penstock, access road from Highway 96 to the Klamath River, proposed new power plant, proposed pole line and proposed outflow pipeline from the power plant.
- The new penstock is proposed to be located in a cross drain culvert under State Highway 96. A Caltrans encroachment permit will be needed for this use.
- The new power plant is located on a low bench above the Klamath River. Your proposed location may be within the 100 year flood level. You will need an accurate measurement of the power plants elevation above the Klamath River's annual mean high water level and an estimation of the 20 and 100 year flood levels. This issue will become more important if the dams on the Klamath River are removed and high winter flows are not regulated.
- The proposed power plant and penstock will be within the wild and scenic river corridor of the Klamath River. The river is designated as "recreational" in this reach. At a minimum, some type of screen will be needed to hide the power plant, penstock and outflow pipeline.
- One option of your proposal is to direct the outflow from the new power plant to a pond ¼ mile up river. In plotting out the location of the new power plant it appears that the pond will be higher than the outflow from your power plant. This issue needs to be verified by establishing the elevation of both the new power plant and the pond. Also, from a fisheries prospective, this proposal would not be as positive as running the water from the new power plant directly to the Klamath River. The cold water input to the Klamath River helps cool the river in the summer. Running the water into a pond where it will warm up before it flows into the Klamath is not as desirable as placing it directly into the Klamath River.

If you have any questions contact George Frey, the permit administrator, at (707) 441-3631.

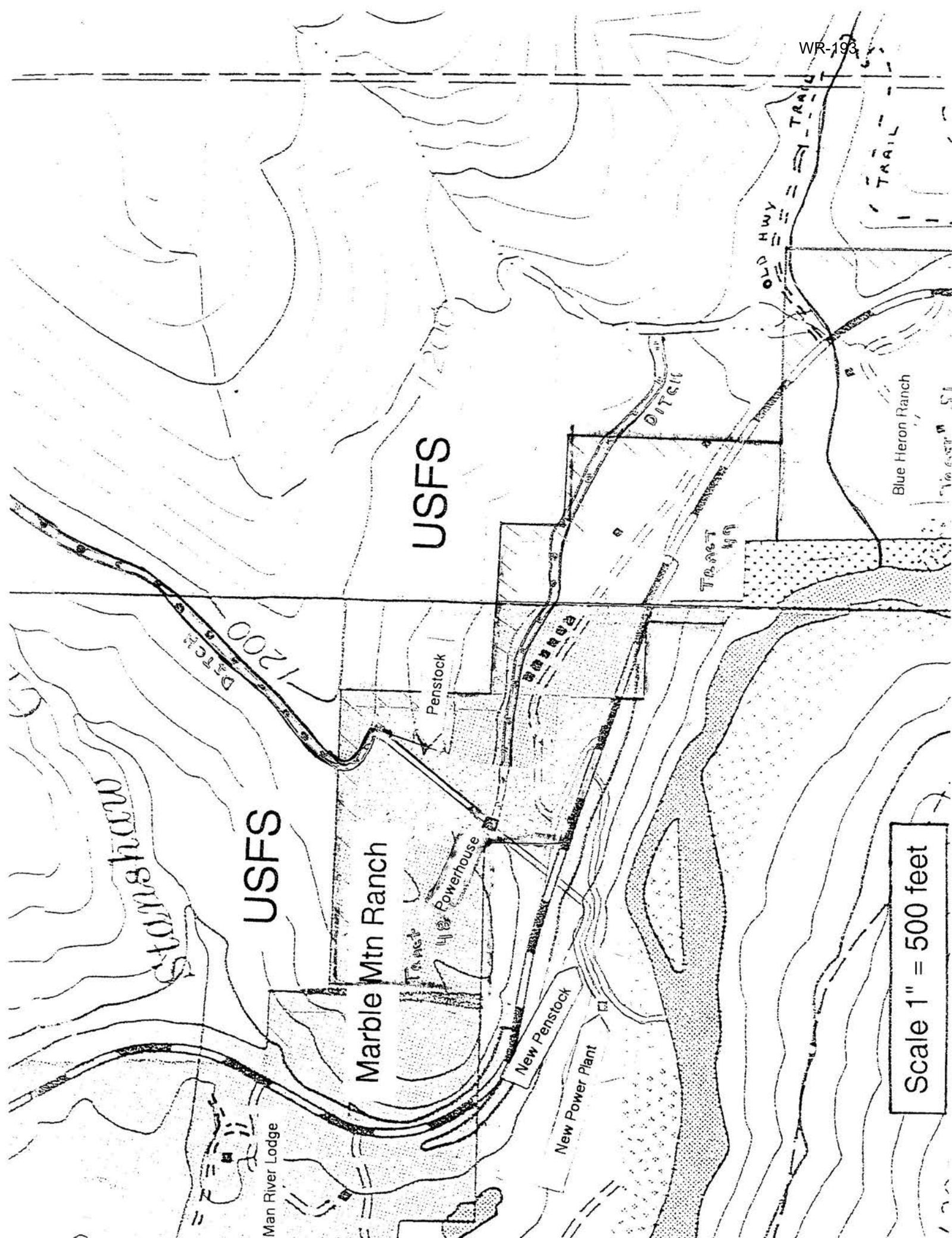
Sincerely,



TYRONE KELLEY
Forest Supervisor

Enclosure

cc: Nolan C Colegrove



Scale 1" = 500 feet

Memorandum

AUG 19 1964

DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL630 Sansome - Rm. 860
San Francisco 94111

Subject: Special Uses - Water
Transmission - Six Rivers -
Donald W. Killian (6/7/63)

August 17, 1964

To: Regional Forester
Attn: L. P. Slattery

Your file no. 2710

In reply to your memorandum of August 5, if the Forest is reasonably sure on the basis of the attached materials and other information that the pipeline has been in place and carrying water continuously since 1876, which is prior to the establishment of the national forest in this area in 1905, then it appears to us that Mr. Killian has a right-of-way for the pipeline over national forest land and does not need a permit therefor, by virtue of 43 U.S. Code, Section 661, which provides in part as follows:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

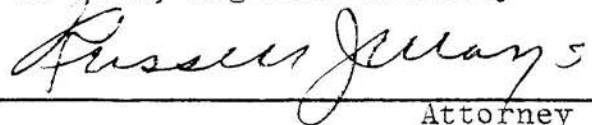
It has been held that this section applies not only to ditches and canals, but also to dams, flumes, pipes, and tunnels.
Peck v. Howard, 167 P. 2d 753.

Accordingly, if the facts are as stated above, Mr. Killian has a right-of-way and no charge can be made for this occupancy.

Your attachments are returned.

Jesse R. Farr, Regional Attorney

By


Attorney

RJMays:dcd
Att.



United States
Department of
Agriculture

Forest
Service

Six Rivers
National
Forest

1330 Bayshore Way
Eureka, CA 95501
(707) 442-1721 Text (TTY)
(707) 442-1721 Voice

File Code: 2770

Date: 18 October 2001

Route To: *

Subject: Water Right Complaint Meeting
Marble Mtn Ranch

To: Files

This is documentation to the files concerning a meeting held 10/17/2001, 10 am at the Marble Mtn. Ranch concerning a complaint filed by Mr. Fisher against Doug and Heidi Cole's application for a license to divert water from Stanshaw Cr. for the purpose of generating electric power by a pelton wheel.

Present:

Forest Service: George Frey, Leslie Goslin-Burrows

NMFS: Tim Broadman, Dave Rielly, Chuck Glasgow, Stacy Li

Karuk Tribe: Toz Solo, Ron Reed, Philip Albers Jr., Lucill Albers, G. Peters

Cal. Dept. F&G - Ron Presley

Klamath Forest Alliance (KFA) - Don Mooney (attorney), Felice Pace, Jim McCarthy

Complainant - Jim Fisher (adjoining landowner), Michael David Fellow, Maig Houston

State Water Resource Control Board (SWRCB) - Michael Contreras, Chuck Rich

Marble Mtn. Ranch (MMR)- Doug Cole, Jan Goldsmith (attorney)

The meeting was led by Chuck Rich of the SWRCB. The meeting was designed to gather information so SWRCB could make a decision on a 20 year application started by Bob Young, a former owner of MMR and continued by the present owner Doug Cole. Application was for a water diversion to run a pelton wheel. Mr. Rich said the Young's had also applied for and the State of California acknowledges a pre 1914 water right for domestic and agricultural water. That right was associated with a recording of a notice by E. Stanshaw in 1867 for the use of 600 miner inches of water in Stanshaw Creek (1 miners inch = .025 cubic feet per second (cfs) therefore 600 miners inches equals 15 cfs). No one in the audience contested this right. They also have a permit for storage of some water on their property in a small pond. The major complaint is that the Cole's current diversion practically dewateres Stanshaw Cr. below the diversion by placing the water that is not consumed in a ditch that empties into Irving Creek. The Cole's typically take 80% of the water in the creek for their operations. As of the day of the meeting Stanshaw Creek above the diversion was flowing between 1 and 2 cfs.

The Cole's Diversion

The Cole's diversion is located 4,000 horizontal feet east of Highway 96 and over 400 vertical feet above the highway. The diversion (which is composed of river rocks arranged by hand) channels water into a ditch originally built by the Chinese in the late 1800's. The ditch contours from Stanshaw Creek over National Forest land for approximately 3000 feet then enters the Cole's property where some water is drawn off for drinking and the rest runs down a 500 foot



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long, 200 foot vertical 14" diameter steel penstock to a pelton wheel that produces hydroelectric power to run the ranch. The ditch can only carry 3 cfs at maximum. Doug Cole said they need approximately close to 3 cfs to run the pelton wheel. This year the water was so low that he had to stop running the pelton wheel in April and it hasn't run since. He has a diesel generator located next to the pelton wheel that is used when the pelton wheel is not running. The water after flowing past the pelton wheel is then directed into a ditch and channeled along the top end of the Cole's property in a southerly direction for approximately 1,800 feet where it leaves the Cole's property and enters upon National Forest land for 800 feet where it ends at a small natural streambed tributary to Irving Creek. This tributary enters Irving Creek 500 feet above Highway 96.

Blue Heron Ranch taps water from this small tributary with a 4" diameter plastic pipe for domestic, agriculture and I believe hydroelectric use. Blue Heron Ranch has ownership along Irving Creek and I did not follow their waterline above Irving Creek to see if it went onto National Forest land. If I had to guess I would say it probably did but it needs to be checked out. Chuck Rich of SWRCB said that Blue Heron Ranch had no water right to take this diverted water and use it for their own purposes. Blue Heron Ranch has riparian rights to Irving Creek and if they used that water they could do so without a license but not the ditch water coming from Stanshaw Creek.

Mr. Fisher's property.

Mr. Fisher is part owner of a parcel located below the highway and adjacent to Stanshaw Creek. The parcel is also known as Old Man River Ranch. I believe this property and the Cole's were once part of a larger parcel. The property has a number of improvements including a caretakers house, a lodge and 4 cabins down near the river. The property is used primarily for fishing. Water for the property is used for domestic and irrigation. No water right is necessary as the property has riparian rights to Stanshaw Creek. The day of this meeting the creek was very low with less than 0.5 cfs of water was flowing through Stanshaw Cr. The reach of Stanshaw Creek from its mouth to Highway 96 is approximately 1000 feet long. It has some fish holding habitat for salmon but no spawning habitat. The creek crosses under Highway 96 by means of 2 arched culverts that are 5 feet high and 6 feet wide at the base and rest on a concrete slab. The culverts are 380 feet long and rise 30 feet over that length making fish passage almost impossible. A review of the creek above the culvert indicates little salmon holding or spawning habitat. The highway culvert has been looked at in the past by Caltrans (along with all other structures on Highway 96) for replacement with a more fish friendly structure but it is thought by some to be a low priority because of the minimal amount of habitat above the crossing and the expense of replacement.

The Tribe, Cal F&G, NMFS and KFA were all concerned with the lack of water in this lower reach of Stanshaw. They felt the water diverted by the Cole's should be returned to Stanshaw Cr. above the highway.

Forest Service Responsibilities:

At the meeting I was asked the Forest Service position on the issues and responded that the intake and outtake of the Cole's system was on National Forest land but their right predated the National Forest and as such they did not need a permit for their domestic and irrigation water so

long as their improvements remained in the same location as originally constructed. I said the Forest Service may issue a special use permit to the Cole's for the sole purpose of documenting the use as we currently have nothing in our files on the location of the ditch over National Forest lands. The permit could not condition use or charge a fee as the ditch was a prior use.

Use of the water for generation of electricity requires a FERC license and a permit from the Forest Service for its operation. The Cole's were currently pursuing acquiring a water right for that purpose and if they are successful we will work with them as they apply to FERC for an exempt license (exempt because its is less than 5 mega watts and once issued does not have to be relicensed).

The use by the Blue Heron Ranch of any waterline over National Forest land is unauthorized and needs to be addressed by the Forest Service (no representative for the Blue Heron Ranch was at the meeting).


The issues concerning the dewatering of most of Stanshaw creek was also a concern of the Forest Service but we looked to NMFS, the Karuk Tribe and the CF&G to take the lead on the issue as the impacts were on private land below the highway and we had no regulatory authority if the historical diversion on National Forest land continued unchanged.

Fisheries Issues:

Most of the meeting centered around impacts of the project to the coho fishery. The attorney for Cole wanted hard data on impacts to the fisheries but no one had such data. The Tribal had anecdotal information but nothing more. The biologists all felt that Stanshaw Creek was being harmed by the diversion. The general concession was Stanshaw water sent through the Cole's ditch needed to be returned to Stanshaw Creek. Doug Cole said he didn't care which way the water used for the hydro plant went but the expense of replumbing the ditch line over to Stanshaw Creek was beyond him. Felice Pace said KFA was opposed to any new water rights being issued to anyone on the Klamath River feeling that the water was already over prescribed

Conclusion:

Chuck Rich from SWRCB stated at the end of the day that he had to make a recommendation on the complaint to the water rights board and would use the information gathered from today's meeting and would accept any written input from the people at the meeting if it was received prior to November 23, 2001. Comments should specifically address the affects of the Cole's application for a hydro water right on the fisheries in Stanshaw Creek.

The Forest Service should continue to cooperate with the other agencies on sharing known and gathering future fisheries data for Stanshaw and Irving Creek. [We should also follow up on ascertaining the location of the Blue Heron waterline in relationship to National Forest ownership. If they are on National Forest land they need to be told to remove their lines as they do not have a water right to the Stanshaw water.] 

/s/ *George Frey*

GEORGE FREY

Assistant Lands and Minerals Officer

Case Report

Stanshaw Creek Water Diversion 10/19/2001

Ukonom Ranger District - Klamath National Forest

Problem

An historic diversion in Stanshaw Creek for the purpose of supplying water to the Marble Mountain Ranch (Section 33 T13N R6E HM) has been a recent source of concern by neighbors, state fish and game wardens and a local environmental group. The diversion has substantially dewatered Stanshaw Creek below the diversion and reduced spawning habitat for anadromous fish in the lower reaches of the creek.

Chronology

3/25/1867 - E. Stanshaw recorded in the County Records Office a Notice of water use (the State of California did not grant water rights till 1914). Stanshaw stated that he had

"taken hold for mining and for purpose of irrigation 600 inches of the water running in Stanshaw Creek. So called the water so taken, being carried by ditch and flume, to and past my dwelling home; second by ditch and flume running up the Klamath River to my upper field, said creek being in Dillon Township, State of California, County of Klamath."

600 inches of water denotes the measurement of the period which was in miner's inches - a miner's inch is the amount of water that would discharge through a 1" x 1" opening under a prescribed head of water. In Northern California it equals 0.025 cu. ft./sec. 600 miner's inch of water is equal to 15 cu ft/sec. The water in this ditch, following use on the homestead, empties into Irving Creek - three quarters of a mile south of Stanshaw Creek.

5/6/1905 - Klamath National Forest created by Presidential proclamation

3/27/1911 - Samuel Stanshaw is granted a Homestead Patent

1912? At some point a hydro power plant utilizing a Pelton wheel was developed. The current owners of the Marble Mtn. Ranch, Doug and Heidi Cole, believe the water wheel was put into place before 1912.

8/17/1964 - Memo from Regional Attorney Russell Mays to Regional Forester confirming that no permit is necessary for the Stanshaw ditch and diversion if it preceded the FS establishment.

Late 1960's or early 1970's - Lew Hayes, owner of the Marble Mtn Ranch, sued the Forest Service for fouling his water as a result of a Forest Service logging operation in

the Stanshaw drainage. The Forest Service settled out of court. I do not have written documentation of the case. It was reported by Orleans/Ukonom District Ranger Bill Heitler.

12/30/1994 - Cole's purchase Marble Mtn. Ranch from the Young's.

1995 - 2000 - A recent call to the State Water Resources Control Board (SWRCB) revealed the Cole's have three filings with the state. The first is a 2.5 cu ft/sec Statement of Diversion (State # S015022). This is probable associated with the 1876 filing in the county recorders office of a notice of water use by E. Stanshaw. The second is a Small Domestic Use for storage of 10 acre feet per year (State # D030945) in a pond on the property. The third is a filing of a power use application for 3 cu ft/sec (State # A029449). This is for use with the hydro project.

1996 - Coles applied for a 0.57 acre Small Tracts Act grant for lands that underlie 3 house trailers, 3 trailer pads and an access road. Improvements were discovered following approval of a BLM Metes and Bounds survey in 1985. Case completed and quit claim granted sometime in 1997 (need copy of recorded deed).

1997 - Completion of a Forest Service trail up Irving Creek. Trail was a cooperative project between the Forest Service and the Coles. The trail accessed the Bull Pine Mine.

1998 - A 0.57 acre Small Tracts Act quit claim is granted by the Forest Service.

4/1999 - The Cal DFG, through its representative Game Warden Ron Presley, and the Cole's entered into a Section 1603 Five Year Maintenance Agreement for Streambed Alteration. The agreement provided for delineating appropriate activities, project modifications and specific measures necessary to protect fish and wildlife resources. The DF&G determined resident trout and aquatic invertebrates would be the wildlife potentially affected by the project due to loss of stream habitat from low flows. The agreement provided that "flows to downstream reaches shall be allowed to pass downstream to maintain wildlife, plant life and aquatic life below the dam in a healthy condition, and to allow fish migration, during all times that the natural stream flow would have supported aquatic life, pursuant to Fish and Game Code section 5937 and 5901". The agreement did not specify a specific bypass volume of water that was to be in the creek below the diversion. The six page agreement identified a number of other construction and maintenance provisions the Cole's were responsible for.

3/9/2000 - Letter from Jon Grunbaum, Happy Camp RD, Klamath NF fisheries biologist to Yoko Mooring of the SWRCB concerning the Cole's filing (#A029449) of a appropriation of water for power use from Stanshaw Creek. Mr. Grunbaum stated the Forest Service was investigating the possible upgrading of the culvert under Highway 96 to allow for fish passage and the Cole's further appropriation of water would make the project pointless. Mr. Grunbaum requested delay of any decision by the SWRCB until more research on Stanshaw Creek is completed. The culvert upgrade project has not

advanced beyond a proposal at this time. Mr. Grunbaum mentioned that as of 4/2001 the SWRCB has not responded to his letter.

9/26/2000 - Documentation of a site visit by District Ranger Bill Heitler and Fisheries Biologist Jon Grunbaum for the purpose of determining if the ditch was on NF land, the age and amount of water diverted. The ditch was definitely on National Forest land, had been in place a long time and diverted 75% of the creeks water. A search of District records indicated no permit authorized the improvements.

10/05/2000 - Letter from District Ranger Bill Heitler to the Cole's stating that the diversion and part of the ditch were on NF lands with no authorization. The letter stated the diversion was causing adverse impacts to fish and that National Marine Fisheries Service and Cal. Dept. of Fish and Game were concerned. The letter gave the Cole's 30 days to respond with any permits they might have authorizing their use. The letter stated the use may predate NF creation and therefore the Cole's may be eligible for a no fee special use permit.

11/03/2000 - J. Konrad Fisher, one of seven owners of the Old Man River Lodge, a parcel that abuts the Marble Mountain Ranch and is adjacent to Stanshaw Creek sent a Freedom of Information Act (FOIA) letter to the Forest Supervisor, Six Rivers NF. He requested all records associated with the Cole water diversion.

11/17/2000 - Letter from Forest Supervisor, Six Rivers National Forest to J. Konrad Fisher answering his FOIA and sending 5 documents including a note written by District Ranger Heitler of a site visit 9/26/2000, a letter from Jon Grunbaum, biologist to SWRCB requesting delay in approving a grant of a 3.0 cu ft/sec appropriation for power use, a recorded notice of taking of water by E Stanshaw in 1867, a copy of the Stanshaw patent and the Cole's 1994 grant deed to the Marble Mtn. Ranch.

3/22/2001 - Documentation of a meeting at the Marble Mtn. Ranch between the Cole's, the Karuk Tribe and the Forest Service concerning efficient use of Stanshaw Creek water and the need as seen by the Tribe of allowing as much water as possible to flow down Stanshaw Creek for the benefit of anadromous fish.

4/2001 - 60 day Notice of filing of a law suit against the Forest Service by the Klamath Forest Alliance. Law suit concerns Forest Service actions in relationship to protecting environmental issues associated with the Coles property.

4/2001 - e-mail from Felice Pace, Conservation Director for the Klamath Forest Alliance, requesting information on Forest Service authorizations associated with the Coles ditch on National Forest land.

4/3/2001 - Article in Siskiyou Newspaper on Coles

4/5/01 - Documents listed that are associated with the Cole property and their water rights.

5/4/2001 - e-mail from Felice Pace requesting info on the Cole use of NF Land

5/8/01 - Draft response letter from Bill Heitler to Felice Pace concerning use of NF land by Coles. Use does not require a special use permit as it predates FS.

6/14/2001 - Letter from Don Mooney, lawyer for KFA and Fisher to SWRCB complaining of improper diversion of water under old 1887 water right established by E. Stanshaw.

7/2/01 - Letter from SWRCB to Coles requesting an answer to the Mooney complaint letter.

10/18/01 - Meeting at Coles with reps for NMFS, KFA, SWRCB, Conrad Fisher, Cal DFG and Karuk Tribe to discuss complaint, view site and discuss possible resolutions. Meeting documented.

Issues

Water Rights

The original taking by E. Stanshaw of 600 inches for mining and irrigation in 1867 appears to be an outstanding right but solely for mining and irrigation, not hydro power production. The Cole's have three water filings with the SWRCB - a Statement of Diversion for 2.5 cu ft/sec, a 10 acre feet right for Small Domestic Use as well as an application for 3 cu ft/sec for power use. The application for the 3 cu ft/sec is needed because their previous recorded rights were not for power production only mining and irrigation. This has resulted in an opportunity by others (Cal. DFG and neighbors) to question additional appropriations when dry season flows result in all the water being diverted by the Cole's.

Need for Authorization by Forest Service

I spoke to Richard Flynn of OGC 4/12/2001 and explained current situation and specifically asked if an authorization for a ditch that predates NF creation is required. He said OGC is divided on the issue. Some attorneys feel every use of National Forest land requires authorization including those that predate NF while others feel no special use permit is required for activities that predate NF creation. He went on to say that if a special use is issued it could not change the rights that the Cole's have. We could not deny them the use of the ditch or have them move it from its current location.

If the Cole's decide to enlarge the ditch or move it then the Forest Service has authority to approve or deny a change but not if the use remains the same.

Ditch Bill Easement

Congress provided users of agricultural ditches that predated NF creation to acquire a Ditch Bill easement. The ditch constructed by E. Stanshaw is believed to be in the same location today. As an improvement that predates the Forest Service it was eligible for a Ditch Bill Easement if an application had been made prior to 12/31/1996. The Cole's have not applied for a Ditch Bill Easement. Applying for the easement is not necessary for maintaining their rights for use of the ditch.

FERC License

The 1920 Federal Power Act requires a license to be obtained for projects utilizing federal lands. The current administer of the Federal Power Act is the Federal Energy Regulatory Agency (FERC). The Cole's and their predecessors have not acquired a FERC license for their power project. The Cole's acknowledge this though I don't know if they have contacted FERC at this time. As a preexisting project the Cole's must apply to FERC for a Petition for Declaratory Order. The size of their hydro operation would probable put them in the "exempt license" category. The Forest Service normally issues a special use permit for the water transmission lines on NF land. In this case the ditch predates NF creation and a special use permit may or may not be needed as the use has not changed (see discussion under "Need for Authorization" above). The water in the ditch is used for multiple purposes including irrigation, domestic use and for running the hydro project. The penstock and powerhouse for the hydro project are all located on private property. Only the ditch that leads to the top of the penstock is on National Forest land.

Trail up Irving Creek

The Klamath Forest Alliance questioned use by the Coles of a trail on National Forest land up Irving Creek. The trail was a cooperative project between the Forest Service and the Coles. It was completed in 1997.

Small Tract Act Case

The Coles applied for a resolution to an innocent trespass by previous owners of siting portions of 3 trails, 3 trailer pads and an access road on 0.57 acres of National Forest land. The Forest Service quit claimed the land to the Coles in 1997 or 1998 (Klamath doesn't have a recorded copy).



State Water Resources Control Board

WR-193



Alan C. Lloyd, Ph.D.
Agency Secretary

Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
Mailing Address: P.O. Box 2000 ♦ Sacramento, California 95812-2000
FAX: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

NOV 09 2005

Doug Cole, et al.
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

MEMORANDUM OF UNDERSTANDING FOR PREPARATION OF ENVIRONMENTAL DOCUMENT AND WATER AVAILABILITY ANALYSIS

Your water right application(s) has/have been reviewed to determine what steps you will need to take before the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) can continue processing your application(s). The required steps are discussed below.

California Environmental Quality Act (CEQA) Documents

CEQA requires that the State Water Board, as Lead Agency, directly or under contract, prepare the appropriate environmental documentation prior to taking any discretionary action, such as approving a water right application. You are responsible for all costs related to the environmental evaluation and preparation of CEQA documents. This includes the related fishery impact studies discussed below. You are required to enter into a Memorandum of Understanding (MOU) that defines your role and the roles of the State Water Board and your environmental consultant(s) for preparing the appropriate CEQA documents. A copy of the MOU template can be obtained at www.waterrights.ca.gov/forms (click on *Memorandum of Understanding for Preparation of Environmental Documents*). If you are unable to access the Division's web page, a copy can be obtained by contacting the Division at the above address or telephone number.

If you think that CEQA does not apply to this project, please provide written justification and documentation to support your position. Also note that the final determination regarding the applicability of CEQA to the appropriate water right process is the responsibility of the State Water Board as Lead Agency.

307, 308
15328, 15333 small water
exemptions: modifications
CEQA Guidelines
Sect 15301-305
301-333

California Environmental Protection Agency

Doug Cole, et al.

- 2 -

Potential Cumulative Impacts on Threatened Fish

National Marine Fisheries Service (NOAA Fisheries Service) listed the Central California Coast coho salmon (*Oncorhynchus kisutch*) and the Central California Coast steelhead (*O. mykiss*) as threatened under the federal Endangered Species Act. Subsequently, NOAA Fisheries Service and the California Department of Fish and Game (DFG) developed a method to assess potential site-specific and cumulative impacts of proposed water projects on anadromous fishery resources in coastal watersheds. This assessment method is described in a document titled *Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams (Draft)* (Guidelines), prepared by NOAA Fisheries Service and DFG and dated June 17, 2002. A copy of this document can be obtained at www.waterrights.ca.gov/coastal_streams/index.html.

Request for Information

The applicant is responsible for completing most technical activities associated with processing a water right application, including resolution of valid protests filed against the application. These technical activities may require that you hire qualified engineering and environmental consultants. They will analyze the project watershed and, if necessary, recommend specific project modifications or actions (mitigation measures) to: 1) prevent your project from contributing to significant cumulative impacts on anadromous fishery resources in the watershed; 2) prevent your project from causing or contributing to other significant environmental impacts; and 3) resolve valid protests against the project. You or your environmental consultant(s) must also prepare the appropriate CEQA documents. A list of environmental and engineering consultants who are familiar with the preparation of water rights analyses and CEQA documents can be obtained at www.waterrights.ca.gov/wrinfo/contacts.htm.

As part of this process, you must determine whether the total diversion demand in the project watershed, including your proposed diversion(s), may cause a significant adverse impact to anadromous fishery resources. Documentation to support a finding that there is water available for appropriation for this project must also be provided according to California Water Code section 1375 (d). To meet these requirements, the applicant must prepare and submit to the Division a Water Availability Analysis/Cumulative Flow Impairment Index Report (WAA/CFII Report) for review and acceptance. An example of how the WAA/CFII Report should be formatted can be viewed at www.waterrights.ca.gov/forms. The WAA/CFII Report's results may require additional site-specific hydrological and biological surveys/analyses in consultation with NOAA Fisheries Service and DFG. Please consult the Guidelines for further information.

In view of the above discussion, please advise the Division in writing within 30 days of the date of this letter if you wish to continue pursuing a water right permit for your project. Your response should also acknowledge that you agree to retain the appropriate engineering and environmental consultants to prepare the WAA/CFII Report and appropriate CEQA documents. If you do not respond in writing within the time allowed, we will assume that you no longer wish



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
Mailing Address: P.O. Box 2000 ♦ Sacramento, California 95812-2000
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WR-193



Arnold Schwarzenegger
Governor

MEMORANDUM

TO: Jane Vorpapel
CALIFORNIA DEPARTMENT OF FISH AND GAME
601 Locust Street
Redding, CA 96001

FROM: **ORIGINAL SIGNED BY:**
Katherine Mrowka, Chief
Watershed Unit 3
DIVISION OF WATER RIGHTS

DATE: **DEL 7 8 2008**

SUBJECT: APPLICATION 29449 OF DOUG COLE, MARBLE MOUNTAIN RANCH,
STANSHAW CREEK IN SISKIYOU COUNTY

Division of Water Rights (Division) staff understands that there has been recent progress in addressing the public trust resource needs associated with Application 29449. A response is requested within the next 45 days that states any proposed protest dismissal conditions that have been developed for this matter.

I can be contacted at (916) 341-5363.

✓ **cc:** Douglas Cole
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

Will Harling
Mid Klamath Watershed
P.O. Box 764
Somes Bar, CA 95568

California Environmental Protection Agency



005988



State Water Resources Control Board

WR-198



Linda S. Adams

Secretary for

Environmental Protection

Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300

P.O. Box 2000 ♦ Sacramento, California 95812-2000

Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger

Governor

In Reply Refer
to:334:KDM:29449

~~CALL 11 5 2001~~

Douglas Cole
Marble Mountain Ranch
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

APPLICATION 29449 OF DOUGLAS T. COLE, STANSHAW CREEK IN
SISKIYOU COUNTY

The National Marine Fisheries Service (NMFS) protested Application 29449 on the basis of potential injury to public trust resources. NMFS provided protest dismissal conditions by letter dated November 15, 2001. The Division has no record to indicate whether you concur with the dismissal conditions. A response is requested within the next 45 days stating whether you are amenable to the conditions or if the conditions have been modified subsequent to the November 15 letter and you are amenable to the modified conditions.

If you have any questions, I can be contacted at (916) 341-5363.

Sincerely,

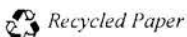
ORIGINAL SIGNED BY:

Katherine Mrowka, Chief
Watershed Unit 3

cc: National Marine Fisheries Service
Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Will Harling
Mid Klamath Watershed
P.O. Box 764
Somes Bar, CA 95568

California Environmental Protection Agency



005989

Recording requested by:

SISKIYOU COUNTY TITLE CO.
AND WHEN RECORDED MAIL THIS DEED AND
UNLESS OTHERWISE SHOWN BELOW, MAIL
TAX STATEMENT TO:

Name: Mr. and Mrs. Doug Cole

Mailing 92520 Hwy. 96
Address:

City/State/Zip Somes Bar, CA
95568

Order No. 60696-dn

CURRENT GRANT
DEED TO COLES
COMPLETE WITH
WATER RIGHTS

RECORDED & INDEXED
SISKIYOU COUNTY TITLE 193

OFFICIAL RECORDS
SISKIYOU COUNTY, CALIF.

DEC 30 . 3 00 PM '94

94018121

David H. Higgs

\$14.00

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Grant Deed

THE UNDERSIGNED GRANTOR(S) DECLARE(S)

DOCUMENTARY TRANSFER TAX IS \$ 88.00

☒ computed on full value of property conveyed, or

☐ computed on full value less value of liens or encumbrances remaining at
time of sale.

☐ unincorporated area

☐ city of

, AND

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

ROBERT E. YOUNG and MARY J. YOUNG, husband and wife

hereby GRANT(S) to DOUGLAS T. COLE and HEIDI ANN COLE, husband and wife as
Joint Tenants

the following described real property in the
County of Siskiyou, State of California:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.
TOGETHER WITH ALL WATER RIGHTS APPURTENANT THERETO.

Dated December 15, 1994

STATE OF CALIFORNIA
COUNTY OF SISKIYOU

On 12/29/94 before me, the undersigned, a
Notary Public in and for said State, personally appeared

Robert E. Young and Mary J. Young

personally, known to me (or proved to me on the basis of
satisfactory evidence) to be the person(s) whose name(s)
is/are subscribed to the within instrument and acknowledged
to me that he/she/they executed the same in his/her/their
authorized capacity(ies), and that by his/her/their signature(s)
on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

Signature *Denise D. Nixon*
NOTARY PUBLIC IN AND FOR SAID STATE

MAIL TAX STATEMENTS AS DIRECTED ABOVE.

Robert E. Young
Robert E. Young
Mary J. Young
Mary J. Young

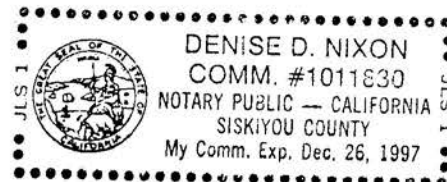


EXHIBIT "A"

ALL THAT REAL PROPERTY SITUATE IN THE COUNTY OF SISKIYOU, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL I:

The Southeast 1/4 of the Northwest 1/4 of the Southwest 1/4, the Southwest 1/4 of the Northeast 1/4 of the Southwest 1/4, the North 1/2 of the Northwest 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southwest 1/4 of the Southwest 1/4, the Northwest 1/4 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, the South 1/2 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, and the Southwest 1/4 of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Base and Meridian.

EXCEPTING THEREFROM: All that portion of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian described as:

Beginning at the South 1/4 corner of said section; thence East 330 feet to the True Point of Beginning; thence East 330 feet along the South line of said Section to the East boundary of the LUE HAYES property; thence North 330 feet along the East line of said Hayes property; thence West 330 feet; thence South 330 feet to the True Point of Beginning.

FURTHER EXCEPTING those portions of the land in the West 1/2 of the Southwest 1/4 of the Southeast 1/4, and in the Southwest 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian, as conveyed to LUE HAYES et ux, by deed recorded July 1, 1955, in Book 352 at page 253, Official Records of Siskiyou County, lying Southerly of the line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, Humboldt Meridian, and Sections 33 and 34, Township 13 North, Range 6 East, Humboldt Meridian, bears South 88° 51' 44" East, 1769.19 feet, said point also being Engineer's Station "A" 479177.35 P.O.C., as established from the Department of Public Works 1964 Survey between Sogues Bar and Ti Creek Road 01-Sis-96; thence from a tangent which bears North 47° 20' 27" West, along a curve to the left, having a radius of 1000.00 feet, through an angle of 07° 37' 11", a distance of 132.99 feet to Engineer's Station "A" 481110.34 E.C., as established from said survey; thence North 35° 02' 22" East, 100.00 feet to a point hereinbelow referred to as Point "B", thence North, 54° 57' 38" West 180 feet more or less to the East line of the West 1/2 of the Southwest 1/4 of the Southeast 1/4 of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence, continuing North 54° 57' 38" West, 610 feet to a point for a total distance of 790.42 feet from said Point "B"; thence South 35° 02' 22" West, 34.00 feet; thence, from a tangent which bears North 54° 57' 38" West, along a curve to the left, having a radius of 1266.00 feet, through an angle of 14° 29' 35", a distance of 320.24 feet to a point hereinbelow referred to as Point "C"; thence North 69° 27' 13" West 520 feet, more or less, to the West line of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33; thence continuing North 69° 27' 13" West, 290 feet, more or less to the South line of the North

(Continued)

1/2 of the North 1/2 of the Southeast 1/4 of the Southwest 1/4 of Section 33; thence continuing North $69^{\circ} 27' 13''$ West, 47 feet to a point, hereinbelow referred to as Point "D" for a total distance of 857.37 feet from said Point "C"; thence from a tangent which bears North $69^{\circ} 27' 13''$ West along a curve to the left, having a radius of 5066.00 feet a distance of 355 feet, more or less to the West line of the Southeast 1/4 of the Southwest 1/4 of said Section 33; thence continuing along last said curve, a distance of 335 feet to a point, hereinbelow referred to as Point "E", through a total angle of $07^{\circ} 48' 15''$, and a total distance of 690.03 feet from said Point "D"; thence North $41^{\circ} 41' 14''$ West, 178 feet, more or less, to the South line of the Northwest 1/4 of the Southwest 1/4 of said Section 33; thence continuing North $41^{\circ} 41' 14''$ West 138 feet to a point for a total distance of 316.31 feet from said Point "E"; thence North $76^{\circ} 12' 04''$ West, 128 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the Northwest 1/4 of the Southwest 1/4 of said Section 33.

EXCEPTING THEREFROM that portion thereof lying Southerly of the line described as follows:

Commencing at said Engineer's Station "A" 481+10.34 E.C., hereinabove described; thence North $54^{\circ} 57' 38''$ West, 159.66 feet; thence South $35^{\circ} 02' 22''$ West, 225.00 feet to a point hereinbelow referred to as Point "F"; thence North $11^{\circ} 17' 26''$ East, 17 feet, more or less, to the South line of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence continuing North $11^{\circ} 17' 26''$ East, 120 feet to a point for a total distance of 136.57 feet from said Point "F"; thence North $54^{\circ} 57' 38''$ West, 575.76 feet; thence from a tangent which bears North $54^{\circ} 57' 38''$ West, along a curve to the left, having a radius of 1100.00 feet, through an angle of $14^{\circ} 29' 35''$, a distance of 278.25 feet; thence North $69^{\circ} 27' 13''$ West, 115 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33.

ALSO EXCEPTING THEREFROM that portion thereof conveyed to EDWIN T. McMANNIS, et ux, by Deed recorded January 19, 1965 in Book 512 at page 457, Official Records of Siskiyou County.

The bearings used in the above description are on the California Co-ordinate System Zone 1, and the distances are surface.

PARCEL II:

That portion of the lands in the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, H.M., conveyed to the State of California by deed recorded December 15, 1965 in Book 524, Official Records, page 98, Siskiyou County Records, lying Northeasterly of a line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, H.M., and Sections 33 and 34, Township 13 North, Range 6 East, H.M., bears South $88^{\circ} 51' 44''$ East, 1769.19 feet, said point also being Engineer's Station "A" 479+77.35 P.O.C., as established from the Department of Public Works 1964 Survey between Somes Bar and Ti Creek, Road 01-Sis-96; thence from a tangent that bears North $47^{\circ} 20' 27''$ West, along a curve to the left with a radius of 1000.00 feet, through an angle of $07^{\circ} 37' 11''$, for a distance of 132.99 feet; thence North $35^{\circ} 02' 22''$ East, 100.00 feet; thence North $54^{\circ} 57' 38''$ West, 182 feet, more or less to the Point of Intersection with the East line of said land, last said

(Continued)

point being the TRUE POINT OF BEGINNING of this parcel thence continuing North 54° 57' 38" West, 117 feet, more or less to the Point of Termination of this line on the North line of said lands.

The bearings used in the above description are on the California Co-ordin

Notice: Is hereby given, that I have taken up and hold for mining and irrigating purposes, six hundred inches of the water running in Sluicron creek, so called, the water so taken, being carried first by ditch and flume, to and past my dwelling house; second by ditch and flume running up the Klamath River to my upper fields; said creek being in Dillon Township, State of California, County of Klamath.

March 25th 1867

E. Stanshaw

Recorded March 25th 1867 at request of E. Stanshaw

B. W. Smith - Recorder

Notice: Is hereby given to all to whom it may concern that I have taken up and hold for mining purposes one hundred inches of the water running in the Creek, that empties in to the Klamath River on the west side, and directly opposite the head of "Jay Bear", and known as the "Chunbancans" Creek said creek being in Dillon Township, State of California, County of Klamath.

March 25th A. D. 1867

E. Stanshaw

Recorded at request of E. Stanshaw March 25th A. D. 1867

Notice: Is hereby given that I have taken up and hold for mining and for purpose of irrigation six hundred inches of the water running in Stanshaw Creek. So called the water so taken, being carried first by ditch and flume, to and past my dwelling home; second by ditch and flume running up the Klamath River to my upper field, said creek being in Dillon Township, State of California, County of Klamath.

March 25th. A.D. 1867 E. Stanshaw

Recorded March 25th. 1867 at request of E. Stanshaw

B. W. Janks Recorder

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March 25th. A.D. 1867 E. Stanshaw

Recorded at request of E. Stanshaw March 25th. A.D. 1867

Stanshaw Creek Water Conservation Project Issues and Concerns by Stakeholder

Marble Mountain Ranch

Contacts: Doug and Heidi Cole (530) 469-3322

- A reliable water system that provides enough flow to produce 35 kw of hydroelectricity for business purposes.
- Water for domestic use.
- Willing to return hydroelectric tailwater flows to Stanshaw Creek.
- Willing to pipe entire system and decommission ditch from pond to Irving Creek.
- Needs enough water to maintain existing pond. Overflow will irrigate pasture.



California Department of Fish and Game

Contacts: Mark Elfgen (530) 841-2560, Jane Vorpapel (530) 225-2124

- Year-round bypass flow of 2.5 cfs to be measured at the culverts below Hwy 96. Total streamflow be bypassed when flow is lower than this amount. (CDFG may require additional bypass flows in the future if conditions change so that 2.5 cfs no longer maintains connectivity.)
- If water in Stanshaw Creek is less than amount needed to run the hydroelectric plant, then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed.
- Improve the ditch system and/or update the hydroelectric system to allow for power generation and domestic use while diverting less water.
- Return tailwater from hydroelectric plant to Stanshaw Creek.



- Current H₂O right for 0.5 cfs
- Cole filed for hydro and small domestic (pond < 10 ac. ft.)
- DFG drop protest against hydro if H₂O comes back above culvert
- Small domestic 4,500 gal. day.

NOAA Fisheries

Contacts: Margaret Tauzer (707) 825-5174, Richard Wantuck (707) 575-6063

- Limit flow diversion to a maximum of 3 cfs. Control flow with headgate (adjustable undershot weir, notched weir, orifice, dimensional flume, etc.)
- Screen intake to prevent entrainment (NOAA contact Richard Wantuck 707-575-6063)
- Return diverted flow to Stanshaw Creek upstream of Highway 96.
- Minimum 1.5 cfs bypass flow below point of diversion (POD) at all times. Bypass flow assumes tailwater from hydro will be returned.
- Install and maintain permanent staff gauges at POD or perform a comprehensive biological and hydrological study to identify an alternate biologically based bypass flow.
- Provide CDFG access to all points of diversion and places of use for monitoring compliance.

Karuk Tribe

Contacts: Toz Soto (530) 627-3116, Ron Reed (530) 627-3116

- Return diverted flow to Stanshaw Creek upstream of Highway 96.
- Screen intake to prevent entrainment
- Improve the ditch system and/or update the hydroelectric system to allow for power generation and domestic use while diverting less water.
- Coordinate with agency and tribal fisheries biologists monitoring Stanshaw Creek connectivity to minimize diversion in order to maintain connectivity.

** UAA - CEIT Analysis*
** Fishery Bypass Flows*
** Feb of Marble Creek*
** Need to go through collaborative process*
Supervisor Kathy Maroka 916-341-5363
A029449
Back late July
Jim Sutton (916) 341-5388
0.5 cfs for 1914

State Water Resources Control Board

Contacts: Michael Contreras (916) 341-5307

- Cole's allow at least 0.7 cfs flow in Stanshaw Creek below Hwy 96 culvert.
- Required bypass flow be determined in one of two fashions:
 - If full diversion is not allowed, the flow should be visually estimated to maintain a small, hand-dug ditch between terminal pool of Stanshaw Creek and the Klamath River
 - If full diversion is allowed, a device shall be installed at the intake capable of bypassing sufficient flow to maintain 0.7 cfs below Hwy 96 culvert before any water is passed down diversion ditch.
- The complaint filed by KFA be closed.
- Parties give serious consideration to a physical solution similar to that discussed in the Staff Report of Investigation.

*→ * Who is CEQA lead? Proposed to pay for cost CEQA*

Klamath Forest Alliance

Contacts: Donald Mooney (Lawyer) (530) 758-2377

- The State Water Resources Control Board (SWRCB) coordinate the study a publication of an Environmental Impact Report to base minimum bypass flow requirements on.
- The SWRCB conduct a hearing on the Cole's application.
- A detailed monitoring plan be outlined.
- Hydroelectric tailwater flows be returned to Stanshaw Creek above Hwy 96 culvert.
- Minimum bypass flows be agreed upon through consultation with CDFG, NOAA Fisheries, USFS and Karuk tribal biologists.

Cal Trans

Contacts:

- An application to excavate a ditch and lay return pipe along the inside corner of through cut on Hwy 96 between Marble Mountain Ranch and Stanshaw Creek be filed.

US Forest Service

Contacts: Brian Harris (Acting Orleans District Ranger) (530) 627-3291
 Leroy Cyr (530) 627-3291
 Leslie Burroughs (530) 627-3291

- Apply to FERC for hydroelectric use.
- Landowner must request from the US Forest Service to use water for hydroelectric use.
- No excavator use in modification on ditch.
- George Frey would work w/ FERC. None of FS Business. Ferc makes call whether FS. resp., County resp. or not.
- Water use pre-dates F.S., Does not require.
- Mike McCall - Owner Blue Heron Ranch
- Talk to Ron Reed re: fern issue to
- Check SWRCB website www.waterrights.ca.gov
- Blue Heron Ranch no right
-

Stanshaw Documents Index

as provided Under Cover of Mid Klamath Watershed Council undated letter received October 25, 2012 (in order provided)

1. Grant Deed Doc # 94018121 recorded 12/30/94, Siskiyou County
2. Undated, no author identified, document titled "Stanshaw Creek Conservation Project Issues and Concerns by Stakeholder"
3. USFS 5/8 (no year) letter from Wm Heitler, District Ranger, to Felice Pace of Klamath Forest Alliance.
4. USDA 08/17/1964 memo from Jesse Farr, Regional Attorney Office of the General Counsel (SF) to Regional Forester Attn L. P. Slattery regarding pipeline ROW in national forest
5. USFS 03/09/2000 letter from John Grunbaum fisheries biologist to Yoko Mooring of SWRCB re: A29449
6. USFS ltr 08/11/10 from Forest Supervisor to Douglas Cole re: FERC jurisdiction over proposed new penstock, power plant and outtake pipeline
7. NOAA 03/08/2000 protest to A29449
8. NOAA 11/15/2001 finding and protest dismissal terms for A 29449
9. DFG 11/20/01 Memo to SWRCB re complaint investigation relating to A29449
10. NOAA 070802 letter to SWRCB re: complaint by Klamath Forest Alliance
11. DFG 1600/1606 Agreement with Marble Mtn Ranch 1999
12. DFG 070505 letter to Doug Cole, Marble Mtn Ranch re: A29449 (?) and DFG protest (small domestic use application up for renewal, and unauthorized diversion referenced)
13. DFG memo 020707 to SWRCB re A29449
14. 030901 Mooney ltr to NOAA, USDA, Coles - 60 day notice of intent to sue (Konrac Fisher and Klamath Forest Alliance)
15. 062402 Mooney ltr to SWRCB re: complaint
16. Undated document authored by Bill Heitler re: 032201 meeting, "Stanshaw Diversion Meeting March 22, 2001" (Heitler was Ranger)
17. "Case Report Stanshaw Creek Water Diversion 10/19/2001 Ukonom Ranger District-Klamath National Forest", author not identified. Subsections titled Problem, Chronology, and Issues.

18. SWRCB Notice of Application 29449 dated 03/27/1989
19. SWRCB 09/15/1998 letter to Coles re: "Unauthorized Diversion ..." discusses pre-14 claim
20. SWRCB 070201 letter to Coles re receipt of Klamath Water Alliance complaint
21. USFS 01/18/01 Memo re Water Right Complaint meeting Marble Mtn Ranch [note- Jan G was Cole atty at the time]
22. SWRCB 052302 letter to Mooney and Goldsmith (Coles) re complaint reporting Complaint Unit Staff conclusions. Water Rights identified: Small Domestic Registration D030945R; A29449, and pre14 claim.
23. SWRCB undated Memo to file from Complaint Unit (Chuck Rich and Michael Contreras) re: complaint. (header dated May 23, 2002)
24. SWRCB 082202 letter to Klamath Forest Alliance re: complaint, Mooney letter of 062402 disagreeing with Complaint Unit conclusions. [Implication that power diversion is separate, or if not, not covered by pre14 claim.]
25. SWRCB 110905 ltr to Coles re CEQA MOU
26. SWRCB 120606 ltrs to Cole re: response to NOA protest dismissal terms of 11/15/01, and to DFG re: what DFG protest dismissal terms would be (stapled together)

**Marble Mountain Ranch
Stanshaw Creek
Water Rights Report**

Supporting Documents – Reference Documents

- 1867claim_copy_of_original
- 1867claim_typed

Notice: Is hereby given, that I have taken up and hold for mining and irrigating purposes, six hundred inches of the water running in Slieberon creek, so called, the water so taken, being carried first by ditch and flume, to and past my dwelling house; second by ditch and flume running up the Klammath River to my upper fields. Said creek being in Dillon Township, State of California, County of Klamath
 March 25-1867 E. Stenshon

Recorded March 25th 1867 at request of E. Stenshon
 B. W. Jencks - Recorder

Notice: Is hereby given to all to whom it may concern that I have taken up and hold for mining purposes one hundred inches of the water running in the Creek, that empties in to the Klammath River on the west side, and directly opposite the head of "Jay Ben", and known as the "Franklin's" Creek said creek being in Dillon Township, State of California, County of Klamath
 March 25th A. D. 1867 E. Stenshon

Recorded at request of E. Stenshon March 25th A. D. 1867

Notice: Is hereby given that I have taken up and hold for mining and for purpose of irrigation six hundred inches of the water running in Stanshaw Creek. So called the water so taken, being carried first by ditch and flume, to and past my dwelling home; second by ditch and flume running up the Klamath River to my upper field, said creek being in Dillon Township, State of California, County of Klamath.

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