



State Water Resources Control Board

John P. Caffrey, Chairman

SURNAME

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Peter M. Rooney
Secretary for
Environmental
Protection

Division of Water Rights
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Pete Wilson
Governor

In Reply Refer
to:332:CM:29449, 29450

SEPTEMBER 15 1998

Doug Cole, Heidi Cole,
Norman D. Cole, Caroline Cole
c/o Mr. Doug Cole
92520 Highway 96
Somes Bar, CA 95568

485399 CWB

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

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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

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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

bcc: John O'Hagan

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