

## AGREEMENT

### REGARDING PROPOSED ACTIVITIES SUBJECT TO CALIFORNIA FISH AND GAME CODE SECTIONS 1600/1606

1     **WHEREAS:**

2     1. Mr. Douglas T. Cole, of Somes Bar, California, representing the  
3     property owner, Marble Mountain Ranch, of Somes Bar (jointly referred to  
4     as "OPERATOR"), on January 21, 1999 notified (99-0040) the DEPARTMENT of  
5     Fish and Game (the DEPARTMENT) of the intent to divert or obstruct the  
6     natural flow of, or change the bed or banks of, or use materials from  
7     Stanshaw Creek, Siskiyou County, a water over which the DEPARTMENT  
8     asserts jurisdiction pursuant to Division 2, Chapter 6 of the California  
9     Fish and Game Code.

10    2. Fish and Game Code Sections 1600 et seq. make provisions for the  
11    negotiation of agreements regarding the delineation and definition of  
12    appropriate activities, project modifications and/or specific measures  
13    necessary to protect fish and wildlife resources.

14    3. The DEPARTMENT has determined that without the mitigative features  
15    identified in this agreement, the activities proposed in the OPERATOR's  
16    notification could substantially adversely affect fish and wildlife. The  
17    DEPARTMENT's representative, Ron Presley, inspected the site on February  
18    16, 1999 and has determined that resident trout and aquatic  
19    invertebrates would be the wildlife potentially affected by this project  
20    due to loss of stream habitat due to lower flows.

21    **NOW THEREFORE, IT IS AGREED THAT:**

22    1. If this agreement is found to be in conflict with any other provision  
23    of law or general conditions of public safety, it is void.

24    2. This agreement does not constitute or imply the approval or  
25    endorsement of a project, or of specific project features, by the  
26    DEPARTMENT of Fish and Game, beyond the DEPARTMENT's limited scope of  
27    responsibility, established by Code Sections 1600 et seq. This  
28    agreement does not therefore assure concurrence by the DEPARTMENT with  
29    the issuance of permits from this or any other agency. Independent  
30    review and recommendations will be provided by the DEPARTMENT as  
31    appropriate on those projects where local, state, or federal permits or  
32    environmental reports are required. This includes but is not limited to  
33    CEQA and NEPA project review. Any fish and wildlife protective or  
34    mitigative features that are adopted by a CEQA or NEPA lead agency or  
35    made the conditions for the issuance of a permit, for this project,  
36    become part of the project description for which this agreement is  
37    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 severally 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

annual flow exceeds five cubic feet per second, a permit may be required by the Corps. A Corps permit may also be required for the installation of rip rap that exceeds 500 linear feet at or over one cubic yard of material per linear foot. If there is any question regarding the possibility of your project meeting the above limitations, you should contact the Corps prior to beginning work. This Agreement in no way represents permitting requirements by the Corps. It is OPERATOR'S responsibility to contact the U.S. Army Corps of Engineers, and to comply with the provisions any 404 Permit issued, if required by the Corps.

For information, contact the US Army Corps of Engineers office in your area: San Francisco District, Eureka Office (707)443-0855.

OPERATOR may have certain other responsibilities pursuant to the Federal Endangered Species Act resulting in mitigative project features required by the U.S. Fish and Wildlife Service or National Marine Fisheries Service.

#### PROVISIONS

Agreed work includes activities associated with the diversion of flows from Stanshaw Creek for irrigation, recreation, domestic, and small hydro-electric use. Construction includes the annual construction of a rock diversion dam (by hand) to entrain flows into the diversion ditch, and maintenance of a culvert/flume crossing on an unnamed ephemeral tributary to Stanshaw Creek. The project area is located in Siskiyou County (SW 1/4 of NE 1/4 of S 33, T 13 N, R 6 E) on property administered by the U.S. Forest Service. The diversion structure existed prior to this agreement.

#### EQUIPMENT AND ACCESS

Vehicles shall not be driven or equipment operated in water covered portions of a stream, or where wetland vegetation, riparian vegetation, or aquatic organisms may be destroyed. Except as otherwise provided for in the Agreement, all work shall be performed by hand/hand tools.

Access to the work site shall be via existing trails.

#### WATER DIVERSION/STRUCTURES

This Agreement does not authorize the construction of any temporary or permanent dam, structure, flow restriction or fill except as described in OPERATOR'S notification.

An adequate fish passage facility shall be incorporated into any barrier that obstructs fish passage.

3 Except as otherwise specified in this Agreement, fill material for  
4 the annual diversion dam shall consist of only native, clean rock which  
5 will cause little or no siltation. If tarps, sand bags, or plastic  
6 sheeting are used to seal the diversion structure, the tarps, bags,  
7 and/or sheeting shall be removed before high seasonal flows return to  
8 prevent littering of the stream.

9 When any dam or artificial obstruction is being constructed,  
10 maintained, or placed in operation in the stream bed, flows to  
11 downstream reaches shall be allowed to pass downstream to maintain  
12 wildlife, plant life, and aquatic life below the dam in a healthy  
13 condition, and to allow fish migration, during all times that the  
14 natural stream flow would have supported aquatic life, pursuant to Fish  
15 and Game Code section 5937 and 5901.

16 Structures and associated materials not designed to withstand high  
17 seasonal flows shall be removed to areas above the normal high-water  
18 mark before the return of such seasonal flows.

19 No excavation in the live stream is allowed. "Live stream" shall  
20 be defined as that portion of the stream bed where flowing water is  
21 present or anticipated during the term of this agreement.

22 In ephemeral streams, all construction will be done while the work  
23 site is dry. Excavated material shall be placed outside the stream's  
24 normal high-water mark.

25 A culvert exists in the intersection of the diversion flume/ditch  
26 and an ephemeral stream. The culvert shall be maintained so as to resist  
27 washout. The up stream and down stream fill slopes shall feature rock  
28 slope protection (RSP) from the toe to the top of the fill. A fail soft  
29 dip shall be maintained where the fill meets original ground to allow  
30 topping flows to remain within the ephemeral stream channel. Rock  
31 dissipators shall be placed at the culvert outlet to prevent channel  
32 bed/bank scour. Upon the next occasion when the culvert washes out, the  
33 pipe alignment shall be corrected to remove the skew (It should be  
34 straight within the channel rather than pointing at the bank.).

## 35 WATER QUALITY

### 36 EROSION, TURBIDITY, AND SILTATION

37 Mud, silt, or other pollutants from diversion maintenance or other  
38 project-related activities shall not be discharged into the flowing  
39 stream or be placed in locations where it may be washed into the stream  
40 by high flows or precipitation.

41 Silty/turbid water shall not be discharged into the stream. Such  
42 water shall be settled, filtered, or otherwise treated prior to  
43 discharge back into the stream channel.

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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.

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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 4/28/97  
35 (signature) (date)

36 Douglas T. Cole  
37 Marble Mountain Ranch  
38 OPERATOR

39 Charles Konval Ron R. Presley  
40 Ron Presley (date)  
41 California DEPARTMENT of Fish and Game

4/30/97