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WRB WR-48
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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

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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.

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

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.

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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

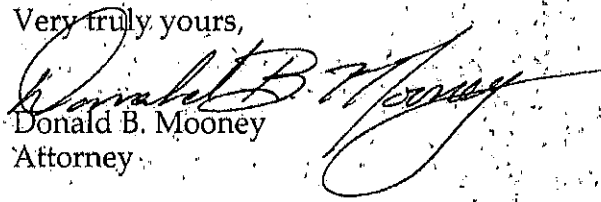
² The courts have ruled that when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition. (*Strahan v. Cox*, 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 appropriate 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).)

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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