

January 12, 2015

VIA U.S. MAIL & E-MAIL (taro.murano@waterboards.ca.gov)

Taro Murano, Enforcement Unit Supervisor
State Water Resources Control Board
Enforcement Unit 5
1001 I Street, 16th Floor
Sacramento, CA 95814

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

Dear Mr. Murano:

As you know, my firm is assisting Douglas and Heidi Cole, Norman and Caroline Cole (the "Coles"), the owners of Marble Mountain Ranch ("MMR"), with the issues related to their pre-1914 appropriative water right on Stanshaw Creek. The Coles currently operate a guest ranch with nine cottages and two homes that can host up to forty-five guests at a time. In order to operate their business, the Coles rely upon their pre-1914 water right to Stanshaw Creek to provide the facilities with water and power. Without this water, it is unlikely that the Coles would be able to continue to operate the guest ranch.

In 2014 a non-profit organization, the Mid Klamath Watershed Council, commissioned a report by Lennihan Law to interpret the Coles water rights for Stanshaw Creek. This report had no binding authority but was intended to be informative and non-biased to assist interested parties in evaluating the situation. When the preliminary draft report was released, we submitted a letter to the Mid Klamath Watershed Council on June 18, 2014 ("June Letter") citing our concerns with the draft report. Mr. Tauriainen indicated that the State Water Resources Control Board ("SWRCB") has a copy of our June Letter.

On October 21, 2014 the Coles were notified that the final version of the Marble Mountain Ranch Stanshaw Creek Water Rights Report (the "Final Report") by Lennihan Law was posted online. Even though the Final Report was posted on October 21, 2014, it was dated September 1, 2014 and failed to take into account relevant caselaw that was decided in September 2014. The Final Report failed to satisfactorily address any of the issues raised by the Coles in the June Letter. Further, the Final Report makes inaccurate statements of water law, which are damaging to the Coles existing rights.

The purpose of this letter is to comment on the Final Report and reiterate outstanding issues that were raised in response to the draft version of the report but were not addressed in the Final Report. We appreciate the SWRCB's attention to this matter.

(1) The Final Report Addresses Issues Outside the Scope of its Purpose.

The stated purpose of the Final Report was to independently evaluate “the water rights for the Coles’ diversions from and uses of water from Stanshaw Creek for the purpose of informing the stakeholders and the physical solution process”. (Final Report at 2). This Final Report was meant to be informative and limited in scope to evaluating the MMR water right. The purpose of the Final Report was not to compare or balance other claims to Stanshaw Creek or cast judgment on what water use is best or most important. However, the evaluation of the MMR water right in the Final Report was clearly influenced by environmental concerns. The *Water Rights* section of the Final Report states that the instream public trust for the fishery would be a sufficient competing claim. (Final Report at 7). Additionally, the Final Report assumes that claims that the MMR right is damaging salmon populations is fact and that it is relevant to the evaluation of the MMR right. (Final Report at 22). The discussion of the MMR right’s impact on salmon populations and the role of the Endangered Species Act may be relevant to working towards a physical solution but it is inappropriate for the limited scope of the Final Report and it is incomplete unless all other water uses in the area are also discussed.

(2) The Final Report Fails to Take into Account Junior Water Rights.

If the Final Report intended to balance competing water rights’ claims, it should have evaluated other water users in the Stanshaw Creek and Klamath River system. It is established in California law that, “when the stream flow is not sufficient to satisfy all of the appropriative rights, senior appropriators are entitled to fully satisfy their rights before junior appropriators may divert water under their rights.” (Final Report at 5). As discussed above, the purpose of the Final Report was to evaluate the MMR pre-1914 water right. The Final Report was not intended to weigh all competing water rights for Stanshaw Creek and the Klamath River and evaluate which rights are superior. The Final Report erred in using environmental water claims to attempt to devalue the MMR right. However, if the Final Report was seeking to evaluate the hierarchy of water rights for Stanshaw Creek and the Klamath River, it failed to do so meaningfully by ignoring all other water right claims in the area. The Stanshaw Creek and Klamath River system are more complicated than just the MMR right and the salmon population. There are numerous water uses in Stanshaw Creek, which are junior to the Coles pre-1914 claim. If any water rights need to be curtailed, the junior water rights should be called upon before the Coles are asked to reduce at all.

(3) The Final Report Misstates the Applicable Burden of Proof.

As noted in our June Letter, the Coles’ burden of proof is limited to showing: “(1) an intent to apply water to a beneficial use; (2) an actual diversion; and (3) an application of the water to some beneficial use within a reasonable time. (*Simmons v. Inyo Cerro Gordo Mining & Power Co.*, (1920) 48 Cal. App. 524, 537). The Coles have provided ample evidence that all of these elements occurred. The Final Report does not challenge that

these elements have been met. Since the Coles met this burden of proof, the burden shifts to the party challenging the right. (*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). The Final Report ignores this burden and presumes that the Coles have automatically lost portions of the MMR right because they have not presented a full case with infallible evidence that all six hundred (600) miners inches have been used every year since 1867.

As stated in our June Letter, the Final Report relies upon an out-of-context excerpt from a SWRCB Water Order. (Final Report at 8-9). As we noted, the quoted water order clearly stated elsewhere in the decision that the party challenging the validity of the right has the initial burden of establishing a prima facie case that the water use is invalid. (*In the Matter of Draft Cease and Desist Order Against Unauthorized Diversion by Woods Irrigation Company*, (2/01/2011) Order WR 2011-0005 at 28). The excerpt quoted in the Final Report only applied after the challenging party established a prima facie case that the water use was a violation.

Any challenge to the MMR water right must be supported by a prima facie case that there is a violation. The Final Report relies upon memories of former property owners and employees and provides no convincing evidence that the MMR right has failed to use at least three (3) cubic feet per second for a period of five (5) years.

(4) The Final Report Ignores the Legal Requirement for a Competing Claim.

Finally, the Final Report presumes that a competing claim is not necessary to trigger the abandonment of water rights despite the legal trend to the contrary. The Final Report acknowledges that the Fifth District Appeal Court found that a competing claim was necessary to require forfeiture. (*North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal. App. 4th 555 (the “*Kern Decision*”). The Final Report relies on an alternative argument in an appellate brief filed for the case of *Millview County Water District v. State Water Resources Control Board* (“*Millview Case*”) which argued that a competing claim is not necessary. However, arguments in appellate briefs are not binding law and the court in the *Millview Case* did not adopt this argument. (*Millview Cnty. Water Dist. v. State Water Res. Control Bd.*, (2014) 229 Cal. App. 4th 879).

Buried in a footnote, the Final Report states that the First Court of Appeal found that a completing claim was necessary to require forfeiture in the *Millview Case* decision in September 2014. The footnote states that this decision is not analyzed in the report because it was decided after the report was complete.

Regarding whether a completing claim is necessary to force forfeiture, the Final Report states: “Which approach will ultimately govern is not yet known. For the purposes of this analysis, we have assumed that no competing claim is required in accordance with the SWRCB’s position.” (Final Report at 8).

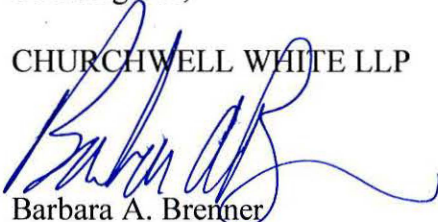
If the law is unsettled, it is disingenuous for the Final Report to adopt one interpretation of law without considering the other. If the Final Report does consider one interpretation, it should be the interpretation currently used and accepted in caselaw that a competing claim is necessary to force a user to forfeit a water right for nonuse. The Final Report does add a single sentence claiming that the instream public trust needs of the fishery would constitute a competing claim. It should be noted that the 2014 *Millview Case* decision found that forfeiture only occurred when: "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." (*Millview Case* (2014) 229 Cal. App. 4th 879, 903, as modified on denial of reh'g (Oct. 14, 2014), review filed (Oct. 22, 2014)). There is no suggestion in the Final Report or elsewhere that the MMR right has used less than three (3) CFS in the past five (5) years. Since no competing claim was asserted earlier, the amount of the MMR water right used more than five (5) years before the present date is a moot point.

The Coles continue to be open to working with concerned parties to find a physical solution that is acceptable for all interested members. However, we feel the Final Report is an unfortunate starting point to this process, which downgrades important historical claims to the water in Stanshaw Creek. We are optimistic that the physical solution process will honor these water rights.

We appreciate the SWRCB's attention to this matter and welcome the opportunity to discuss these issues further if you have any questions or would like any additional information. I look forward to working with you on these issues. If you have any questions or concerns, please do not hesitate to contact me.

Best Regards,

CHURCHWELL WHITE LLP



Barbara A. Bremner
Partner

BAB/ems

cc: Client

Andrew Tauriainen, SWRCB Senior Staff Counsel

Will Harling, Executive Director Mid Klamath Watershed Council