
State Water Resources Control Board

NOTICE OF ASSIGNMENT

The State Water Resources Control Board's Executive Director
has assigned
the pending matter of alleged waste, unreasonable use, unreasonable method of use,
and unreasonable method of diversion of water by

Douglas and Heidi Cole and Marble Mountain Ranch

to the Board's Administrative Hearings Office
for additional work, pursuant to Water Code section 1112, subdivisions (c)(2) and (3).

**ALLEGED WASTE, UNREASONABLE USE, UNREASONABLE METHOD OF USE,
AND UNREASONABLE METHOD OF DIVERSION**

Douglas and Heidi Cole own and operate Marble Mountain Ranch (MMR), a commercial guest ranch located at 92520, Highway 96 in Somes Bar, Siskiyou County. Surface water to serve MMR is diverted from a single point of diversion on Stanshaw Creek, a tributary to the Klamath River, under a pre-1914 claim of right for 3 cubic feet per second (cfs) reported under two Statements of Diversion and Use, S015022 and S016375, and a Small Domestic Use Registration, D030945R. The claimed beneficial uses are: domestic, irrigation, power, fish and wildlife preservation and enhancement, stockwatering, and fire protection. Studies of the area show that the creek feeds a large pool within the Klamath River floodplain, which is critical rearing habitat for threatened Southern Oregon/Northern California Coast (SONCC) coho salmon. The salmon use this pool for a thermal refuge in the summer and a velocity refuge in the winter.

On July 17, 2013, the Division of Water Rights (Division) of the State Water Resources Control Board (State Water Board or Board) received a complaint alleging that the Coles were diverting water at rates exceeding those authorized by their pre-1914 claim of right. The complaint also alleged that Stanshaw Creek was being dewatered in most summers, causing impacts to public trust resources. On January 29, 2014, the Division received a video dated January 2014 from Konrad Fisher, the sole downstream landowner, which appeared to Division staff to show the MMR diversion diverting nearly the entire flow of Stanshaw Creek. This video also appeared to show a lack of connectivity between the Stanshaw Creek refugial pool and the Klamath River.

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

On August 30, 2016, the Division's Enforcement Branch (Enforcement Branch) issued a draft order to the Coles containing findings of: (1) waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water, (2) unreasonable harm to public trust resources, and (3) corrective actions with interim and final implementation deadlines. The Enforcement Branch informed the Coles that the Enforcement Branch had requested a hearing be scheduled on the matter, for which the parties could request postponement if the Coles complied with the corrective actions required by the draft order's first interim deadline, October 15, 2016. By June 9, 2017, no request for postponement of the hearing had been received; therefore, the matter was noticed for public hearing.

The Board held the public hearing concerning this matter November 13 to 16, 2017. During the hearing, the Board hearing officer, Steven Moore, and Board staff heard testimony and received evidence. Eight parties participated in the hearing and submitted closing briefs: the Prosecution Team, the Coles and Marble Mountain Ranch, the Karuk Tribe, the National Marine Fisheries Service, the California Department of Fish and Wildlife, the Old Man River Trust, the California Sportfishing Protection Alliance, and the Klamath Riverkeeper.

The evidentiary record and hearing documents for this matter are available on the Water Board's website at https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/.

ASSIGNMENT TO THE ADMINISTRATIVE HEARINGS OFFICE

Effective January 1, 2019, Water Code section 1110 established the Administrative Hearings Office (AHO) within the State Water Board. Water Code section 1112, subdivision (c)(2), provides that the Board may assign an adjudicative hearing to the AHO. Water Code section 1112, subdivision (c)(3), provides that AHO hearing officers may perform additional work requested by the Board, including, but not limited to, presiding over hearings on non-adjudicative matters, mediations, and overseeing investigations.

On December 9, 2021, Erik Ekdahl, Deputy Director for the Division, recommended to the Board's Executive Director, Eileen Sobeck, that she assign the matter of alleged waste, unreasonable method of use, unreasonable method of use, and unreasonable method of diversion of water by the Coles and Marble Mountain Ranch to the AHO. On December 9, Ms. Sobeck issued a memo to the AHO assigning this matter to the AHO.

HEARING OFFICER AND HEARING TEAM

Hearing Officer Megan Knize, from the AHO, will preside over any hearing in this matter. Other members of the AHO may be present and assist the hearing officer throughout these proceedings, except Skyler Anderson, environmental program

manager in the AHO, who will not participate in this matter. No member of the AHO hearing team will discuss any substantive or major procedural issues, including any controversial procedural issue, regarding any aspect of this matter with Mr. Anderson.

The hearing officer and other AHO staff members may consult with staff of the Board's Division of Water Rights and the Board's Office of Research, Planning, and Performance, attorneys in the Board's Office of Chief Counsel, members of the executive management of the State Water Board, and State Water Board members, to discuss or deliberate on matters relevant to this proceeding. The hearing officer and other AHO staff will not consult regarding this matter with any member of the Enforcement Section or any other State Water Board staff member who worked with the Enforcement Section on this matter.

DETERMINATION OF COMPLEX MATTER; ADDITIONAL PROCEEDINGS

The hearing officer deems this matter complex under Water Code section 1114(d)(1)(A) and (D). After reviewing the administrative record, the hearing officer will establish a hearing management plan and monitor the proceeding to ensure timely disposition under Water Code section 1114(d)(3). The hearing officer may conduct additional proceedings as necessary. The AHO then will prepare a proposed order and transmit it to the Board under Water Code section 1114.

ADMINISTRATIVE RECORD

The AHO has uploaded copies of all documents from the Water Board's files for this matter, as the AHO's initial administrative record in this matter, on the State Water Board's FTP site in the AHO-FTP folder. These documents are also available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/.

Instructions regarding how to access the AHO-FTP folder on this FTP site are on the AHO's webpage at:

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/2021-07-09_ftp_sites.pdf.

PROHIBITION ON EX PARTE COMMUNICATIONS

All parties are prohibited from having any *ex parte* communications with any members of the AHO hearing team. (See Wat. Code, § 1110, subd. (c); Gov. Code, §§ 11430.10-11430.80.) The AHO has posted a discussion of *ex parte* communications on the AHO's webpage at

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/2021-07-06_webpage_faq.pdf. (See response to FAQ 16.)

If any party wants to communicate with the AHO regarding any procedural or substantive issue related to this matter, then that party shall make such communication to the AHO in writing (by e-mail or letter) and, except as otherwise provided in this notice, shall serve all other parties with copies of the communication and include a proof of service demonstrating such service with the written communication to the AHO. The service list attached to this notice is the AHO's initial service list for this matter. For e-mails, the verification of service shall be a list of the e-mail addresses of the parties or their representatives in an electronic-mail "cc" (carbon copy) list. For letters, the verification of service shall be a list of the names and mailing addresses of the other parties or their representatives in the cc portion of the letter. The AHO will post copies of all such communications to the AHO-FTP folder described above.

Please do not attempt to communicate by telephone or in person with any AHO hearing team member regarding any procedural or substantive issue concerning this hearing, because other parties would not be able to participate in such communications. If oral communications with any members of the AHO hearing team are necessary to discuss any procedural or substantive issue, then the AHO will set up a Zoom conference in which representatives of all parties may participate. Any party may request such a conference at any time using the written communications protocols described above.

UPDATES TO SERVICE LIST

The AHO prepared the attached service list using the "March 25, 2019 Updated Service List" available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marble_mountain/ and current information available to the AHO. The AHO requests that all parties listed on the service list provide the AHO with the names, mailing addresses and e-mail addresses of the people who currently are representing the parties and whom the parties want to have on the updated service list. Parties should submit this information to the AHO by e-mail at adminhr@waterboards.ca.gov on or before **January 28, 2022**. Parties do not need to send copies of these e-mails to representatives of the other parties.

After January 28, the AHO will prepare an updated service list and circulate it to the parties' representatives.

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for internet website accessibility in Government Code section 11546.7, the AHO has posted and will post all notices and other AHO documents regarding this matter on the AHO's internet webpage at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

Any interested person may sign up to receive all AHO notices at https://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.html.

Date: January 7, 2022

SIGNATURE ON FILE

Megan S. Knize, Hearing Officer

Attachments:

- Attachment 1 – December 9, 2021 Memo from E. Ekdahl to E. Sobeck
- Attachment 2 – December 9, 2021 Memo from E. Sobeck to AHO
- Attachment 3 – Initial Service List (copies of this notice are being sent by e-mail and U.S. Mail to everyone on this list)

SERVICE LIST

Division of Water Rights
Kenneth Petruzzelli
State Water Resources Control Board
Office of Enforcement
801 K Street, 23rd Floor
Sacramento, CA 95814
kenneth.petruzzelli@waterboards.ca.gov
v

Douglas and Heidi Cole,
Marble Mountain Ranch
Barbara A. Brenner
White Brenner LLP
1414 K Street, 3rd Floor
Sacramento, CA 95814
barbara@whitebrennerllp.com

California Department of Fish and
Wildlife
Stephen Puccini, Attorney IV
Nancee Murray, Attorney V
Nathan Voegeli, Assistant Chief
Counsel
1416 Ninth St.
Sacramento, CA 95814
stephen.puccini@wildlife.ca.gov
nancee.murray@wildlife.ca.gov
nathan.voegeli@wildlife.ca.gov

California Sportfishing Protection
Alliance
Chris Shutes
1608 Francisco St.
Berkeley, CA 94703
blancapaloma@msn.com

California Sportfishing Protection
Alliance
Michael Jackson
P.O. Box 207
75 Court Street
Quincy, CA 95971
mjatty@sbcglobal.net

Klamath Riverkeeper
Paul Kibel
2140 Shattuck Ave., Suite 801
Berkeley, CA 94704-1229
pskibel@waterpowerlaw.com

Karuk Tribe
Russell Attebery, Karuk Chairman
Joshua Saxon, Karuk Executive Director
William Tripp, Director of Natural
Resources
64236 Second Avenue
Happy Camp, CA 96039
battebery@karuk.us
jsaxon@karuk.us
btripp@karuk.us

National Marine Fisheries Service
Christopher Keifer, Attorney
NOAA Office of General Counsel,
501 W. Ocean Blvd., Suite 4480
Long Beach, CA 90802
christopher.keifer@noaa.gov
margaret.tauzer@noaa.gov
justin.ly@noaa.gov

Old Man River Trust
Konrad Fisher
100 Tomorrow Rd.
Somes Bar, CA 95568
k@omrl.org

Pacific Coast Federation of Fishermen's
Associations and Institute for Fisheries
Resources
Noah Oppenheim
Regina Chichizola
P.O. Box 29196
San Francisco, CA 94129-8196
regina@ifrfish.org