

State Water Resources Control Board

AUG 30 2016

VIA ELECTRONIC MAIL AND HAND DELIVERY

Tom Howard  
Executive Director  
State Water Resources Control Board  
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**SUBJECT: CORRECTIVE ACTIONS NECESSARY TO CORRECT ALLEGED WASTE AND UNREASONABLE USE OF WATER BY DOUGLAS AND HEIDI COLE AND MARBLE MOUNTAIN RANCH FROM STANSHAW CREEK IN COUNTY OF SISKIYOU**

Dear Tom Howard:

Marble Mountain Ranch is owned and operated by the Cole family (Diverter). It functions as a commercial guest ranch, offering activities such as horseback trail riding, hiking, whitewater rafting, jet boat rides, sport shooting, fly fishing and kayaking. The Diverter diverts surface water from Stanshaw Creek, a tributary to the Klamath River, primarily under a pre-1914 claim of right. The Diverter's point of diversion, a rock wing diversion dam, diversion infrastructure, and an unlined ditch roughly half a mile long, was constructed in the 1800's. The Diverter continues to rely on these methods for diverting water.

Stanshaw Creek has a short but significant section of Coho habitat below the Highway 96 crossing, including an off-channel pond or pool located just upstream of its confluence with the Klamath River. This pool is filled by cold Stanshaw Creek water when high flows in the Klamath River subside, creating a high quality summer and winter rearing habitat for non-natal juvenile Coho salmon migrating down the Klamath River corridor. The National Marine Fisheries Service (NMFS), Department of Fish & Wildlife (DFW), and the Karuk Tribe have asserted that the Diverter's water diversion adversely impacts Coho salmon in violation of the federal Endangered Species Act and other laws.

On July 17, 2013 the State Water Resources Control Board's (State Water Board) Division of Water Rights (Division) received a complaint alleging that the Diverter was diverting water in excess of its pre-1914 claim of right and as a result dewatering Stanshaw Creek in most summers and harming public trust resources. On December 17, 2014, Division staff met with the Diverter for a facility tour to observe the water diversion and use of water from Stanshaw Creek. Division staff conducted a second site inspection on February 12, 2015 together with staff from the North Coast Regional Water Board (Regional Water Board). During the inspection, Regional Water Board and Division staff observed evidence of ditch failures, an inadequate diversion headgate to control the amount of water diverted from Stanshaw Creek into the diversion ditch, and hydropower operation resulting in significant discharges to Irving Creek.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

In a letter dated December 3, 2015, the Division and the Regional Water Board sent the Diverter a notice of violation and draft cleanup and abatement order from the Regional Water Board describing water quality violations and prescribing corrective actions. The letter also included a report of inspection (ROI) from the Division identifying that the Diverter's diversion of water constituted a waste, unreasonable use, and unreasonable methods of diverting water, as well as a violation of public trust. The Division's report of inspection also prescribed corrective actions. The letter stated that the Regional Water Board and the State Water Board had completed their investigations and would pursue formal enforcement action if Diverter failed to respond to the letter in 30 days and substantially address the concerns outlined in the Regional Water Board's draft CAO and the Division's report of inspection.

The Diverter responded with a letter dated January 19, 2016 with a preliminary scope of work and time schedule. After evaluating the Diverter's response and discussing the matter with the Diverter's legal counsel, the Regional Water Board and the Division concluded that the Diverter's response failed to demonstrate commitment to substantially address concerns outlined in the Regional Water Board's CAO and the Division ROI. In a letter dated February 12, 2016, the Regional Water Board and the Division notified the Diverter that they would pursue formal enforcement action. However, the Regional Water Board and the Division encouraged the Diverter to pursue corrective actions.

The Draft Order alleges there is substantial evidence that the Diverter is in violation of Article X, section 2 of the California Constitution, and Water Code section 100, which provide that the right to water from any natural stream shall be limited to reasonable beneficial use, and that such right does not extend to the waste or unreasonable use of water. Under Water Code section 275, the State Water Board shall take all appropriate proceedings or actions to prevent the misuse of water in this State. Title 23, Division 3, Article 22, section 857 of the California Code of Regulations authorizes any interested person or the State Water Board, upon its own motion, to hold a hearing to determine if any misuse of water is occurring or has occurred.

Pursuant to Title 23, Division 3, Article 22, section 857, Division staff is recommending that by **June 30, 2018**, the Diverter should take the prescribed corrective actions to cease misusing water and harming public trust resources. The Division has established a time schedule for project milestones and required the Diverter to submit quarterly reports. The time schedule and reporting requirement is based on a scope of work and time schedule the Diverter provided in a letter dated March 24, 2016. In summary, the Division requests that the Diverter:

1. Install a water diversion control mechanism at the point of diversion;
2. Measure diversions;
3. Return diverted water that is not put to beneficial use or water that is put to non-consumptive use back to Stanshaw Creek;
4. Eliminate unnecessary and unreasonable conveyance losses in the conveyance system;
5. Implement the bypass flows recommended by the NMFS letter dated August 3, 2016 and install a measuring device, or devices if necessary, to demonstrate these flows are provided downstream;
6. Cease adverse impacts to public trust resources and habitat; and
7. Consult with the California Department of Fish and Wildlife to determine whether a fish screen to prevent fish entrapment should be installed or whether implementation of an alternative method such as point of diversion design modification should be used to prevent fish entrapment.

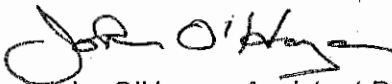
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The time schedule's first interim deadline is October 15, 2016. The Division therefore requests that the State Water Board schedule a hearing within 90 to 120 days after October 15, 2016. If the Diverter meets the project milestones for the October 15, 2016 interim deadline, the Division requests that the parties, upon concurrence, request the State Water Board to postpone the hearing date.

Prior to the Division's request for hearing, on August 5, 2016 the Regional Water Board issued Cleanup and Abatement Order No. R1-2016-0031 for Cole to eliminate the threat of future discharges and to clean up and abate the effects of discharges of soil, rock and miscellaneous debris into Irving Creek, Stanshaw Creek, and the Klamath River. The Cleanup and Abatement Order will address water quality violations MMR causes with its diversion facility and conveyance system. Alternatively, the State Water Board's adoption of the Draft Order will address the alleged misuse of water and public trust impacts if the Diverter does not voluntarily comply with the Division's milestones and this matter goes to a hearing. Complementary, coordinated actions using both the State Water Board's water right and public trust enforcement authority and the Regional Water Board's water quality authority is necessary to fully address the Diverter's alleged water quality violations, misuse of water, and public trust impacts.

If you have any questions regarding this Petition for Hearing, please contact Kathy Mrowka, Manager, Enforcement Section at (916) 341-5363 or [Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov); or Kenneth Petruzzelli, Senior Staff Counsel, Office of Enforcement, at (916) 319-8577 or [Kenneth.Petruzzelli@waterboards.ca.gov](mailto:Kenneth.Petruzzelli@waterboards.ca.gov).

Sincerely,



*John O'Hagan, Assistant Deputy Director  
Division of Water Rights*

Enclosure:

Draft Order WR 2017-00XX-DWR Finding Waste, Unreasonable Method of Use, and Unreasonable Method of Diversion of Water and Ordering Corrective Actions

Ec: See next page

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