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October 17, 2016

 ORIGINAL

**VIA US MAIL AND EMAIL**  
**([kenneth.petruzzelli@waterboards.ca.gov](mailto:kenneth.petruzzelli@waterboards.ca.gov))**

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State Water Resources Control Board  
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STATE WATER RESOURCES CONTROL BOARD  
DIVISION OF WATER RIGHTS  
SACRAMENTO  
2016 OCT 20 AM 11:25

Re: Draft Order 2017-00XX-DWR issued August 30, 2016

Dear Mr. Petruzzelli:

On August 30, 2016, the State Water Resources Control Board (“State Water Board”), Division of Water Rights (“Division”) issued Draft Order 2017-00XX-DWR (“Draft Order”) to my clients, Douglas and Heidi Cole (the “Coles”) regarding their diversion at Marble Mountain Ranch (“Ranch”) located near Somes Bar in Siskiyou County. The Draft Order alleges that the Coles are engaged in waste, unreasonable method of use and an unreasonable method of diversion of water. As discussed below, the Coles’ diversion does not constitute waste, an unreasonable method of use or an unreasonable method of diversion of water. This letter outlines the Coles’ concerns with the Draft Order to frame further discussions with the State Water Board.

The Draft Order asserts jurisdiction under the public trust doctrine to require that the Coles reroute their diversion outfall point to Stanshaw Creek and decrease diversions to no more than 10% of the natural flow year round. In this case, however, the State Water Board does not have jurisdiction to regulate pre-1914 appropriative rights, beyond the prevention of an illegal diversion, waste or unreasonable use of water. (*Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 404 [as modified (Sept. 20, 2013)].) The Coles’ operational adjustments during low flow periods have eliminated the possibility that their diversions will harm salmonids or any other public trust resources. The State Water Board therefore lacks jurisdiction to require rerouting of the diversion outfall point to Stanshaw Creek and restrict the amount of water diverted.

The Coles have been cooperative participants in the effort to implement improvements at the Ranch for over 20 years. This more than 20-year period of collaborative effort has sought to provide a permanent physical solution for the diversion that benefits all

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stakeholders within the Stanshaw Creek system. The Coles' voluntary efforts have been met with agency resistance that has further complicated and delayed implementation of any improvements or a permanent solution. A recent example of the regulator caused complication and delay is the State and Regional Water Boards' insistence that the Coles seek 1600, 401, and 404 permitting for the installation of a six-inch pipe within their diversion ditch to convey consumptive-use water to the Ranch. The Coles sought these permits as requested. Upon submitting applications to the responsible agencies, each of the agencies confirmed that the project was outside their jurisdiction and did not require permitting. This delayed the Coles' ability to seek funding for this project. Consequently, the project remains unfunded and unfinished.

With the issuance of the Draft Order and the related Cleanup and Abatement Order ("CAO") from the North Coast Regional Water Quality Board ("Regional Water Board"), the State and Regional Water Boards have changed the tone of the over 20-year collaborative effort. The Coles entered into this process voluntarily as a stakeholder within the Stanshaw Creek system seeking a permanent physical solution at the Ranch. The Draft Order and CAO now mandate studies and specific physical improvements within a timeline with which the Coles are unable to comply.

Despite the Coles' inability to comply with the deadlines under the Draft Order and the CAO, they have continued to make efforts to provide the information required under the Draft Order and the CAO. Their consultants have been in the process of completing water and energy efficiency studies and securing grant funding to implement the six inch pipe project. However, the onerous conditions and short timelines contained in the Draft Order and CAO caused the Coles' previous consultant team to resign from the project. Those consultants were unable to complete the water or energy efficiency study and have not provided the draft reports to the Coles. The Coles are now in the process of finding and retaining new consultants to assist them in implementing a permanent physical solution at the Ranch. They remain committed to working with the State and Regional Water Boards in that effort.

To ensure that the Coles are able to implement a permanent physical solution at the Ranch and avoid potential liability under the Draft Order and the CAO, the Coles request a meeting with State and Regional Water Board staff to discuss both the Draft Order and the CAO, as well as the information provided in this correspondence. They seek a long term agreement with the State Water Board in regard to physical improvements at the Ranch that will allow the Coles to continue to operate a successful business.

#### **A. Historical Background**

The historical information included in the Draft Order begins in 1989 and notes the transfer of ownership of the Ranch and its water rights to the Coles in 1994. The Draft Order continues with historical information through a meeting between the Coles and

stakeholders, including the State Water Board, on May 14, 2016. The majority of the time from the Coles taking ownership of the Ranch in 1994 to the May 14, 2016, meeting was spent demonstrating to the State Water Board that the Coles had their now established pre-1914 right to appropriate 3 cfs of water year round. Following extensive study and review by an outside consultant, the Coles pre-1914 right was finally confirmed in 2014. While the Coles were focusing on establishing their pre-1914 right, they were still engaged with stakeholders to identify improvements to the diversion. However, they were unable to move forward with those improvements until it was clear they possessed the requisite water right to divert water.

One such effort to identify improvements even during the focus on establishing the Coles' water right, occurred in 2005, as identified in the Draft Order. (Draft Order p. 8.) On May 5, 2005, the Coles participated in a stakeholders' meeting that identified a number of potential improvements. One of the identified improvements was a project that would return water used for hydroelectric power to Stanshaw Creek via a pipeline installed near Highway 96. That solution was identified based on the circumstances at that time. In 2005, there was both funding available and ongoing work near Highway 96, including ditches being dug to install fiber optic cable that could have incorporated a return flow pipe for the Coles' diversion. The work near Highway 96 is now complete and the funding opportunities are no longer available. Current estimates for this effort indicate that the cost of returning flow to Stanshaw Creek through a piped conveyance along Highway 96 is likely to be greater than \$500,000.

## **B. Jurisdictional and Legal Issues**

### **1. The Diversion Ditch does not Constitute Waste, Unreasonable Use or an Unreasonable Method of Diversion of Water**

The Draft Order alleges that the ditch diversion system at the Ranch is an unreasonable use of water and an unreasonable method of diversion. (Draft Order ¶¶ 29 – 32.) A strict definition of what constitutes an unreasonable use of water has never been established. (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1473.) Instead, the determination is made by evaluating the circumstances in which the water is used. (*Id.*)

The State Water Board has found that use of an unlined ditch in a desert environment to irrigate crops where improvements could result in significant conservation was not a waste of water. (California State Water Resources Control Board, Imperial Irrigation District Alleged Waste and Unreasonable Use of Water, Decision 1600 (June 21, 1984) (finding that failing to implement a conservation plan was an unreasonable use of water, but the unlined ditches themselves were not an unreasonable use) (“Imperial Irrigation District decision”).) This is in line with the California Supreme Court's holding that appropriators, as a matter of law, possess the right to divert water through earthen

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ditches, provided that conveyance losses must be reasonable. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489.)

The Coles' diversion ditch is similar to those that were not an unreasonable use or waste of water in the Imperial Irrigation District decision. The diversion uses unlined ditches to convey water to the Ranch and is operated in a manner to keep conveyance loss to a minimum. In addition, the Coles have greatly reduced the amount of water they divert during the current low flow periods to comply with the National Marine Fisheries Services ("NMFS") bypass flow recommendation. The reduced diversion, during low flow periods, complies with the NMFS bypass flow recommendation, but this reduction in no way demonstrates an intention to waive or reduce the amount of their established pre-1914 right to divert 3 cfs of water, nor does it waive the Coles' right to develop alternatives that ensure the Coles' operations do not impact fishery resources in Stanshaw Creek. The Coles will regularly inspect the diversion during the upcoming high-flow period to address overtopping and seepage concerns as well.

All of the water the Coles divert is put to a beneficial use as has been demonstrated. These uses include domestic use for residents and guests at the Ranch, hydropower generation, irrigation, stock watering and fire protection. Thus, the Coles are not engaged in waste, unreasonable use of water or an unreasonable method of diversion.

2. The Water Board Lacks the Jurisdiction to Require the Coles to Change the Operation of the Diversion Based on Public Trust Resources

The Draft Order raises the public trust doctrine as a basis for prohibiting discharges to Irving Creek, decreasing the diversion year round, and for submitting plans for review and approval by the State Water Board, Regional Water Board, and other responsible agencies, to return flows to Stanshaw Creek by April 17, 2017. (Draft Order ¶¶ 38, 47.) The public trust doctrine, however, cannot be used to invoke the State Water Board's jurisdiction in this case.

The public trust doctrine requires the State Water Board to consider the effects of a proposed diversion on trust resources, including fish species and ecological values, in connection with the issuance of post-1914 permits. (*National Audubon Society v. Super. Court* (1983) 33 Cal.3d 419.) To date, no California court has necessarily held that the public trust doctrine would allow the State Water Board to assert its jurisdiction and curtail rights held by pre-1914 appropriators. A decision to extend jurisdiction in this manner would likely result in vigorous opposition by numerous pre-1914 water right holders.

To invoke the public trust doctrine, the State Water Board must also show that the diversion *clearly* harms the interests protected by the public trust. (*National Audubon Society, supra*; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82.) Potential impacts do not suffice, nor do unsupported allegations. In the

present case, the Draft Order proposes corrective action based on NMFS' theoretical calculations of in-stream flow requirements. The State Water Board lacks substantial evidence of harm to trust resources; this defect is compounded by the fact that the Coles have taken significant steps to eliminate the possibility of harm to trust resources by curtailing diversions during low flow periods. Invoking the public trust doctrine in this context would require an extraordinary finding of harm to justify the extension of this principle to holders of pre-1914 rights. Actions taken by the Coles do not support this finding or the extension of established case law regarding the public trust doctrine.

### **C. NMFS Year Round Bypass Flow Recommendation Does Not Benefit Fisheries**

The Draft Order incorporates, in its public trust resources allegations, NMFS's recommended bypass flow as outlined in NMFS's letter dated August 3, 2016. (Draft Order ¶¶ 34(a) – (d).) NMFS recommends that the Coles implement a 90% bypass flow year round, with no less than a 2 cfs bypass amount at the point of diversion, and return any flow used to generate hydroelectric power to Stanshaw Creek. (NMFS Bypass Flow Recommendation, p.11-12.) Requiring the Coles to return flow to Stanshaw Creek and limiting the Coles' diversion to 10% of flow year round is prohibitively expensive and unnecessary.

The cold water refuge at the confluence of Stanshaw Creek and the Klamath River that the NMFS recommendation is based upon only benefits fishery resources during the warmer months of the year when the Klamath River's temperatures rise. As discussed above, to invoke the public trust doctrine as a method of regulating a water right holder, actual harm must exist. The NMFS letter does not provide evidence of harm during the high flow periods to justify limiting the Coles diversion to 10% of those flows or to require the Coles to return flow to Stanshaw Creek.

The Coles have already voluntarily agreed to reduce and have been reducing their diversion to 10% of the flows in Stanshaw Creek during low flow periods. This provides the cold water refuge NMFS identifies as significant habitat for salmonids during the warmer months that generally coincide with low flow periods. The reduction in flow has come with significant increases in operational costs for the Ranch as the Coles must operate their diesel generator when they are not using their hydroelectric facilities. The increased operational costs in addition to the likely cost of over \$500,000 to return flow to Stanshaw Creek under the NMFS recommendation are not justified.

### **D. The Coles Continued Commitment to Resource Improvements**

Despite the State Water Board's lack of jurisdiction to require the Coles to implement specific improvements, the Coles remain committed to implementing a permanent physical solution. As part of their commitment, the Coles have upgraded their consumptive use water filtration and storage system at a cost of \$60,000. Photographs

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of that update were included in the September 30, 2016 progress report provided to the State and Regional Water Boards. The Coles are also still committed to installing the six inch pipe in the diversion ditch to convey consumptive use water to the Ranch. They are seeking funding to implement this project and have learned that grant funding decision will be made on October 19, 2016. If the Coles are awarded the grant, they will proceed with construction at that time, weather permitting.

#### **E. The Coles Concerns with the Draft Order's Requirements**

In addition to the jurisdictional issues discussed above, outlined below are the concerns the Coles wish to address.

##### 1. Reports required under the CAO and Draft Order

The CAO and Draft Order require that the Coles complete a number of reports and studies of the diversion. These studies require that the Coles find and retain professionals to gather information about the diversion without any clear connection to implementing solutions at the Ranch. The Coles must redirect their time, effort, and monetary resources to these studies to identify solutions that have already been discussed for an over 20 year period. Further study is not focused on providing any additional information for a solution to improve the Coles' diversion.

The onerous requirements in the CAO and Draft Order for these studies has also further complicated the Coles' effort to comply. Their previous consultants have elected to resign from further participation in the project rather than face any possible action based on onerous results that they must produce in a limited amount of time. The Coles are now in the process of identifying and retaining new consultants, but this has further delayed their ability to comply with the CAO and the Draft Order.

##### 2. Develop an Implementation Plan to return flow back to Stanshaw Creek with input from stakeholders and permitting agencies

As discussed above, the State Water Board lacks the jurisdiction to require the Coles to return flow back to Stanshaw Creek. The Coles are pre-1914 appropriative right holders with an established right to divert 3 cfs of water year round. Further, the course of the Coles diversion with the outfall point into Irving Creek has been in place for over 150 years. Any potential impact to fishery resources occurred years before the Coles purchased the property and continued to operate the diversion. The water used for hydroelectric generation that leaves the diversion at the Irving Creek outfall point is returned to the Klamath River, just as it would be if the flow was returned to Stanshaw Creek.

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Despite this lack of jurisdiction, the Coles, as part of their effort to identify and retain new consultants, have retained a fish biologist, Steven Cramer of Cramer Fish Sciences, to assist them with avoiding impacts to fishery resources. Based on Mr. Cramer's initial review of NMFS's report, he concurs the base flows during low flow periods appear reasonable. With Mr. Cramer's assistance, the Coles are interested in taking action to support the cold water refuge at the Stanshaw Creek confluence with the Klamath River during higher temperature periods in the Klamath River typically associated with low flows in Stanshaw Creek.

Mr. Cramer requires at least six months to study site specific circumstances that were not available for the NMFS recommendation. Additional measurement of stream dimensions and flows will help insure that the Coles are implementing a solution that includes minimum flow that fully accounts for site specific circumstances that affect the quality of the Stanshaw Creek and Klamath River confluence's aquatic habitat. These measurements can be completed this fall/winter and can be used to submit a plan for the State Water Board's review by next spring.

3. Install a permanent water diversion control mechanism and conveyance infrastructure in the ditch, such as a pipeline or other suitable infrastructure, adequate to eliminate the misuse of water in the ditch

As discussed above, the ditch is not a misuse of water. However, the Coles seek clarification of this requirement. The directive refers to "a conveyance infrastructure," not to the six inch pipe project which has been the focus of stakeholder discussions and the Coles' efforts up to the present. The Coles have not submitted plans or contemplated funding an additional pipeline to divert their full pre-1914 3 cfs water right at this time. They anticipate that they may install a larger pipeline in the diversion at some point in the future, but that project will not be completed in time to comply with the Draft Order's October 15, 2016 deadline.

If instead the Coles are interpreting the State Water Board's directive correctly and identify this requirement as one to install the six inch pipe by October 15, 2016, they lack funding to comply with this directive. They will not receive the grant funding decision until October 19, 2016. If they are provided funding, they will move forward with the project at that time, weather permitting. As part of that project, the Coles will install a headgate at the point of diversion. In the meantime, the Coles will continue to inspect and manage the diversion as they have through the most recent low flow period.

4. Stabilize head cut and slope at Irving Creek

The Coles have previously submitted a letter addressing the CAO that demonstrates they are unable to stabilize the head cut and slope at Irving Creek until a proper study of that outfall point can be done. The study requires more water being diverted to actually have water exiting the outfall and leaf off, wet conditions. These conditions are not

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available until the wet season. Rocco Fiori has submitted a declaration of these fact in support of the Coles' appeal of the Regional Water Board's CAO. The declaration is attached to this letter as **Exhibit A**. Thus, the Coles will not be able to provide a report that adequately assesses the situation until the spring of 2017, with implementation of any recommendations from that report through the fall of 2017.

5. Install a flow gauge upstream from the Stanshaw Creek Point of Diversion and a flow gauge downstream below the Highway 96 culverts

The Coles are unable to comply with this requirement. They lack the authority to enter the Forest Service's land above the Point of Diversion and downstream below the Highway 96 culverts to install flow gauges. The Coles also lack the authority to enter the Fisher's property to install a flow gauge below the Highway 96 culvert if the location contemplated for the flow gauge is on the Fisher's property. The Coles welcome the State Water Board's assistance in achieving this objective in securing permission and funding to place these flow gauges, however, the Coles are not obligated to install and monitor flow gauges above and below their point of diversion.

**Conclusion:**

The Coles have been active participants in the process of discussing a final physical solution to benefit all stakeholders in the Stanshaw Creek system for over 20 years. The Draft Order in concert with the CAO do not focus on a physical solution and instead seek additional reports and information gathering that the Coles must fund without any clear path to these studies resulting in a final, physical solution. The Coles are in the process of identifying and retaining a new team of consultants to complete the effort to make resource improvements at the Ranch since their previous consultants elected to resign.

The State Water Board lacks the jurisdiction to require that the Coles change their operations in the manner directed under the Draft Order. The State Water Board relies on its jurisdiction under the public trust doctrine but have not shown the diversion results in any harm to public trust resources or a waste or unreasonable use of water.

To demonstrate their commitment to resource improvements, the Coles have already voluntarily reduced their diversion amount to benefit fishery resources during the warmer months that typically coincide with low flow periods. This addresses the public trust concerns raised by the various stakeholders over the last 20 years. The Coles continue to be committed to a final physical solution to managing their diversion while still operating a successful small business. The Draft Order and CAO make continued collaboration to achieve that goal difficult at best.

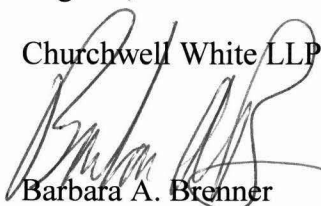


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We anticipate meeting with the State Water Board to discuss these issues and potentially identify a basis for a long term agreement for all parties. The Coles are agreeable to being a participant in improving the Stanshaw Creek system, but as small business owners are unable to bear the onerous requirements and potential liability under the Draft Order and CAO. Please feel free to contact me at [barbara@churchwellwhite.com](mailto:barbara@churchwellwhite.com) or (916) 468-0950.

Regards,

Churchwell White LLP



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7  
8 STATE OF CALIFORNIA

9 STATE WATER RESOURCES CONTROL BOARD

10 In the Matter of the Petition of Douglas Cole and  
Heidi Cole for Review and Stay of the North  
11 Coast Regional Water Quality Control Board  
Issuance of Cleanup and Abatement Order No.  
12 R1-2016-0331.

DECLARATION OF ROCCO FIORI IN  
SUPPORT OF PETITION FOR REVIEW  
AND STAY OF CLEANUP AND  
ABATEMENT ORDER NO. R1-2016-0331

13  
14  
15  
16 I, ROCCO FIORI, declare as follows:

17 1. I am the Principle at Fiori Geosciences, a position I have held for 10 years, a  
18 Licensed Geologist (PG 8066), and have 30 years of experience assessing and mitigating  
19 anthropogenic erosion and sedimentation problems. I make this declaration in support of the  
20 accompanying Petition for Review and Stay of Cleanup and Abatement Order No. R1-2016-0331.  
21 I have personal knowledge of the following facts and, if called and sworn as a witness, could and  
22 would competently testify thereto.

23 2. I am the author of the Fiori Geosciences Technical Memorandum dated May 14,  
24 2016.

25 3. I evaluated the Coles diversion at Marble Mountain Ranch on April 20, 2016,  
26 reviewed the North Coast Regional Water Quality Control Board inspection report by Stormer  
27 Feiler dated March 9, 2015, and used desktop analysis, including qualitative assessment of site  
28 conditions using a 1-meter resolution LiDAR DEM, Digital Ortho-Photographs, and the Regional

1 Geologic Map to reach my conclusions in my Technical Memorandum dated May 14, 2016.

2 4. The May 14, 2016 Technical Memorandum accurately reflects my opinion of the  
3 causes of sedimentation and erosion that results from the Coles diversion at Marble Mountain  
4 Ranch.

5 5. The May 14, 2016 Technical Memorandum accurately reflects my  
6 recommendations for addressing the sedimentation and erosion impacts to waters of the state from  
7 the Coles diversion at Marble Mountain Ranch

8 6. I have reviewed all of the required reports and deliverables contained in Cleanup  
9 and Abatement Order No. R1-2016-0031 and determined that leaf off, wet conditions are  
10 necessary to accurately complete the required reports and deliverables in Cleanup and Abatement  
11 Order No. R1-2016-0031.

12 7. The requirements in paragraph 4(a) on page 11 of Cleanup and Abatement Order  
13 No. R1-2016-0031 requires that the Coles “[a]ssess slopes between the upper ditch and Stanshaw  
14 creek and the streambed of Stanshaw Creek and Irving Creek and the unnamed tributary to Irving  
15 Creek for stored sediment deposits and erosional sources associated with the past and current  
16 failures of the ditch” cannot be fully implemented as it would be difficult to deconvolve natural,  
17 and legacy ditch related sediment deposits from those that are a result of modern ditch failures.  
18 Furthermore, an assessment of the cause of the erosion and sediment deposits cannot provide  
19 unequivocal evidence that a nuisance impact to the waters of the State had occurred unless the  
20 actual discharge, or flow path and deposit can be traced from the point of origin to the discharge  
21 location.

22 I declare under penalty of perjury under the laws of the State of California that the  
23 foregoing is true and correct, and that this declaration was executed on this 6 day of September,  
24 2016, at Klamath, California.

25 

26 ROCCO FIORI  
27 Engineering Geologist, PG 8066  
28 Fiori GeoSciences