

February 8, 2017

**VIA U.S. MAIL/EMAIL**

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Kenneth Petruzzelli  
State Water Resources Control Board  
801 K Street, 23<sup>rd</sup> Floor  
Sacramento, CA 95814

Re: Proposed Time Schedule for Projects at Marble Mountain Ranch

Dear Mr. Petruzzelli:

Based on our discussion on December 16, 2016, regarding Marble Mountain Ranch (“Ranch”), please find below a proposed time schedule to complete many of the projects outlined in the State Water Resources Control Board’s (“State Water Board”) Draft Order WR 2017-00XX-DWR (“Draft Order”), and the North Coast Regional Water Quality Control Board’s (“Regional Water Board”) Cleanup and Abatement Order R1-2016-0031 (“CAO”). Douglas and Heidi Cole (the “Coles”) remain committed to implementing improvements at the Ranch but require additional time to properly retain experts, create plans to implement improvements, secure permits for the identified improvements and execute the plans to make the improvements.

While the Coles remain engaged stewards of the Stanshaw Creek system, there are several requirements in the Draft Order and CAO that are not necessary to achieve the goal of a sustainable Stanshaw Creek system. The Coles are small business owners with limited resources to address any improvements at the Ranch. To ensure that the highest priority improvements are the focus of the Coles’ efforts and resources moving forward, a discussion of the lack of need for several of the projects that do not contribute to the goal of establishing a sustainable Stanshaw Creek system contained in the Draft Order and CAO is also included below.

The dates included herein are based on several assumptions that may affect the time required to complete the projects. Those assumptions include, but are not limited to, (1) the Coles and the State and Regional Water Board being able to agree to a time schedule for improvements; (2) the Coles being able to secure all required permits and regulatory approvals for each of the projects; and (3) weather and other unforeseen circumstances not causing undue delay. If the Coles encounter any of these possible complications, additional time to complete the projects may become necessary.

### Need for Additional Time

The Coles have been involved in the effort to implement improvements at the Ranch for over 20 years. During that time, in addition to successfully defending their pre-1914 3 cfs water right, the Coles have been engaged with stakeholders discussing and identifying resource improvements for the Ranch, many of which are included in the Draft Order and CAO. Following receipt of the Draft Order and the CAO, the Coles have taken steps to comply with the requirements in those orders, including pursuing a sedimentation study and slope stability analysis, retaining new consultants to assist them in their compliance efforts, submitting progress reports to the State and Regional Water Boards, and providing a water sampling plan for the Regional Water Board's review.

In addition to their efforts to submit the required documentation under the CAO and Draft Order, the Coles have also engaged in diversion management practices that ensure the diversion complies with the requirements under the Draft Order and CAO while they work toward permanent solutions. Those efforts include the Coles temporarily reducing the amount of water they are diverting, not running their hydropower generation plant to comply with the National Marine Fisheries Service ("NMFS") bypass flow requirements and continuing regular inspection and maintenance efforts. Though the Coles have elected to reduce the amount of water they are diverting during their compliance efforts, the Coles are not demonstrating any intention to waive their full pre-1914 3 cfs water right.

### Proposed Time Schedule for Resource Improvements at Marble Mountain Ranch

Water Code section 13300 allows for a water user to enter into a time schedule of specific actions the water user will take to avoid a violation of any requirement prescribed by the State or Regional Water Board. To that end, and based on the reasoning below, the Coles propose the following time schedule for several of the projects in the Draft Order and CAO. Proposed dates for significant elements of each of the projects and the final completion date for those projects is also summarized in a table attached as **Exhibit A**.

### **Install conveyance infrastructure in the ditch, such as a pipeline or other suitable infrastructure (Draft Order, Page 22, Table 4)**

The Coles have previously submitted designs and permit review determinations to install a six inch pipe in the diversion at the Ranch. Those plans were proposed as an approach to comply with the NMFS bypass flow recommendation and would have only allowed the Coles to divert enough water for their consumptive use needs. The Coles still identify the piping of at least the first 1,000 feet of the diversion as a practical approach to improving the diversion but must increase the size of the pipe to be installed in order to convey the full complement of their 3 cfs water right to the Ranch.

Thus, they require additional time to create the plan for the greater capacity pipe, obtain any necessary permits, secure the necessary funds for the project and finally install the pipe. Based on projections from the Coles' environmental consultants, ECORP Consulting, Inc., the Coles will require until **June 30, 2018**, to install a conveyance infrastructure in at least the first 1,000 feet of the ditch, such as a pipeline or other suitable infrastructure. The table below details additional dates for submitting plans, securing permits, and beginning and completing construction.

<b>Task 1</b>	<b>Proposed Date</b>
Submit plans for an enlarged piping project	June 30, 2017
Secure any necessary permits and agency approvals	January 1, 2018
Begin construction	April 1, 2018*
Project complete	June 30, 2018

\*Weather permitting

**Install a diversion control mechanism at the point of diversion (Draft Order, Page 22, Table 4)**

The Coles are in the process of identifying possible alternatives for a diversion control mechanism and are seeking an engineering consultant to assist them in that effort. The Coles anticipate that a diversion control mechanism will require additional time to design and install based on the nature of the Coles' diversion and the Stanshaw Creek system. The Coles have reached out to the Farmers' Conservation Alliance to discuss the possibility of using their prefabricated fish screen at the Ranch, but those efforts have been stalled by a lack of response from the California Department of Fish and Wildlife with regard to whether they will accept the prefabricated fish screen design. The project may also require additional permitting. Therefore, the diversion control mechanism is projected to be installed at the Ranch by **December 31, 2018**. A proposed timeline to install the diversion control mechanism is outlined in the following table.

<b>Task 2</b>	<b>Proposed Date</b>
Submit plans for the diversion control mechanism	June 30, 2017
Secure any necessary permits and agency approvals	January 1, 2018
Begin construction	April 1, 2018*
Project complete	June 30, 2018

\*Weather permitting

**Stabilize head cut and slope at Irving Creek outfall point (Draft Order, Page 22, Table 4)**

The Coles will stabilize the head cut and slope at the Irving Creek outfall point; however, a full remediation of the area that includes a Restoration and Monitoring Plan does not appear warranted or the best approach. The reasons for not perusing a full remediation of the Irving Creek outfall point are more fully discussed on page 7 of this correspondence. Briefly, based on an initial assessment of the area, introducing any fill at the Irving Creek outfall point will potentially result in discharge of that fill material. Therefore, it is requested that any remediation plans avoid fill of the area during the stabilization effort. In order to properly secure any necessary permits, or other approvals for the stabilization effort and any required construction materials, the Coles anticipate they will complete this task by **December 31, 2017**. Deadlines for the significant activities required to implement the stabilization effort at Stanshaw Creek are proposed as follows:

<b>Task 3</b>	<b>Proposed Date</b>
Submit plans to stabilize the head cut and slope at Irving Creek	May 31, 2017
Secure any necessary permits and agency approvals	July 31, 2017
Begin construction	September 30, 2017*
Project complete	December 31, 2017

\*Weather permitting

**Develop a plan to return flow to Stanshaw Creek and return flow to Stanshaw Creek (Draft Order, Page 22, Table 4)**

The Coles have been attempting to achieve the goal of returning flow to Stanshaw Creek since at least 2005. Those efforts have been complicated by the challenge to the Coles' water right and many different federal and state agencies' jurisdictional interest in the project. While the Coles maintain that the State Water Board lacks the jurisdiction to require the Coles to return flow to Stanshaw Creek, they are willing to continue exploring a plan to return flow to Stanshaw Creek.

The Coles are in the initial process of identifying possible alternatives for the project and securing cost estimates for permitting and completing each of those alternatives. Therefore, they are unable to speculate on a timeline for any of the elements of this project. In addition to determining possible approaches to returning flow to Stanshaw Creek, the Coles will also be seeking grant funding for the planning and implementation of this project. The uncertainty with regard to when and how the Coles may receive funding for the project further prohibits the Coles from speculating on any possible timelines for implementation or completion of this project; however, an outline of the proposed timeline to seek these funding opportunities is outlined below.

<b>Task 4</b>	<b>Proposed Date</b>
Assess funding opportunities	April 30, 2017
Submit funding proposals or applications, if any	August 31, 2017

**Provide a slope stability assessment and sedimentation study of the diversion (CAO, Pages 10 and 11, Items 3 and 4)**

The Coles have retained Rocco Fiori of Fiori Geosciences to complete the slope stability assessment and sedimentation study of the diversion. As was discussed at the December 16, 2016, meeting with the State and Regional Water Boards, Mr. Fiori completed a field review of the Ranch on December 16, 2016. Since that time, Mr. Fiori has been in the process of completing a report of his findings. Following the storm events in January of 2017, and conversations with the Coles, Mr. Fiori has had to delay release of his report until **February 28, 2017**, to incorporate additional analysis.<sup>1</sup> As soon as Mr. Fiori completes his report, it will be provided to the State and Regional Water Boards.

<b>Task 5</b>	<b>Proposed Date</b>
Site Visit	December 16, 2016
Slope stability assessment and sedimentation study complete	February 28, 2017

**Submit Division of Drinking Water (“DDW”) Public Water System determination or copy of DDW Public Water System permit to the Division of Water Rights (Draft Order, Page 22, Table 4)**

The Coles completed a declaration in 2005 certifying that the Ranch does not qualify as a public water system. They received a notice on December 22, 2016, that the DDW “received information suggesting that Marble Mountain Ranch may be serving water to at least 25 people daily at least 60 days out of the year.” The notice advised the Coles that they either needed to “apply for a permit to operate a public water system” or sign and return a declaration that was attached to the letter. Douglas Cole signed and completed the declaration certifying that the Ranch still does not qualify as a public water system in January of 2017.

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<sup>1</sup> Beyond the additional information following the January 2017 storms, Mr. Fiori’s report has also been delayed because the scope of his review has expanded and he has been ill during the month of January.

**Implement National Marine Fisheries Service (“NMFS”) bypass flow recommendation (Draft Order, Page 22, Table 4)**

The Coles have voluntarily reduced the amount of water they are diverting to comply with the NMFS bypass flow since the low flow periods of the summer of 2016. The lack of clarity from the State Water Board with regard to how it would implement NMFS’s recommendation led the Coles to make the decision to temporarily reduce the amount of water they divert. The Draft Order indicates that the NMFS bypass flow should be implemented upon completion of the return flow to Stanshaw Creek project. The Coles may not be completing the Stanshaw Creek return flow project if they are unable to secure funding for the project. Therefore, the Coles will continue to implement NMFS’s bypass flow recommendation during low flow periods, as they have during 2016 low flow periods.

**Submit Quarterly Progress Reports (Draft Order and CAO)**

Since the release of the CAO and Draft Order, the Coles have submitted two quarterly progress reports for the last two quarters of 2016. The Coles will continue to submit quarterly progress reports until they have completed the projects proposed through this correspondence.

Pending Projects

**Water Quality Sampling Plan (CAO, page 11, ¶ 4(b).)**

The Coles previously submitted a water quality sampling plan (“Sampling Plan”) to the Regional Water Board in the event the Coles would be discharging water from the Ranch. The Regional Water Board approved the Sampling Plan, but the Coles have not taken any further steps to implement the Sampling Plan at the Ranch. Their reasons for this are two-fold.

First, the CAO specifically requires the Coles implement a Sampling Plan to “[e]nsure that water used onsite, conveyed in the ditch and discharged, does not adversely impact waters of the state.” (CAO, page 11, ¶ 4(b).) The Coles are not currently discharging water so there is no impact to waters of the state from the Ranch. Secondly, the Coles’ water system is tested and monitored by Siskiyou County on a quarterly basis. Therefore, the Ranch’s water quality is already monitored and deemed safe by a governmental agency. Once the Coles begin diverting water that they then discharge to waters of the state, they will revisit the Sampling Plan and provide any proposed modifications.

**Ditch Operation and Maintenance Plan (CAO, page 11, ¶ 3(b).)**

The CAO requires that the Coles provide a ditch operation and maintenance plan “that includes an inspection and maintenance schedule” for the diversion. The Coles have an existing inspection and maintenance schedule that they are in the process of formalizing into a plan with the assistance of their environmental consultants, ECORP Consulting, Inc. Douglas Cole outlined his operation and maintenance efforts at the December 16, 2016, meeting. The Coles propose that they will submit a ditch operation and maintenance plan on the following time schedule.

<b>Task 6</b>	<b>Proposed Date</b>
Submit ditch operation and maintenance plan	March 31, 2017

**Projects the Coles do not anticipate completing**

Several of the projects contained in the Draft Order and CAO are not necessary to achieve a sustainable Stanshaw Creek system. To focus the Coles’ efforts moving forward on the highest priority projects, the Coles propose eliminating the following projects from the Draft Order and CAO. The reasons for eliminating each of the projects is also discussed.

**Remediation of the Irving Creek Outfall point that includes a Restoration and Monitoring Plan with monitoring reports through 2021 (CAO, page 8, item 2 and page 10, item 2)**

Rocco Fiori of Fiori Geosciences has discussed his initial findings from his site visit at the Ranch with the Coles. Part of the conclusions that will be contained in his forthcoming report indicate that a fill and full remediation of the Irving Creek outfall is unnecessary and will likely result in discharge of that fill material. To avoid that potential outcome, the Coles anticipate that they will install a culvert at the top of the outfall point and riprap at the base of the outfall point to address any impacts to waters of the state from the outfall point. Following that effort, no further remediation or monitoring should be required at the Irving Creek outfall point.

**Complete Energy Audit and develop plan to implement recommendations from that audit (CAO, page 8, item 1)**

The Coles have established their pre-1914 right to divert 3 cfs of water that includes the right to use water for hydroelectric generation. As part of the discussions with stakeholders in the Stanshaw Creek system, the Coles agreed to pursue possible alternative courses of action to address stakeholder concerns. A review of their energy use was part of that strategy; however, with the issuance of the Draft Order and CAO, the Coles can no longer afford to pursue any additional optional approaches to

addressing stakeholders concerns. The 3 cfs right allows the Coles to operate their existing hydroelectric power plant which adequately serves the Coles' energy needs. Therefore, the Coles do not plan to complete the energy audit or further pursue this alternate course of action.

**Complete a water efficiency study (Draft Order, Page 22, Table 4)**

As discussed above, the Coles have an established pre-1914 right to divert 3 cfs of water. They have provided data that details the beneficial uses they put that water to at the Ranch. A water efficiency study will not provide any additional helpful information toward the effort to implement water efficiency improvements at the Ranch. Therefore, the Coles do not plan to complete a water efficiency study.

**Install a flow gauge upstream from the point of diversion in Stanshaw Creek and downstream below the Highway 96 culvert (Draft Order, Page 22, Table 4)**

The Coles lack the authority to place a flow gauge upstream of their point of diversion in Stanshaw Creek, as that area is United States Forest Service land. They also lack the authority to place a flow gauge downstream below the Highway 96 culvert because they do not own property at that location. When the flow gauges were originally discussed, it was the Coles' understanding that flow gauges may be placed by the federal or state fishery agencies. Further, there is no internet or power source along this portion of Stanshaw Creek which makes installation of flow gauges impracticable. Because the Coles lack the authority to comply with this directive, they are not able to implement this task as outlined in the Draft Order.

**Cease discharge to Irving Creek by April 30, 2017 (Draft Order, Page 22, Table 4)**

As previously noted, the Coles maintain that the State Water Board lacks the authority to require that the Coles return flow to Stanshaw Creek and cease discharging water used for hydroelectric power generation to Irving Creek. The Draft Order bases its requirement that the Coles cease discharging to Irving Creek and return flow back to Stanshaw Creek on the public trust doctrine. (Draft Order ¶¶ 38, 47.)

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. Further, to invoke jurisdiction under the public trust doctrine, the State Water Board must show that the diversion *clearly* harms the interests protected by the public trust. (*National Audubon Society v. Super. Court* (1983) 33 Cal.3d 419; *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's 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 to require that the Coles cease discharging to Irving Creek would require an extraordinary finding of harm to justify the extension of the public trust doctrine to holders of pre-1914 rights. Actions taken by the Coles do not support this finding.

Consequently, the Coles request the ability to return flow to Irving Creek after stabilizing the head cut and slope at the Irving Creek outfall point and obtaining any necessary permits. If and when the Coles are able to secure funding for the effort to return flow to Stanshaw Creek, they will cease diverting water to Irving Creek.

**Develop a plan to remove the outboard berm if the ditch is piped (CAO, Page 8, Item 1)**

The Coles anticipate that they will be piping at least the first 1,000 feet of the diversion. The diversion lies along a forested hillside that includes many large trees and is habitat for large animals such as elk that can cause damage to installed infrastructure. The outboard berm establishes a path of access to any pipe that is installed in the historical ditch footprint. Therefore, the Coles anticipate keeping the outboard berm in place to ensure that they are able to inspect and repair any damage to any pipe installed in the existing ditch.

Please contact me at [barbara@churchwellwhite.com](mailto:barbara@churchwellwhite.com) or (916) 468-0625 if you have any questions or concerns.

Regards,

Churchwell White LLP



Barbara A. Brenner  
KAF/dmg

Enclosure

**(via email, with enclose)**

cc: Douglas and Heidi Cole ([guestranch@marblemountainranch.com](mailto:guestranch@marblemountainranch.com))  
Eric Stitt, ECORP Consulting, Inc. ([estitt@ecorpconsulting.com](mailto:estitt@ecorpconsulting.com))

**Install conveyance infrastructure in the ditch, such as a pipeline or other suitable infrastructure**

<b>Task 1</b>	<b>Proposed Date</b>
Submit plans for an enlarged piping project	June 30, 2017
Secure any necessary permits and agency approvals	January 1, 2018
Begin construction	April 1, 2018*
Project complete	June 30, 2018

\*Weather permitting

**Install a diversion control mechanism at the point of diversion**

<b>Task 2</b>	<b>Proposed Date</b>
Submit plans for a diversion control mechanism	June 30, 2017
Secure all necessary permits and agency approvals	January 1, 2018
Begin construction	April 1, 2018*
Project complete	June 30, 2018

\*Weather permitting

**Stabilize head cut and slope at Irving Creek outfall point**

<b>Task 3</b>	<b>Proposed Date</b>
Submit plans to stabilize the head cut and slope at Irving Creek	May 31, 2017
Secure all necessary permits and agency approvals	July 31, 2017
Begin construction	September 30, 2017*
Project complete	December 31, 2017

\*Weather permitting

**Seek funding opportunities to return flow to Stanshaw Creek**

<b>Task 4</b>	<b>Proposed Date</b>
Assess funding opportunities	April 30, 2017
Submit funding proposals and applications, if any	August 31, 2017

**Provide a slope stability assessment and sedimentation study of the diversion**

<b>Task 5</b>	<b>Proposed Date</b>
Site Visit	December 16, 2016
Slope stability assessment and sedimentation study complete	February 28, 2017

**Provide a ditch operation and maintenance plan**

<b>Task 6</b>	<b>Proposed Date</b>
Submit ditch operation and maintenance plan	March 31, 2017

**Implement National Marine Fisheries Service bypass flow recommendation**

<b>Ongoing Task</b>	<b>Proposed Remedy</b>
Implement bypass flow recommendation	As required during low flow periods

**Marble Mountain Ranch  
Proposed Time Schedule Summary Table by Project**

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**Quarterly progress reports**

<b>Ongoing Task</b>	<b>Proposed Date</b>
Submit Report	Quarterly through June 30, 2018*

\*The Coles may submit additional progress reports depending on the status of the return flow project