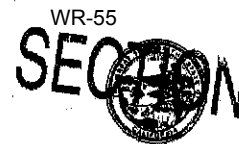




State Water Resources Control Board



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5377
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>

Gray Davis
Governor

AUG 22 2002

In Reply Refer to:
363:MC:262.0(47-40-01); A029449

Klamath Forest Alliance
c/o Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Dear Mr. Mooney:

WATER RIGHTS COMPLAINT OF THE KLAMATH FOREST ALLIANCE AGAINST THE COLES REGARDING DIVERSIONS FROM STANSHAW CREEK IN SISKIYOU COUNTY

Staff of the Division of Water Rights (Division) has completed their review of your letter of June 24, 2002 regarding the subject complaint. You indicate in this letter that you and your client disagree with the conclusions reached by Complaint Unit staff, as expressed in their letter and Staff Report of Investigation dated May 23, 2002. After review of both the Staff Report of Investigation and your letter, I have concluded that further action with respect to your client's complaint is not warranted, and I have directed the Complaint Unit to close this complaint. The supporting rationale for this action is described below.

Unauthorized Diversion of Water – You contend that the Division previously determined that any pre-1914 appropriative right held by the Coles is limited to approximately 0.11 cubic feet per second (cfs). Regardless of past letters sent by the Division containing estimates of what could be diverted pursuant to a pre-1914 appropriative right claim, the Division has no adjudicatory authority to quantify such a claim. Only the courts can make this determination. The most recent evidence submitted by the Coles and their legal counsel indicates that diversion of water from Stanshaw Creek into their ditch, and the subsequent use of this water for irrigation and domestic purposes at the Marble Mountain Ranch, was initiated prior to 1914 using at least as much, if not more, water than is used today. All available evidence suggests that the diversion and use has been maintained in a diligent and continuous fashion ever since. Consequently, we believe that a court would find that the Coles have a valid claim of a pre-1914 appropriative right to divert water for the full irrigation and domestic uses currently maintained, including reasonable conveyance losses.

While the Cole's current diversion of water for power purposes is not technically covered by a permit, this diversion and use has been ongoing for almost 60 years. Diversions prior to a determination regarding issuance of a permit are very common, especially for long-standing diversions such as the Cole's. The State Water Resources Control Board (SWRCB) has discretion whether to take enforcement action against an unauthorized diversion of water. Upon reviewing a complaint, the SWRCB may decide not to take enforcement action, or to defer consideration of enforcement. The SWRCB may consider several factors when deciding whether to pursue enforcement. One factor the SWRCB weighs is the willingness of the water diverter to legitimize the diversion. The SWRCB may choose not to initiate enforcement against a person who files an application promptly upon notification of the complaint, and then

California Environmental Protection Agency

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diligently pursues the application, complies with all application requirements and requests for information, and cooperates with SWRCB staff. While the Cole's application (A029449) has been pending for an extraordinarily long time, there is no indication in the application file that the Coles have not pursued approval of their application in a diligent fashion.

Potential Injury to Other Uses of Water - Another important factor in considering enforcement is the extent of injury caused by the water diversion. If a complaint investigation shows the unauthorized diversion is causing little or no injury to established right holders or to public trust values, the SWRCB may decide *not* to take enforcement action. The SWRCB may also consider the degree of hardship that enforcement action would impose on persons who rely on the diversion of water when it decides whether to take enforcement action in response to a complaint. Based on available evidence and rationale described in the Staff Report of Investigation, Complaint Unit staff concluded that there would be little potential for harm to other diverters or public trust resources if the Coles were allowed to divert water for power purposes, as long as a minimum bypass flow is maintained similar to that occurring during their investigation. You disagree with this conclusion, and make reference to the professional opinions of staff for the National Marine Fisheries Service, Department of Fish and Game, Karuk Tribe, and Humboldt State University. While we have received copies of these opinions, the evidence and logical rationale on which these opinions are based has not been submitted. Consequently, I believe the prima facie evidence utilized by Complaint Unit staff is more persuasive. Asking the Coles to terminate their diversion would also cause severe economic hardship on them without providing much if any benefit to the instream resources.

I do agree with you that the Cole's application has been pending for far too long. This application has been noticed and protests received. I doubt the parties will be able to resolve these protests amicably amongst themselves. The next steps in the process would be to complete an environmental review of the project pursuant to the California Environmental Quality Act (CEQA), and then proceed to protest resolution via either a field investigation or formal hearing. I have directed the Division's Environmental Section to give as much priority as possible to this application so that final resolution of the protests can be achieved as soon as feasible. I have also asked the Division's Application and Environmental units to send copies of all correspondence to you so that you will be kept apprised of the progress in this matter.

In the meantime, I expect the Coles to maintain a minimum bypass, as described in the Staff Report of Investigation. Failure to do so could result in a reevaluation of the need for enforcement action prior to a final determination of the Cole's request for a permit.

If there are any questions regarding this matter, please contact Charles Rich, Chief of the Division's Complaint Unit, at (916) 341-5377.

Sincerely,

ORIGINAL SIGNED BY

Edward C. Anton, Chief
Division of Water Rights

cc: See next page.

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cc: Mr. Doug and Mrs. Heidi Cole
c/o Jan Goldsmith
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Department of Fish and Game
Environmental Services
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Jane Vorpapel
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National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman and
Margaret Tauzer
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William M. Heitler, District Ranger
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Orleans, CA 95556-0410

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Siskiyou County Planning Department
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Courthouse Annex
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Mr. Konrad Fisher
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Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556

bcc: Larry Attaway, Ross Swenerton
MContreras\lfischer 8/16/02
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