



500 Capitol Mall, Suite 1600
 Sacramento, California 95814
 main 916 447 0700
 fax 916 447 4781
 www.stoel.com

November 29, 2012

BARBARA A. BRENNER
 Direct (916) 319-4676
 babrenner@stoel.com

VIA EMAIL AND REGULAR MAIL

Attn: Mr. Bob Rinker
 State Water Resources Control Board
 1001 I Street
 Sacramento, CA 95814

**Re: Supplemental Information for Initial Statement of Water Diversion and Use for
 MJM:A029449; Statement No. 15022**

Dear Mr. Bob Rinker:

The purpose of this Initial Statement of Water Diversion and Use is, that in conjunction with a USGS map, to provide the most current information required by the State Water Resources Control Board in order to reactivate Statement No. 15022. Below please find supplemental information to be attached to the Initial Statement of Water Diversion and Use form.

Supplemental Information

E. Place of Use Description

Address: Marble Mountain Ranch, 92520 Hwy 96, Somes Bar, CA 95568
 Acreage: Approximately sixty-five (65) acres

F. Purpose of Use Description

The California Department of Fish and Game has indicated that the fishery may benefit from an approximately 1 cfs bypass flow in the stream. When there is adequate flow, Mr. Cole makes every effort to provide this bypass flow.



Attn: Mr. Bob Rinker
November 29, 2012
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H. Quantity of Water

The 178.5 acre-feet provided for December 2012 is an estimate based on the conversion from the 3 cfs anticipated diversion for that month.

I. Recent Water Use

The Coles have stored water in a pond that is filled with the out fall from their power plant, with a pond outlet that continues across the ranch and ultimately into Irving Creek, and thence to the Klamath. This is a permitted pond and provides for irrigation, fire protection, and recreational beneficial uses.

Within the last five years, the maximum water use is calculated from a maximum rate of diversion of 3 cfs per month, which converts to 178.5 acre-feet per month, for a total of 2,142 acre-feet a year. The minimum water use is calculated using the 3 cfs maximum diversion for 9 months, and then 2 cfs diversion for 3 low flow months for a total minimum water use of 1,963.53 acre-feet a year.

J. Maximum Rate of Diversion

The Coles intend to divert 3 cfs in December 2012. Thus, this is an estimate based on the maximum rate that is generally available at all times except for months of very low flow. December, unlike August and September, is not historically a low flow month and therefore the maximum 3 cfs is typically diverted.

K. Miscellaneous Water Use

Water Conservation – Description of water conservation efforts in current use

1. Upon purchase of the ranch in 1994 the Coles changed the business model from an existing RV/mobile home park with 57 licensed hook-ups to a guest ranch targeting a population of about 30 people. The 57 RVs were each impacting ranch infrastructure and consuming water, generating sewage, and needing the limited power available. The smaller population, full service, guests of a dude ranch generate sufficient income with far less demand on the resources.

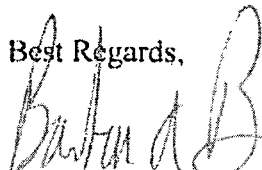


Attn: Mr. Bob Rinker
November 29, 2012
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2. Original flood irrigation of agricultural lands has been upgraded to more efficient sprinkler distribution of water.
3. The original gold rush era cast iron pelton wheel and generator system was upgraded to a more efficient bronze wheel and modern generator system in 1997.
4. Transport of canal water has been continuously improved as the Coles line the canal with 1/2 culverts in leaky/ suspect areas of the canal. This reduces loss of transported water through leakage.
5. An original gold rush era flume has been replaced with a permanent full culvert system also containing a high flow bypass to return excess winter flows to Stanshaw Creek.
6. All Ranch buildings have been upgraded and remodeled with duo pane windows, full insulation, fluorescent light fixtures, modern appliances, and current building technology to reduce the power demands of these buildings.
7. Past grant applications have been made to return unused power plant outflow to the anadromous sections of Stanshaw Creek, and the Coles are currently in grant consideration for on-ground water distribution system upgrades - pending acceptance by California Department of Fish and Game.

Thank you for your continued assistance in this matter. If you have any questions or concerns, please do not hesitate to contact Parissa Ebrahimzadeh (pebrahimzadeh@stoel.com) at (916) 319-4644 or me.

Best Regards,



Barbara A. Brenner

cc: Doug Cole

**State Water Resources Control Board
DIVISION OF WATER RIGHTS
INITIAL STATEMENT OF WATER DIVERSION AND USE**

NOTE: A Statement is not a Water Right
READ THE ATTACHED INFORMATION AND INSTRUCTION SHEET BEFORE COMPLETING THIS FORM

A. Claimant Information (required)			
Claimant Name(s): Douglas T. Cole, Heidi A. Cole, Norman D. Cole, Carolyn T. Cole			
Mailing Address 92520 Hwy 96	City Somes Bar,	State CA	Zip 95568
Phone Number 530-469-3322	Email Address (if available) gustranch@marblemountainranch.com		
Agent Name (if applicable) Douglas T. Cole			
Mailing Address 92520 Hwy 96	City Somes Bar,	State CA	Zip 95568
Phone Number 530-469-3322	Email Address (if available) gustranch@marblemountainranch.com		
Land Owner Name (if different from claimant)			
Mailing Address	City	State	Zip
B. Type of Claim			
Check the box(es) which describe the type of claim(s) under which you are diverting water.			
<input type="checkbox"/> Riparian	<input checked="" type="checkbox"/> Pre-1914	<input type="checkbox"/> Court Decree	<input type="checkbox"/> Pending Appropriative Application
If you checked yes for Court Decree or Pending Appropriative Application, list the decree number or application ID			
C. Water Course Description (required)			
Source Name at the point of diversion Stanshaw Creek	Tributary to Klamath River		
D. Legal Land Description (required)			
Provide the location of the Point of Diversion using one of the following methods (check one box and enter coordinates, if applicable).			
<input checked="" type="checkbox"/> Latitude/Longitude Measurements: Latitude: 41.472760/Longitude: -123.503764			
<input type="checkbox"/> California Coordinate System (NAD 1983): _____			
<input checked="" type="checkbox"/> USGS Topographic Map with point of diversion labeled on map (if checked yes, please attach map)			
County (required) Siskiyou	Assessor's Parcel Number(s), if assigned		
Provide Public Land Description to nearest 40 acres (if assigned)			
SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 33, Township 13N, Range 6E, B&M H			
E. Place of Use Description (required)			
Provide a general description of the area in which the water was used. See attached			
Provide an outline of the Place of Use using one or both of the following methods (check box indicating each map attached)			
<input checked="" type="checkbox"/> USGS Topographic map <input type="checkbox"/> County Assessor's parcel map			
F. Purpose of Use Description (required)			
Provide a listing of use types (see instructions for a listing of water uses)			
Power generation, domestic use, irrigation, stock watering, fire protection, in-stream flow fish passage			
Number of Acres (if applicable) Approx. 65 acres	Persons Served (if applicable) 30 Average. Peak approx. 500 at fire camps	Stock Watered (if applicable) 25 Head	

CONTINUE TO PAGE 2

SOURCE/TRIBUTARY Stanshaw Creek

DIVERSION WORKS NAME Stanshaw Memorial C

G. Diversion Works Description (required)

Name of Diversion Works, if named: Stanshaw Memorial Canal Year in which diversion commenced (or specify nearest known year): 1865

List any related existing water rights, if applicable (for example, an appropriative right using the same diversion works).

Type of Diversion Facility (select one): Gravity Creek Pump Well Pump Other (please specify): _____

Method of Measurement (check one box): Weir Electric Meter Flume Estimate Inline Flow Meter Other (please specify): _____

Capacity of Diversion Works (specify unit of measure): 3 cfs gpm gpd Capacity of Storage Tank or Reservoir (if applicable): 10 Gallons Acre-feet

H. Quantity of Water Diverted (Required - If amounts are available, list below - otherwise check months in which diversion occurred)

Provide the quantity of water diverted each month in the table below as measured in (check one box) Gallons Acre-feet

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
2012	178.5	178.5	178.5	178.5	178.5	178.5	178.5	119.01	119.01	178.5	178.5	178.5	2023.0

I. Recent Water Use

Provide the annual water use in recent years: See attached

Maximum: 2,142 Gallons Acre-feet
 Minimum: 1,963.53 Gallons Acre-feet

J. Maximum Rate of Diversion (if available)

If available, provide the maximum rate of diversion achieved in each month as measured in (check one box) cfs gpm gpd

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2012	3	3	3	3	3	3	3	2	2	3	3	3

K. Miscellaneous Water Use (answer only sections applicable to your diversion)

Water Conservation: Are you currently employing any methods of water conservation? YES NO

If yes, describe any water conservation efforts in current use. See attached

Water Quality and Wastewater Reclamation: Are you now or have you been using reclaimed water from a wastewater treatment facility, desalination facility or water polluted by waste to a degree that unreasonably affects such water for other beneficial uses? YES NO

Conjunctive use of surface water and groundwater: Are you using groundwater in lieu of surface water? YES NO

L. Certification of Statement (required)

I declare under penalty of perjury that the information in this statement of water diversion and use is true to the best of my knowledge and belief.

*DATE: 4/28/2012 at Siskiyou California
(County)

*SIGNATURE: Douglas J Cole

*PRINTED NAME: Douglas J. Cole
(first name) (middle initial) (last name)

COMPANY NAME: Marble Mountain Ranch

UPON COMPLETION OF THIS STATEMENT, ATTACH ALL SUPPORTING DOCUMENTATION AND MAPS AND MAIL TO:

State Water Resources Control Board
 Division of Water Rights
 PO Box 2000
 Sacramento, CA 95812-2000

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7.5 MINUTE SERIES (TOPOGRAPHIC)

NEW ORLEANS 15' QUADRANGLE

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1267 III
(UKONOM LAKE)
1.62 500

FEET 456

Mile 78 SJ

58

123°30'

41°30'

94

BM

827

790 000

FEET

KLAMATH

Sandy Bar

93

92

POD

41°28'56.9"N
Latitude

123°29'45.03"W
Longitude

Stansbur

Mile 78

BM

817

Mobile Master bar
POU

91

RIVER

000716



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Double click to re-center, click and drag to pull the map around, zoom in and out.

MARK POINTS:
Click on a place to add a marker.

NOTES:
Switch between Navigate and Mark Points at any time.

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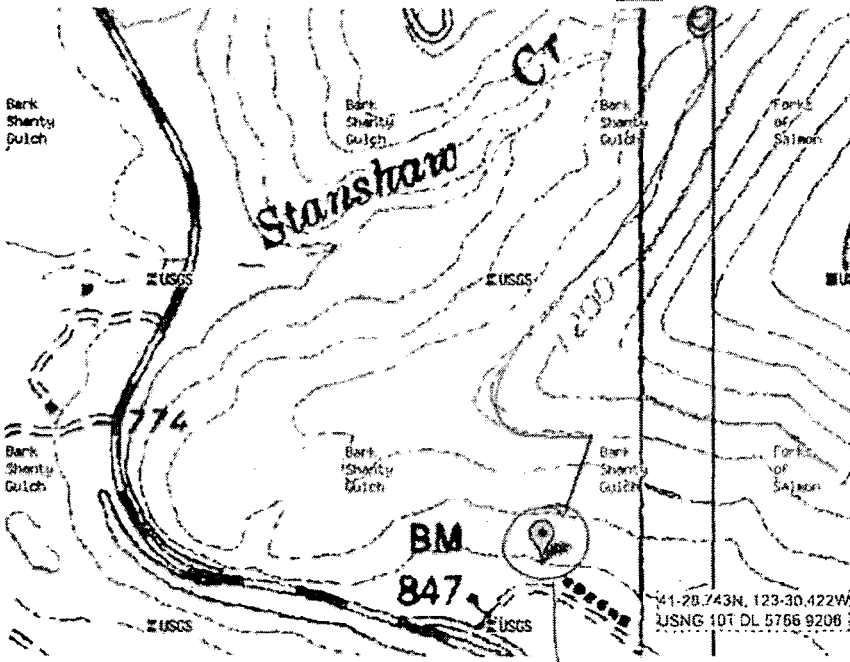
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Page Last Modified: May 17, 2012

MARBLE MOUNTAIN RANCH

POINT OF DIVERSION - 41° 28' 56.9" N
(POD) Latitude

123° 29' 45.03" W Longitude



WR-6
EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

NOV 02 2012

In Reply Refer to:
MJM:A029449

Marble Mountain Ranch
c/o Ms. Barbara Brenner
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814

Dear Ms. Brenner:

**APPLICATION 29449 OF DOUGLAS COLE, ET AL., STANSHAW CREEK TRIBUTARY TO
KLAMATH RIVER IN SISKIYOU COUNTY**

By letter dated March 30, 2012, State Water Resources Control Board (State Water Board), Division of Water Rights (Division) staff requested that Douglas Cole (Applicant) provide a plan within sixty days to supply information necessary to document compliance with Water Code section 1275, subdivision (b). This information is necessary in order to continue processing Application 29449.

By letter dated May 29, 2012, you requested additional time to gather information about the Applicant's claim of pre-1914 right. Division staff granted your request. In your letter, however, you indicated that it had become apparent that the Applicant holds a valid pre-1914 water right that would negate the need for Application 29449.

By letter dated October 1, 2012, you provided information regarding the Applicant's claim of pre-1914 right. In the letter, you state that the State Water Board has no authority to adjudicate a pre-1914 right and thus has no jurisdiction over the Applicant's pre-1914 claim of right.

Pre-1914 Claim and Statement Requirements

The Applicant filed Statement of Water Diversion and Use (Statement) No. 15022 with the Division on December 1, 1998. According to Division files, no Supplemental Statements have been filed pursuant to Water Code section 5104, subdivision (a). Consequently, Statement No. 15022 is inactive in the Division's records. In your October 1, 2012 letter, you indicate that the Applicant has made continuous use of water pursuant to their pre-1914 claim of right.

With limited exceptions, Water Code section 5101 requires that a Statement be filed for a diversion not covered by a permit or license. After an Initial Statement is filed, Water Code section 5104 requires Supplemental Statements to be filed at three-year intervals. Water Code section 5107, subdivision (c)(1) provides that the State Water Board may impose a civil liability of \$1,000, plus \$500 per day for each additional day on which the violation continues if the person fails to file a

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

Marble Mountain Ranch
c/o Ms. Barbara Brenner

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NOV 02 2012

Statement within 30 days after the State Water Board has called the violation to the attention of that person. These penalties are in addition to any penalties that may be imposed if the diverter does not hold a valid right or diverts in excess of what is authorized under that right. This letter serves as your notice of the Statement requirement and potential penalty. You should immediately file a new Statement, or contact Mr. Bob Rinker to see if Statement No. 15022 can be reactivated so you can file online Supplemental Statements. Mr. Rinker can be reached at (916)-322-3143 or by email at rrinker@waterboards.ca.gov.

Request for Information

In the Division's March 30, 2012 letter, the Division threatened cancellation of Application 29449, pursuant to Water Code section 1276, if the requested information was not received within the time period specified. To date, the Division has not received the requested information. If the Division does not receive the requested information within 30 days of the date of this letter, Application 29449 will be cancelled.

Matt McCarthy is the staff person presently assigned to this matter, and he may be contacted at (916) 341-5310 or mmccarthy@waterboards.ca.gov. Written correspondence or inquiries should be addressed as follows: State Water Resources Control Board; Division of Water Rights; Attn: Matt McCarthy; P.O. Box 2000; Sacramento, CA 95812-2000.

Sincerely,



Phillip Crader, Manager
Permitting and Licensing Section
Division of Water Rights

- cc: Marble Mountain Ranch
c/o Douglas Cole
92529 Highway 96
Somes Bar, CA 95568
- ec: State Water Resources Control Board
Matthew McCarthy
mmccarthy@waterboards.ca.gov
- John O'Hagan
johagan@waterboards.ca.gov
- Taro Murano
tmurano@waterboards.ca.gov
- Bob Rinker
rrinker@waterboards.ca.gov
- ec: Continues on next page.

Marble Mountain Ranch
c/o Ms. Barbara Brenner

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WR-6

NOV 02 2012

ec: Department of Fish and Game
Jane Vorpapel
jvorpapel@dfg.ca.gov

National Marine Fisheries Service
Margaret Tauzer
margaret.tauzer@noaa.gov

000720

COMPLAINT LOGIN & UPDATE FORM

Main Menu

Help

WR-6

COMPLAINT ID:

868

COMPLAINT FILE 262.0 (COUNTY #: 47 - STREAM #: 40 - FILE #: 01)

COUNTY:

SISKIYOU

FILENAME:

Stanshaw Creek

ADD STREAM

SOURCE:

Stanshaw Creek

RELATED APP'S

A029449

TRIBUTARY:

Klamath River

MORE RELATED APPS

COMPLAINANT(S):

Klamath Forest Alliance

MORE COMPLAINANTS

RESPONDENT(S):

Cole, Doug and Heidi

MORE RESPONDENTS

STATUS

INVESTIGATION INFORMATION

ENGINEER ASSIGNED:

MC

COMPLAINT RECEIVED:

06/18/2001

DIVISION LETTER:

ENV SPEC ASSIGNED:

ANSWER REQUESTED:

INACTIVE STATUS:

CURRENT STATUS:

ACTIVE

ANSWER RECEIVED:

FIELD INVESTIGATION:

COMPLAINT CLOSED:

REPORT DRAFTED:

REPORT COMPLETED:

TARGET DATE FOR NEXT ACTION:

CURRENT STEP

Current Step Help

CURRENT STEP COMMENTS

REMARKS:

REQUIRED ACTION:

KDM



*Check
Rud
47-40-01*

2009 OCT 19 AM 11:42
DIV OF WATER RIGHTS
SACRAMENTO

Memorandum

Date: October 15, 2009

To: Ms. Katherine Mrowka, Chief
Inland Streams Unit
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Kenneth C. Moore

From: **GARY B. STACEY**, Regional Manager
Northern Region
Department of Fish and Game
601 Locust Street
Redding, CA 96001

Subject: **Small Domestic Use Registration No. D030945, Certificate No. R480, Douglas Cole, Stanshaw Creek, Siskiyou County**

The Department of Fish and Game (Department) has received your September 3, 2009, letter which asks for a written confirmation within 45 days regarding requirements which the Department would need for the subject registration. As indicated in your letter, the Department has never issued a clearance letter with terms and conditions for this Small Domestic Use Registration (SDU). Pursuant to Section (§)1228.3 of the State Water Code, registration of a small domestic use appropriation requires consultation with the Department.

The Water Rights Division (Division) sent Mr. Cole a letter on November 30, 1999 and again on April 8, 2005, requesting he contact the Department to obtain a written clearance letter. The Division never received a letter from the Department regarding clearance for this SDU registration and consequently, Certificate R480 has not been renewed.

Based on this information, it appears that Mr. Cole has not complied with the requirements for maintaining a SDU registration. Board literature on small domestics state "In order to maintain a registration, the registrant must renew the registration every five years by completing and submitting a renewal form and renewal fee." As stated above the State Water Code requires consultation with the Department prior to issuance of a SDU.

The Department does have conditions which must be met to avoid impacts to beneficial uses due to this diversion.

Ms. Katherine Mrowka, Chief
October 15, 2009
Page Two

This diversion was the subject of a complaint investigation with an inspection held on October 17, 2001. This diversion is also the subject of a protest on Water Right Application 29449 by the Department on March 17, 2000. We understand the Division regards these as separate issues, however, the point of diversion and impacts to resources are the same.

As the Department stated in our November 20, 2001 letter to the Board, as well as in a letter to Mr. Cole, our primary concerns are for coho salmon (*Onchorhynchus kisutch*) which rear in the lower reach of Stanshaw Creek below Highway 96. Coho salmon are State- and federally-listed as "threatened." Coho salmon have undergone at least a 70% decline in abundance since the 1960s, and are currently at 6 to 15% of their abundance during the 1940s (Department, 2004). The presence of coho salmon in Stanshaw Creek was established by the Department during a field investigation. The North Coast Regional Water Quality Control Board's Draft Total Maximum Daily Load for the Klamath River identifies Stanshaw Creek as an important refugia for coho salmon.

The Department believes the Highway 96 culverts are currently a barrier to upstream migration of fish. The Department, therefore, has focused our concerns and mitigation measures on the 0.25 mile stream reach downstream of these culverts. This stream reach is characterized by deep pools, large woody debris, dense overhanging riparian cover shading the stream, and generally cool water temperatures thus providing good rearing and refuge habitat for juvenile coho salmon and steelhead trout (*O. mykiss*).

Coldwater habitats such as those provided by Stanshaw Creek are important refuge for juvenile coho salmon which may need to escape the warmer temperatures, and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical coldwater refuge habitats for coho salmon and steelhead trout in lower Stanshaw Creek need to be accessible to the fish, therefore, sufficient water needs to remain in the stream to maintain connectivity to the Klamath River year round. Mr. Cole's diversion takes water from Stanshaw Creek and discharges it into another watershed, Irvine Creek.

The Department believes the Division should revoke Mr. Cole's SDU. He has not complied with regulations to obtain the water right in a lawful manner.

If the Division still requests our conditions at this juncture, the following would be our preliminary recommendations:

1. The Department currently proposes year-round bypass flows of 2.5 cubic feet-per-second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to

Ms. Katherine Mrowka, Chief
October 15, 2009
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ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained. To accomplish this objective, the Department recommends the total stream flow be bypassed whenever it is less than the designated amount.

Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

2. Pursuant to Fish and Game Code (Code) §1600 *et seq.*, prior to any substantial diversion from a stream the applicant must notify the Department and obtain a lake or streambed alteration agreement (LSAA). Mr. Cole last applied for a LSAA in 1999. Due to the listing of coho salmon significant change in conditions has occurred and his LSAA should be updated.
3. The California Endangered Species Act (CESA) (Code Sections 2090 to 2097) is administered by the Department and prohibits the take of plant and animal species designated by the Fish and Game Commission as either threatened or endangered in the State of California. If the project could result in the "take" of a State listed threatened or endangered species, the Responsible Party has the responsibility to obtain from the Department, a California Endangered Species Act Incidental Take Permit (CESA 2081 Permit). The Department may formulate a management plan that will avoid or mitigate take. If appropriate, contact the Department CESA coordinator at (530) 225-2300.
4. All water diversion facilities shall be designed, constructed, and maintained so they do not prevent, or impede, or tend to prevent or impede the passing of fish upstream or downstream, as required by Fish and Game Code Section 5901. This includes, but is not limited to, maintaining or providing a supply of water at an appropriate depth, and velocity to permit volitional upstream and downstream migration of juvenile and adult salmonids.
5. Notwithstanding any right the Responsible Party has to divert and use water, the Responsible Party shall allow sufficient water to pass over, around, or through any dam the party owns or operates to keep in good condition any fish that may exist below the dam, as required by Fish and Game Code Section 5937.

The issuance of this letter by the Department does not constitute a valid water right or an LSAA.

Ms. Katherine Mrowka, Chief
October 15, 2009
Page Four

If you have questions or comments regarding this memorandum, please contact Staff Environmental Scientist Jane Vorpapel at (530) 225-2124.

cc: Ms. Jane Vorpapel
Northern Region
Department of Fish and Game
601 Locust Street
Redding, CA 96001

ec: Mss. Jane Vorpapel, Donna Cobb, and Jane Arnold
Mr. Jim Whelan, Warden Greg Horne
Department of Fish and Game, Northern Region
Jvorpapel@dfg.ca.gov, Dcobb@dfg.ca.gov, Jwhelan@dfg.ca.gov,
Ghorne@dfg.ca.gov, JArnold@dfg.ca.gov

Ms. Nancy Murray
Office of the General Counsel, Sacramento, CA
Nmurray@dfg.ca.gov

Messrs. Carl Wilcox and Paul Forsberg
Water Branch, Sacramento, CA
Cwilcox@dfg.ca.gov, Pforsber@dfg.ca.gov



Division of Water Rights

Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterboards.ca.gov/waterrights



WR-6

Arnold Schwarzenegger
Governor

Linda S. Adams
Secretary for
Environmental Protection

MEMORANDUM

TO: Gary Stacey, Regional Manager
Department of Fish and Game
Northern Region
601 Locust Street
Redding, CA 96001

ORIGINAL SIGNED BY:

FROM: Katherine Mrowka, Chief
Inland Streams Unit
DIVISION OF WATER RIGHTS

DATE: SEP 03 2009

SUBJECT: REQUEST FOR DEPARTMENT OF FISH AND GAME WRITTEN CONDITIONS FOR SMALL DOMESTIC USE REGISTRATION IN THE NAME OF DOUGLAS COLE, REGISTRATION NO. D030945R, CERTIFICATE NO. R480; DIVERSION FROM STANSHAW CREEK TRIBUTARY TO KLAMATH RIVER IN SISKIYOU COUNTY

On August 25, 2009 and August 27, 2009 the Division of Water Rights (Division) staff discussed or e-mailed the Department of Fish and Game (DFG) regarding Small Domestic Use (SDU) Certificate No. R480 regarding the lack of DFG written conditions for the SDU.

The Division of Water Rights (Division) received this Registration on September 9, 1999, and the Certificate was issued on November 30, 1999. Our records indicate that Division staff visited the site in May 1999. Mr. Squires, agent for Mr. Cole, indicated DFG had made a site visit and that Mr. Cole was entering into an Agreement with DFG. The Division never received either written conditions for the SDU, or a copy of the DFG Streambed Alteration Agreement. (DFG Code § 1600 et seq.)

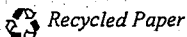
Mr. Cole returned his Registrant Report and Request for Renewal in August, 2004, along with his renewal fee. A subsequent conversation with Yoko Mooring of this office and Jane Vorpagal, dated January 18, 2005, is summarized in a contact report in our records. Subsequently, on April 8, 2005, the Division sent Mr. Cole a letter requesting that he contact DFG again to obtain a written clearance letter from DFG. Division staff stated that his renewal was pending the DFG clearance letter. This office never received a letter from DFG regarding clearance for this SDU, and consequently, Certificate R480 has not been renewed.

Emails from Ms. Vorpagal of August 25 and 27, 2009 state that DFG has not issued clearance for this SDU, and DFG may require a new Streambed Alteration Agreement. The emails also state that Mr. Cole may need to file an Incidental Take permit for Coho. Please confirm in writing whether or not DFG will require either or both the Streambed Alteration Agreement and Incidental Take permit for this Registration.

SURNAME

S. Wilson
9/2/09

California Environmental Protection Agency



Tom 9-2-09

000726

Gary Stacey, Regional Manager
Department of Fish and Game

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The ongoing protest regarding pending Application A029449, and the complaint regarding Mr. Cole's pre-1914 claim of right are separate issues and should be considered separately.

We will put a hold on the renewal process for this Registration for 45 days. If no response is received within 45 days of this letter, we will assume that DFG has determined that no special conditions for the Small Domestic Use Registration are required. We will proceed with the renewal process, if Mr. Cole submits his Report and Request for Renewal, along with the renewal fee.

Enclosures: Copy of Original Application
Copy of Certificate R480

cc: (with enclosures)

Jane Vorpagal
Department of Fish and Game
Northern Region
601 Locust Street
Redding, CA 96001


bcc: Katherine Mrowka, Steve Herrera, Chuck Rich (electronic copy of memo only)

sjw:08282009: DCC: 09/02/09

u:\perdrv\swilson\LSU SDU Registration\ID030945R DFG clearance memo 08282009



State Water Resources Control Board

262.0(47-40-01)
SURNAME/FILES
WR-6


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>

Winston H. Hickox
Secretary for
Environmental
Protection

Gray Davis
Governor

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

AUG 22 2002

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

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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.

Klamath Forest Alliance

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AUG 22 2002

cc: Mr. Doug and Mrs. Heidi Cole
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National Marine Fisheries Service
Santa Rosa Field Office
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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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June 24, 2002

STATE OF CALIFORNIA
WR-6
2002 JUN 26 11:00 AM '02

VIA FACSIMILE

Mr. Michael Contreras
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Water Rights Complaint Submitted by the Klamath Forest Alliance Alleging Unlawful Diversion of Water From Stanshaw Creek*

Dear Mr. Contreras:

The Klamath Forest Alliance ("KFA") disagrees with the Complaint Unit's conclusions and recommendations contained in your letter dated May 23, 2002, regarding Doug and Heidi Cole's unlawful diversion of water from Stanshaw Creek. The Complaint Unit's conclusions and recommendations are not supported by the evidence or by California water law.

I. THE SWRCB COMPLAINT UNIT'S CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE OR CALIFORNIA WATER LAW

A. Response to Conclusion Number 1

Conclusion Number 1 states that:

A court of competent jurisdiction would most likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch

The primary problem with Conclusion Number 1 is that it states that the Coles' have a pre-1914 appropriative water right "for full domestic and irrigation purposes." This statement fails to quantify the pre-1914 appropriative water right and is inconsistent with the SWRCB staff's previous conclusions regarding the Cole's pre-1914 appropriative water right. Moreover, this statement implies that the Coles may increase their pe-1914 appropriative water right so long as it is used for domestic and irrigation purposes. Such a conclusion is in direct conflict with California water law. Additionally, the conclusion contradicts the

Complaint Unit's May 23, 2002, Memorandum to File which states that "[t]his right has not been quantified. . . ." Thus, if the right has not been quantified and the SWRCB does not know the current or historical demand for domestic and irrigation, a conclusion that a court would find that the Coles have a valid right for "full domestic and irrigation purposes" simply cannot be supported by either the evidence or the law.

"The right of priority . . . attaches to the definite quantity of water that the appropriator has put to reasonable beneficial use in consummating his appropriation." (Hutchins, *The California Law of Water Rights*, at p. 132.) The specific quantity of water is one of its most distinctive features. (*Id.*) Therefore, assuming that the Coles' have a pre-1914 appropriative water right for Marble Mountain Ranch, the Coles are only entitled to the quantity of water that has been continuously diverted and put to a reasonable and beneficial use.

The SWRCB staff has concluded on two separate occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1998 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, Land and Water Use in Klamath River Hydrographic Unit, Table 4 at p. 55) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists. Although the Coles questioned the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles failed to provide any evidence to dispute the estimated demand and they provided no alternate estimate of a higher demand.

When the Coles' predecessors sought an application to appropriate water for domestic and irrigation, the SWRCB staff assessed the ranch's overall domestic requirement to be 0.02 cfs, or approximately 14-acre feet per year. (See Letter dated February 4, 1993, from Katherine Mrowka to Robert E. and Mary Judith Young.) The SWRCB staff further concluded that the water demand for irrigation is that which is required to irrigate 7 acres of alfalfa. (*Id.*) Based upon these assessments and utilizing standard conversion equations, the Coles' combined domestic and irrigation water uses can be met with 0.11 cfs.¹

Domestic:	0.02 cfs multiplied by the conversion factor of 1.98 multiplied by 365 days per year equals approximately 14.4 acre feet per day.
Irrigation:	The SWRCB staff has previously determined that 1 cfs for each 80 acres of irrigated area is considered reasonable for Siskiyou county. (See letter dated February 4, 1993, from Katherine Mrowka SWRCB staff, to Robert E. and Mary Judith Young, Coles' predecessors-in-interest.) Using the SWRCB staff's methodology, irrigating 7 acres would requires approximately 0.09 cfs.
Combined:	Combining the irrigation demand of 0.09 cfs with the domestic demand of 0.02 cfs results in an overall demand rate of 0.11 cfs.

Therefore, if a court of competent jurisdiction held that the Coles had a valid pre-1914 appropriative water right, it would most likely quantify that any such right does not exceed 0.11 cfs. The highest amount that the Coles could show that either they or their predecessors have put to a reasonable and beneficial use.

To the extent the Coles rely solely on the historic Stanshaw pre-1914 appropriative water rights, the Coles rights may be further diminished as the Coles' predecessors did not acquire all of the interests in land and water from Stanshaw. (See Exhibit C to letter dated August 20, 2001, from Janet Goldsmith to Harry M. Schueller.) The Coles only obtained a small portion of the original Stanshaw property. Moreover, the Coles have presented no evidence as to the quantity of Stanshaw's pre-1914 appropriative water right that was used on the property now owned by the Coles, or the quantity of water right that was transferred to the Coles.

Thus, neither the evidence nor California water law supports the Complaint's Unit's Conclusion Number 1. As the Complaint Unit failed to address the quantity of water that may be diverted under a claim to a pre-1914 appropriative water right for irrigation and domestic uses, the subsequent conclusion regarding the incidental use of water for power generation amounts to pure speculation.

B. Response to Conclusion Number 2

KFA agrees with Conclusion Number 2 which states in part that "[e]vidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes . . ."

C. Response to Conclusion Number 3

KFA disagrees with Conclusion Number 3, which states that:

With the current irrigation system, most diversions for power purposes during the low-flow periods of the year are incidental to domestic and irrigation needs.

The primary problem with Conclusion Number 3 stems from the Complaint Unit's Conclusion Number 1, which failed to quantify the pre-1914 appropriative water right. By providing an "open ended right", there is no way to determine or conclude that the diversions for power purposes are incidental to the Coles' domestic and irrigation needs.

Based upon the Coles' Application (A029449), the Coles claim a need for 3 cfs for power production. As the Coles' pre-1914 appropriative water right does

not exceed 0.11 cfs, such power generation cannot be characterized as incidental to the Coles' domestic and irrigation needs. If the Coles' diversion for power purposes were incidental to their diversion for consumptive uses, there would not be the significant "return flow" from the Coles' property into Irving creek that exceeds the amount of water flowing in Stanshaw Creek below the Coles' diversion.

The Coles have indicated that if they limit their diversion from Stanshaw Creek to the amount used only for domestic and irrigation, it is not enough water to operate their hydroelectric generator. This is supported by the fact that on the day of the October 16, 2001, field investigation, the Coles were diverting 50 percent of the stream flow and none of it was being applied towards power generation. Therefore, the evidence simply cannot support a finding that the Coles' purported need for 3 cfs for power generation is incidental to any pre-1914 right they may have for domestic and irrigation uses. In fact, the evidence, and the Coles' own admissions support the conclusion that in order for the Coles to generate power, they must divert water from Stanshaw Creek at a rate substantially higher than any rate they may claim under a pre-1914 appropriative water right for domestic and irrigation purposes.

D. Response to Conclusion Number 4

Klamath Forest Alliance agrees with the Conclusion Number 4. It should be noted, however, that more than just *prima facie* evidence supports the conclusion that lower Stanshaw Creek provides critical habitat. Uncontested expert opinions from the California Department of Fish and Game ("DFG"), the National Marine Fisheries Service ("NMFS"), Toz Soto, a fisheries biologist with the Karuk Tribe, and Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University, support Conclusion Number 4. Despite repeated opportunities, the Coles have submitted no evidence to the contrary.

E. Response to Conclusion Number 5

It is the responsibility of the public agencies to protect public trust resources. (See *National Audubon Society v. Superior Court* (1983) 33 Cal. 419, 426 ("before . . . agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests").) The letter and intent of public trust doctrine cannot, nor was it intended to be upheld only by public agencies demanding proof from the non-profit sector when a public trust resource is in jeopardy of being harmed. A private individual or entity seeking to appropriate a public trust resource must bear the burden of demonstrating compliance with the public trust doctrine.

The SWRCB's complaint unit provides no evidence to support a bypass flow recommendation of .7 cfs, or the assertion that, "Bypass flows on the order of 1/2 to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2-3 cfs." (See May 23, 2002, Memorandum to File from Charles A. Rich and Michael Contreras, at p. 10.) Flow connectivity and the presence of juvenile fish on a given day, do not, in and of themselves, prove that a habitat has not been degraded.

Federal, state, tribal and independent fisheries biologists have indicated that the Coles' current diversion decreases the availability and quality of habitat in Stanshaw Creek. The California Department of Fish and Game, (DFG), recommended a year-round bypass flow of 2.5 cfs to be measured at the culverts below Highway 96. DFG acknowledged that steelhead and coho exist in the portion of the creek below Hwy 96, and stated that factors considered in making their recommendation included a desire to maintain cold temperatures in the creek, and an "adequate channel" for fish to access the creek from the Klamath River. DFG also stated that it, "may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek."

DFG rightfully retained the right to change the bypass flow recommendation because the mouth of Stanshaw Creek naturally forms at least 3 channels before it enters the river. When combined with naturally low flows during dry months, the Coles' diversion would, in the absence of periodic manual channeling of the creek's mouth, prevent salmonids from traveling between Stanshaw Creek and the Klamath River. With unimpeded flows however, fish can access the creek from the Klamath River year-round without manual channeling.

The National Marine Fisheries Service, (NMFS), recommended a minimum bypass flow of 1.5 cfs downstream of the point of diversion, requested that tailwater from the Coles' hydroelectric plant be returned to Stanshaw Creek and reserved the right to modify their recommendation, "when CalTrans provides salmonid passage through the Highway 96 culvert." NMFS cited the preservation of "Thermal refugia" at the mouth of Stanshaw Creek as a primary concern. NMFS also noted that an 8-inch salmonid was stranded in the Coles' diversion flume during the field investigation and requested that measures be taken to prevent such strandings.

Toz Soto, a Fisheries Biologist for the Karuk Tribe's Department of Natural Resources has addressed several concerns associated with the Coles' diversion. In a November 30, 2001 statement about Stanshaw Creek, Mr. Soto wrote:

Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for out migrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids.

Mr. Soto went on to address a number of other problems with the diversion. These include, but are not limited to, 1) the possible dewatering of established spawning sites, 2) limited access to the creek for adult and juvenile fish, 3) the entrapment of resident fish in the Coles diversion ditch, 4) reduced flows and stream velocity which limit adult spawning and nest building opportunities in lower Stanshaw Creek, and 5) the release of sediment into Stanshaw Creek from the diversion ditch.

The SWRCB's complaint unit disregarded all of the aforementioned expert input and based its bypass flow recommendations on an arbitrary assessment of the flow sufficient for the movement of juvenile fish below the culverts.

According to Dr. Terry D. Roelofs, a renowned professor of fisheries biology at Humboldt State University, reducing summer flow in the portion of Stanshaw Creek between highway 96 and its confluence with the Klamath River, "decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species."

The Complaint Unit's conclusion and recommendation for a 0.7-cfs is based upon staff's field observation and completely ignores the evidence and recommendations provided by the agencies responsible for protecting the resources in lower Stanshaw Creek.

The SWRCB's actions allowing the unlawful diversion of water from Stanshaw that results in a take of a protected species constitutes a violation of

take prohibition of section 9 of the Endangered Species Act, 16 U.S.C. § 1538. (See *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997), cert. denied, 119 S.Ct.81, and cert. denied, 119 S.Ct. 437 (1998) (when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition); *Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999) (the failure of government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act).) The same rationale that caused the court in *Strahan* to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the Complaint Unit's decision to allow the Coles to continue an unlawful diversion that is likely to result in a take of a listed species.

F. Response to Conclusion Number 6

KFA disagrees with Conclusion Number 6 which states that "[m]easuring flows on a regular basis in Stanshaw Creek is not practical. All the protestants to the Coles' Application to Appropriate water, including NMFS and DFG, have demanded the instillation of a flow-measuring device as a dismissal term. Such devices are inexpensive, and locations such as the culverts under Highway 96 and the rock flumes above and below the Coles' point of diversion are conducive to their use.

G. Response to Conclusion Number 7

KFA agrees that all sides in this dispute would benefit if a physical solution were implemented, but not if the solution entails the frivolous use of hydropower to the detriment of rare and threatened species. KFA proposes that the Coles use water and power more efficiently, and that they adopt a method of power generation that does not adversely impact critical habitat. To this end, the SWRCB should direct the Coles to research the alternatives to the current operation.² If the Coles cannot devise a way to produce hydropower without adversely impact habitat, then the Coles must adopt an alternative to hydropower. The Coles' property is situated in an exposed, south facing location ideal for solar power. Some combination of solar, wind and/or efficient internal combustion generators are all viable alternatives.

² It should be noted that the Coles' could have halved their water consumption by merely utilizing all 400 feet, rather than 200 feet of the drop available between their 1,200 foot point of diversion and the 800 foot low-point on their property.

Whatever the ultimate source of the Coles' water, the Coles must take steps to utilize it more efficiently. Following recommendations from the SWRCB's Complaint Unit, water should be transported by pipe to prevent loss, and to the diversion to be halted when water is not in use. This also permits the use of sprinklers, which are far more efficient than flood irrigation.

One of the most effective ways for people living off the grid to conserve power is to utilize a battery bank to store power when excess is being produced. Peak energy needs can then be met by combining the use of stored power and produced power. This allows residences and businesses to maintain power production facilities that produce a fraction of the watts they need during peak usage. And a large portion of the time, a residence or business can operate exclusively off of a battery bank.

With the exception of the Marble Mountain Ranch, all residences and businesses known to KFA which operate off the grid, utilize most, if not all of the aforementioned power conservation methods. According to NMFS officials, grants are available for reallocation of power generation capacity. Tribal, SWRCB and DFG employees have offered to help the Coles locate and apply for grants to bring their operation into compliance with the law. It appears that many options are available to the Coles if they would pursue them. Considerable benefit would accrue to the public trust resources of Stanshaw Creek if the Coles' implemented an appropriate physical solution.

II. THE COMPLAINT UNIT'S RECOMMENDATIONS ARE NOT SUPPORTED BY EVIDENCE

A. Recommendation Number 1

The Complaint Unit's recommended actions allow the Coles to continue their unlawful diversion of water from Stanshaw Creek unless the Coles maintain a flow in lower Stanshaw Creek below Highway 96 of approximately 0.7 cfs. The 0.7 cfs bypass requirement, however, is not based upon any scientific evaluation of the needs of Stanshaw Creek and the public trust resources that rely upon flow from Stanshaw Creek, including coho salmon, a threatened species. (See 50 C.F.R. § 102(a)(4).) The 0.7 cfs bypass requirement is based solely upon the SWRCB staff's observations of the flows at the time of the field investigation. In contrast, DFG stated that a 2.5-cfs bypass flow must be required in order to maintain existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead. (See November 21, 2001, Memorandum from Donald B. Koch, Regional Manager, to Edward C. Anton, at p. 2.) Additionally, NMFS' investigation resulted in a recommendation that a 1.5 cfs bypass flow be maintained at all times.

Recommendation 1 is also not supported by the evidence as it references a post-1914 appropriative right derived from Application 29449. The Coles have derived no right to divert water from this application as the SWRCB has not approved the application. Prior to approving the application, the SWRCB must make a determination as to whether unappropriated water is available, and whether the diversion would impact public trust resources and/or other vested water rights.

B. Recommendation Number 2

Recommendation 2(a) provides for the Coles to visually estimate the bypass requirement. Not only is the recommended bypass not supported by evidence, but even if it were implemented, a visual estimation of the bypass provides no ability to ensure compliance with the requirement, or any other appropriate bypass requirement. The SWRCB's recommendation does not indicate how the 0.7 cfs would be monitored or enforced. This is a particular concern to KFA and others as the Coles have expressed their disagreement with any bypass requirements. NMFS recommended that the Coles should be required to install and maintain permanent staff gages at the point of diversion. The installation of such gages would also allow for further investigation as to whether the quantity of water diverted for power generation is in fact simply incidental to the Coles' domestic and irrigation needs.

With regards to recommendation 2(b), any diversion, full diversion of the of the Creek into the Coles ditch would have significant impacts to Stanshaw Creek from the point of diversion to Highway 96. Approval of any such diversion facilities must undergo environmental review under CEQA, and may require formal consultation with the U.S. Forest Service under section 7 of the ESA. (16 U.S.C. § 1536.)

C. Recommendation Number 3

Recommendation 3 states that KFA's complaint against the Coles should be closed. For the reasons stated throughout this response, KFA strongly disagrees with this recommendation. As the Complaint Unit's conclusions and recommendations fail to adequately address the issues raised by the SWRCB staff, NMFS, DFG, and KFA, the complaint should not be closed.

III. The SWRCB Has Failed to Rule on the Coles' Pending Application

The Coles' current Application (A029449) was accepted by the SWRCB on March 27, 1989. In 13 years, however, the SWRCB has failed to conduct a hearing on this application or conduct any environmental review pursuant to the California Environmental Quality Act, Public Resources Code, section 21000 *et seq.* Moreover, despite the current controversy regarding the Coles' diversion

and the impacts to a federally listed species, the SWRCB has provided no indication as to when it intends to conduct hearings on the application or release an environmental document for public review. In the meantime, the SWRCB is allowing the Coles to continue diverting water from a watershed that provides critical habitat to a threatened species.

Quite frankly, much of the current controversy surrounding the Coles' unlawful diversion from Stanshaw Creek can be attributed to the SWRCB's delay in processing the Coles' application and the Coles' lack of diligence in pursuing the application and completely any necessary environmental review. Had the SWRCB acted upon this application in a timely fashion, then the environmental impact report would have been prepared and circulated for public review. Instead, the SWRCB's decision to indefinitely allow the Coles' to continue the unlawful diversion amounts to *de facto* approval of the application without any necessary environmental review.

If the SWRCB does not have the financial resources to conduct the necessary environmental impact report for the Coles' application, then the SWRCB should direct the Coles to deposit an appropriate sum of money for the SWRCB to hire an outside consultant to prepare the EIR. If the Coles or the SWRCB decide not to conduct the environmental review, then the application should be immediately dismissed and the Coles directed to cease all unlawful diversions of water from Stanshaw Creek.

IV. CONCLUSION

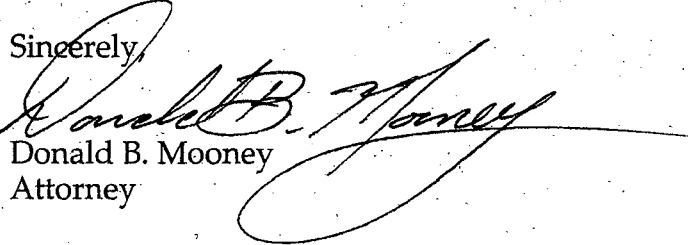
The Complaint Unit's May 23, 2002, Memorandum to File states in part that:

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion. (Memorandum to File at p. 8.)

Although in the present action, the Coles have a pending application to appropriate water for power generation, the pending application has not been diligently pursued by either the Coles or the SWRCB. The Coles' application has languished for over 13 years, no environmental review has been conducted, no hearings have been conducted, and no hearing date has been set. Additionally, as demonstrated in this response, as well as in KFA's November 30, 2001, letter, and in DFG and NMFS's respective comment letters, *prima facie* evidence exists to support a finding that the Coles' unlawful diversion adversely impacts public

trust resources, including coho salmon, a federally listed species. Moreover, the Complaint Unit's recommendation for a 0.7 cfs bypass is not supported by any evidence, and in fact directly contradicts the evidence and recommendations submitted by DFG and NMFS. Therefore, based upon the foregoing, the SWRCB should direct the Coles to cease and desist all unlawful diversions.

Sincerely,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Doug and Heidi Cole
Ron Prestly, Department of Fish and Game
Tim Broadman, National Marine Fisheries Services
Margaret Tauzer, National Marine Fisheries Services
William M. Heitler, United States Forest Service, Orleans Ranger District
Jim De Pree, Siskiyou County Planning Department
Konrad Fisher
T. James Fisher, Fisher Logging Co.
Toz Soto, Karuk Tribe, Department of Natural Resources
Mr. Edward C. Anton, Chief, SWRCB Division of Water Rights

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June 24, 2002

VIA FACSIMILE

Mr. Michael Contreras
 Division of Water Rights
 State Water Resources Control Board
 P.O. Box 2000
 Sacramento, CA 95812-2000

Re: Water Rights Complaint Submitted by the Klamath Forest Alliance Alleging Unlawful Diversion of Water From Stanshaw Creek

Dear Mr. Contreras:

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I. THE SWRCB COMPLAINT UNIT'S CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE OR CALIFORNIA WATER LAW

A. Response to Conclusion Number 1

Conclusion Number 1 states that:

A court of competent jurisdiction would most likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch

The primary problem with Conclusion Number 1 is that it states that the Coles' have a pre-1914 appropriative water right "for full domestic and irrigation purposes." This statement fails to quantify the pre-1914 appropriative water right and is inconsistent with the SWRCB staff's previous conclusions regarding the Cole's pre-1914 appropriative water right. Moreover, this statement implies that the Coles may increase their pre-1914 appropriative water right so long as it is used for domestic and irrigation purposes. Such a conclusion is in direct conflict with California water law. Additionally, the conclusion contradicts the

Complaint Unit's May 23, 2002, Memorandum to File which states that "[t]his right has not been quantified. . . ." Thus, if the right has not been quantified and the SWRCB does not know the current or historical demand for domestic and irrigation, a conclusion that a court would find that the Coles have a valid right for "full domestic and irrigation purposes" simply cannot be supported by either the evidence or the law.

"The right of priority . . . attaches to the definite quantity of water that the appropriator has put to reasonable beneficial use in consummating his appropriation." (Hutchins, *The California Law of Water Rights*, at p. 132.) The specific quantity of water is one of its most distinctive features. (*Id.*) Therefore, assuming that the Coles' have a pre-1914 appropriative water right for Marble Mountain Ranch, the Coles are only entitled to the quantity of water that has been continuously diverted and put to a reasonable and beneficial use.

The SWRCB staff has concluded on two separate occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1998 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, Land and Water Use in Klamath River Hydrographic Unit, Table 4 at p. 55) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists. Although the Coles questioned the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles failed to provide any evidence to dispute the estimated demand and they provided no alternate estimate of a higher demand.

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Domestic:	0.02 cfs multiplied by the conversion factor of 1.98 multiplied by 365 days per year equals approximately 14.4 acre feet per day.
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Combined:	Combining the irrigation demand of 0.09 cfs with the domestic demand of 0.02 cfs results in an overall demand rate of 0.11 cfs.

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Therefore, if a court of competent jurisdiction held that the Coles had a valid pre-1914 appropriative water right, it would most likely quantify that any such right does not exceed 0.11 cfs. The highest amount that the Coles could show that either they or their predecessors have put to a reasonable and beneficial use.

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Thus, neither the evidence nor California water law supports the Complaint's Unit's Conclusion Number 1. As the Complaint Unit failed to address the quantity of water that may be diverted under a claim to a pre-1914 appropriative water right for irrigation and domestic uses, the subsequent conclusion regarding the incidental use of water for power generation amounts to pure speculation.

B. Response to Conclusion Number 2

KFA agrees with Conclusion Number 2 which states in part that "[e]vidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes . . ."

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The primary problem with Conclusion Number 3 stems from the Complaint Unit's Conclusion Number 1, which failed to quantify the pre-1914 appropriative water right. By providing an "open ended right", there is no way to determine or conclude that the diversions for power purposes are incidental to the Coles' domestic and irrigation needs.

Based upon the Coles' Application (A029449), the Coles claim a need for 3 cfs for power production. As the Coles' pre-1914 appropriative water right does

not exceed 0.11 cfs, such power generation cannot be characterized as incidental to the Coles' domestic and irrigation needs. If the Coles' diversion for power purposes were incidental to their diversion for consumptive uses, there would not be the significant "return flow" from the Coles' property into Irving creek that exceeds the amount of water flowing in Stanshaw Creek below the Coles' diversion.

The Coles have indicated that if they limit their diversion from Stanshaw Creek to the amount used only for domestic and irrigation, it is not enough water to operate their hydroelectric generator. This is supported by the fact that on the day of the October 16, 2001, field investigation, the Coles were diverting 50 percent of the stream flow and none of it was being applied towards power generation. Therefore, the evidence simply cannot support a finding that the Coles' purported need for 3 cfs for power generation is incidental to any pre-1914 right they may have for domestic and irrigation uses. In fact, the evidence, and the Coles' own admissions support the conclusion that in order for the Coles to generate power, they must divert water from Stanshaw Creek at a rate substantially higher than any rate they may claim under a pre-1914 appropriative water right for domestic and irrigation purposes.

D. Response to Conclusion Number 4

Klamath Forest Alliance agrees with the Conclusion Number 4. It should be noted, however, that more than just *prima facie* evidence supports the conclusion that lower Stanshaw Creek provides critical habitat. Uncontested expert opinions from the California Department of Fish and Game ("DFG"), the National Marine Fisheries Service ("NMFS"), Toz Soto, a fisheries biologist with the Karuk Tribe, and Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University, support Conclusion Number 4. Despite repeated opportunities, the Coles have submitted no evidence to the contrary.

E. Response to Conclusion Number 5

It is the responsibility of the public agencies to protect public trust resources. (See *National Audubon Society v. Superior Court* (1983) 33 Cal. 419, 426 ("before . . . agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests").) The letter and intent of public trust doctrine cannot, nor was it intended to be upheld only by public agencies demanding proof from the non-profit sector when a public trust resource is in jeopardy of being harmed. A private individual or entity seeking to appropriate a public trust resource must bear the burden of demonstrating compliance with the public trust doctrine.

The SWRCB's complaint unit provides no evidence to support a bypass flow recommendation of .7 cfs, or the assertion that, "Bypass flows on the order of 1/2 to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2-3 cfs." (See May 23, 2002, Memorandum to File from Charles A. Rich and Michael Contreras, at p. 10.) Flow connectivity and the presence of juvenile fish on a given day, do not, in and of themselves, prove that a habitat has not been degraded.

Federal, state, tribal and independent fisheries biologists have indicated that the Coles' current diversion decreases the availability and quality of habitat in Stanshaw Creek. The California Department of Fish and Game, (DFG), recommended a year-round bypass flow of 2.5 cfs to be measured at the culverts below Highway 96. DFG acknowledged that steelhead and coho exist in the portion of the creek below Hwy 96, and stated that factors considered in making their recommendation included a desire to maintain cold temperatures in the creek, and an "adequate channel" for fish to access the creek from the Klamath River. DFG also stated that it, "may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek."

DFG rightfully retained the right to change the bypass flow recommendation because the mouth of Stanshaw Creek naturally forms at least 3 channels before it enters the river. When combined with naturally low flows during dry months, the Coles' diversion would, in the absence of periodic manual channeling of the creek's mouth, prevent salmonids from traveling between Stanshaw Creek and the Klamath River. With unimpeded flows however, fish can access the creek from the Klamath River year-round without manual channeling.

The National Marine Fisheries Service, (NMFS), recommended a minimum bypass flow of 1.5 cfs downstream of the point of diversion, requested that tailwater from the Coles' hydroelectric plant be returned to Stanshaw Creek and reserved the right to modify their recommendation, "when CalTrans provides salmonoid passage through the Highway 96 culvert." NMFS cited the preservation of "Thermal refugia" at the mouth of Stanshaw Creek as a primary concern. NMFS also noted that an 8-inch salmonid was stranded in the Coles' diversion flume during the field investigation and requested that measures be taken to prevent such strandings.

Toz Soto, a Fisheries Biologist for the Karuk Tribe's Department of Natural Resources has addressed several concerns associated with the Coles' diversion. In a November 30, 2001 statement about Stanshaw Creek, Mr. Soto wrote:

Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for out migrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids.

Mr. Soto went on to address a number of other problems with the diversion. These include, but are not limited to, 1) the possible dewatering of established spawning sites, 2) limited access to the creek for adult and juvenile fish, 3) the entrapment of resident fish in the Coles diversion ditch, 4) reduced flows and stream velocity which limit adult spawning and nest building opportunities in lower Stanshaw Creek, and 5) the release of sediment into Stanshaw Creek from the diversion ditch.

The SWRCB's complaint unit disregarded all of the aforementioned expert input and based its bypass flow recommendations on an arbitrary assessment of the flow sufficient for the movement of juvenile fish below the culverts.

According to Dr. Terry D. Roelofs, a renowned professor of fisheries biology at Humboldt State University, reducing summer flow in the portion of Stanshaw Creek between highway 96 and its confluence with the Klamath River, "decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species."

The Complaint Unit's conclusion and recommendation for a 0.7-cfs is based upon staff's field observation and completely ignores the evidence and recommendations provided by the agencies responsible for protecting the resources in lower Stanshaw Creek.

The SWRCB's actions allowing the unlawful diversion of water from Stanshaw that results in a take of a protected species constitutes a violation of

take prohibition of section 9 of the Endangered Species Act, 16 U.S.C. § 1538. (See *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); cert. denied, 119 S.Ct.81, and cert. denied, 119 S.Ct. 437 (1998) (when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition); (*Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999) (the failure of government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act).) The same rationale that caused the court in *Strahan* to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the Complaint Unit's decision to allow the Coles to continue an unlawful diversion that is likely to result in a take of a listed species.

F. Response to Conclusion Number 6

KFA disagrees with Conclusion Number 6 which states that "[m]easuring flows on a regular basis in Starshaw Creek is not practical. All the protestants to the Coles' Application to Appropriate water, including NMPS and DFG, have demanded the instillation of a flow-measuring device as a dismissal term. Such devices are inexpensive, and locations such as the culverts under Highway 96 and the rock flumes above and below the Coles' point of diversion are conducive to their use.

G. Response to Conclusion Number 7

KFA agrees that all sides in this dispute would benefit if a physical solution were implemented, but not if the solution entails the frivolous use of hydropower to the detriment of rare and threatened species. KFA proposes that the Coles use water and power more efficiently, and that they adopt a method of power generation that does not adversely impact critical habitat. To this end, the SWRCB should direct the Coles to research the alternatives to the current operation.² If the Coles cannot devise a way to produce hydropower without adversely impact habitat, then the Coles must adopt an alternative to hydropower. The Coles' property is situated in an exposed, south facing location ideal for solar power. Some combination of solar, wind and/or efficient internal combustion generators are all viable alternatives.

² It should be noted that the Coles' could have halved their water consumption by merely utilizing all 400 feet, rather than 200 feet of the drop available between their 1,200 foot point of diversion and the 800 foot low-point on their property.

Whatever the ultimate source of the Coles' water, the Coles must take steps to utilize it more efficiently. Following recommendations from the SWRCB's Complaint Unit, water should be transported by pipe to prevent loss, and to the diversion to be halted when water is not in use. This also permits the use of sprinklers, which are far more efficient than flood irrigation.

One of the most effective ways for people living off the grid to conserve power is to utilize a battery bank to store power when excess is being produced. Peak energy needs can then be met by combining the use of stored power and produced power. This allows residences and businesses to maintain power production facilities that produce a fraction of the watts they need during peak usage. And a large portion of the time, a residence or business can operate exclusively off of a battery bank.

With the exception of the Marble Mountain Ranch, all residences and businesses known to KFA which operate off the grid, utilize most, if not all of the aforementioned power conservation methods. According to NMFS officials, grants are available for reallocation of power generation capacity. Tribal, SWRCB and DFG employees have offered to help the Coles locate and apply for grants to bring their operation into compliance with the law. It appears that many options are available to the Coles if they would pursue them. Considerable benefit would accrue to the public trust resources of Stanshaw Creek if the Coles' implemented an appropriate physical solution.

II. THE COMPLAINT UNIT'S RECOMMENDATIONS ARE NOT SUPPORTED BY EVIDENCE

A. Recommendation Number 1

The Complaint Unit's recommended actions allow the Coles to continue their unlawful diversion of water from Stanshaw Creek unless the Coles maintain a flow in lower Stanshaw Creek below Highway 96 of approximately 0.7 cfs. The 0.7 cfs bypass requirement, however, is not based upon any scientific evaluation of the needs of Stanshaw Creek and the public trust resources that rely upon flow from Stanshaw Creek, including coho salmon, a threatened species. (See 50 C.F.R. § 102(a)(4).) The 0.7 cfs bypass requirement is based solely upon the SWRCB staff's observations of the flows at the time of the field investigation. In contrast, DFG stated that a 2.5-cfs bypass flow must be required in order to maintain existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead. (See November 21, 2001, Memorandum from Donald B. Koch, Regional Manager, to Edward C. Anton, at p. 2.) Additionally, NMFS' investigation resulted in a recommendation that a 1.5 cfs bypass flow be maintained at all times.

Recommendation 1 is also not supported by the evidence as it references a post-1914 appropriative right derived from Application 29449. The Coles have derived no right to divert water from this application as the SWRCB has not approved the application. Prior to approving the application, the SWRCB must make a determination as to whether unappropriated water is available, and whether the diversion would impact public trust resources and/or other vested water rights.

B. Recommendation Number 2

Recommendation 2(a) provides for the Coles to visually estimate the bypass requirement. Not only is the recommended bypass not supported by evidence, but even if it were implemented, a visual estimation of the bypass provides no ability to ensure compliance with the requirement, or any other appropriate bypass requirement. The SWRCB's recommendation does not indicate how the 0.7 cfs would be monitored or enforced. This is a particular concern to KFA and others as the Coles have expressed their disagreement with any bypass requirements. NMFS recommended that the Coles should be required to install and maintain permanent staff gages at the point of diversion. The installation of such gages would also allow for further investigation as to whether the quantity of water diverted for power generation is in fact simply incidental to the Coles' domestic and irrigation needs.

With regards to recommendation 2(b), any diversion, full diversion of the of the Creek into the Coles ditch would have significant impacts to Stanshaw Creek from the point of diversion to Highway 96. Approval of any such diversion facilities must undergo environmental review under CEQA, and may require formal consultation with the U.S. Forest Service under section 7 of the ESA. (16 U.S.C. § 1536.)

C. Recommendation Number 3

Recommendation 3 states that KFA's complaint against the Coles should be closed. For the reasons stated throughout this response, KFA strongly disagrees with this recommendation. As the Complaint Unit's conclusions and recommendations fail to adequately address the issues raised by the SWRCB staff, NMFS, DFG, and KFA, the complaint should not be closed.

III. The SWRCB Has Failed to Rule on the Coles' Pending Application

The Coles' current Application (A029449) was accepted by the SWRCB on March 27, 1989. In 13 years, however, the SWRCB has failed to conduct a hearing on this application or conduct any environmental review pursuant to the California Environmental Quality Act, Public Resources Code, section 21000 *et seq.* Moreover, despite the current controversy regarding the Coles' diversion

and the impacts to a federally listed species, the SWRCB has provided no indication as to when it intends to conduct hearings on the application or release an environmental document for public review. In the meantime, the SWRCB is allowing the Coles to continue diverting water from a watershed that provides critical habitat to a threatened species.

Quite frankly, much of the current controversy surrounding the Coles' unlawful diversion from Stanshaw Creek can be attributed to the SWRCB's delay in processing the Coles' application and the Coles' lack of diligence in pursuing the application and completely any necessary environmental review. Had the SWRCB acted upon this application in a timely fashion, then the environmental impact report would have been prepared and circulated for public review. Instead, the SWRCB's decision to indefinitely allow the Coles' to continue the unlawful diversion amounts to *de facto* approval of the application without any necessary environmental review.

If the SWRCB does not have the financial resources to conduct the necessary environmental impact report for the Coles' application, then the SWRCB should direct the Coles to deposit an appropriate sum of money for the SWRCB to hire an outside consultant to prepare the EIR. If the Coles or the SWRCB decide not to conduct the environmental review, then the application should be immediately dismissed and the Coles directed to cease all unlawful diversions of water from Stanshaw Creek.

IV. CONCLUSION

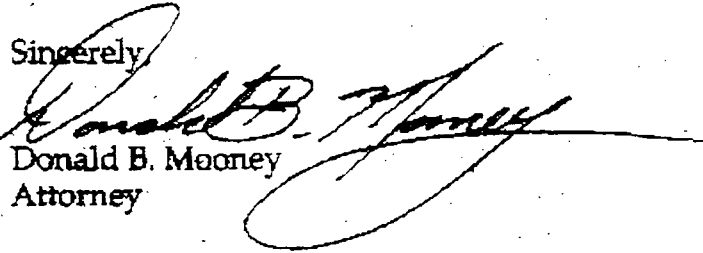
The Complaint Unit's May 23, 2002, Memorandum to File states in part that

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion. (Memorandum to File at p. 8.)

Although in the present action, the Coles have a pending application to appropriate water for power generation, the pending application has not been diligently pursued by either the Coles or the SWRCB. The Coles' application has languished for over 13 years, no environmental review has been conducted, no hearings have been conducted, and no hearing date has been set. Additionally, as demonstrated in this response, as well as in KFA's November 30, 2001, letter, and in DFG and NMFS's respective comment letters, *prima facie* evidence exists to support a finding that the Coles' unlawful diversion adversely impacts public

trust resources, including coho salmon, a federally listed species. Moreover, the Complaint Unit's recommendation for a 0.7 cfs bypass is not supported by any evidence, and in fact directly contradicts the evidence and recommendations submitted by DFG and NMFS. Therefore, based upon the foregoing, the SWRCB should direct the Coles to cease and desist all unlawful diversions.

Sincerely,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Doug and Heidi Cole
Ron Prestly, Department of Fish and Game
Tim Broadman, National Marine Fisheries Services
Margaret Tauzer, National Marine Fisheries Services
William M. Heitler, United States Forest Service, Orleans Ranger District
Jim De Pree, Siskiyou County Planning Department
Konrad Fisher
T. James Fisher, Fisher Logging Co.
Toz Soto, Karuk Tribe, Department of Natural Resources
Mr. Edward C. Anton, Chief, SWRCB Division of Water Rights

FACSIMILE COVER SHEET

To: Michael Contreras
Firm: State Water Resources Control Board
Fax Number: 916-341-5400
Office Number:
From: Don Mooney
Total number of pages: 12 (including cover letter)
Date Transmitted: June 24, 2002
Time Transmitted: 10:00 AM

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June 24, 2002

VIA FACSIMILE

Mr. Michael Contreras
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Water Rights Complaint Submitted by the Klamath Forest Alliance Alleging Unlawful Diversion of Water From Stanshaw Creek*

Dear Mr. Contreras:

The Klamath Forest Alliance ("KFA") disagrees with the Complaint Unit's conclusions and recommendations contained in your letter dated May 23, 2002, regarding Doug and Heidi Cole's unlawful diversion of water from Stanshaw Creek. The Complaint Unit's conclusions and recommendations are not supported by the evidence or by California water law.

I. THE SWRCB COMPLAINT UNIT'S CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE OR CALIFORNIA WATER LAW

A. Response to Conclusion Number 1

Conclusion Number 1 states that:

A court of competent jurisdiction would most likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch

The primary problem with Conclusion Number 1 is that it states that the Coles' have a pre-1914 appropriative water right "for full domestic and irrigation purposes." This statement fails to quantify the pre-1914 appropriative water right and is inconsistent with the SWRCB staff's previous conclusions regarding the Cole's pre-1914 appropriative water right. Moreover, this statement implies that the Coles may increase their pre-1914 appropriative water right so long as it is used for domestic and irrigation purposes. Such a conclusion is in direct conflict with California water law. Additionally, the conclusion contradicts the

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Combined:	Combining the irrigation demand of 0.09 cfs with the domestic demand of 0.02 cfs results in an overall demand rate of 0.11 cfs.

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Thus, neither the evidence nor California water law supports the Complaint's Unit's Conclusion Number 1. As the Complaint Unit failed to address the quantity of water that may be diverted under a claim to a pre-1914 appropriative water right for irrigation and domestic uses, the subsequent conclusion regarding the incidental use of water for power generation amounts to pure speculation.

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It is the responsibility of the public agencies to protect public trust resources. (See *National Audubon Society v. Superior Court* (1983) 33 Cal. 419, 426 ("before . . . agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests".)) The letter and intent of public trust doctrine cannot, nor was it intended to be upheld only by public agencies demanding proof from the non-profit sector when a public trust resource is in jeopardy of being harmed. A private individual or entity seeking to appropriate a public trust resource must bear the burden of demonstrating compliance with the public trust doctrine.

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Mr. Soto went on to address a number of other problems with the diversion. These include, but are not limited to, 1) the possible dewatering of established spawning sites, 2) limited access to the creek for adult and juvenile fish, 3) the entrapment of resident fish in the Coles diversion ditch, 4) reduced flows and stream velocity which limit adult spawning and nest building opportunities in lower Stanshaw Creek, and 5) the release of sediment into Stanshaw Creek from the diversion ditch.

The SWRCB's complaint unit disregarded all of the aforementioned expert input and based its bypass flow recommendations on an arbitrary assessment of the flow sufficient for the movement of juvenile fish below the culverts.

According to Dr. Terry D. Roelofs, a renowned professor of fisheries biology at Humboldt State University, reducing summer flow in the portion of Stanshaw Creek between highway 96 and its confluence with the Klamath River, "decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species."

The Complaint Unit's conclusion and recommendation for a 0.7-cfs is based upon staff's field observation and completely ignores the evidence and recommendations provided by the agencies responsible for protecting the resources in lower Stanshaw Creek.

The SWRCB's actions allowing the unlawful diversion of water from Stanshaw that results in a take of a protected species constitutes a violation of

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F. Response to Conclusion Number 6

KFA disagrees with Conclusion Number 6 which states that "[m]easuring flows on a regular basis in Stanshaw Creek is not practical. All the protestants to the Coles' Application to Appropriate water, including NMFS and DFG, have demanded the instillation of a flow-measuring device as a dismissal term. Such devices are inexpensive, and locations such as the culverts under Highway 96 and the rock flumes above and below the Coles' point of diversion are conducive to their use.

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² It should be noted that the Coles' could have halved their water consumption by merely utilizing all 400 feet, rather than 200 feet of the drop available between their 1,200 foot point of diversion and the 800 foot low-point on their property.

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Whatever the ultimate source of the Coles' water, the Coles must take steps to utilize it more efficiently. Following recommendations from the SWRCB's Complaint Unit, water should be transported by pipe to prevent loss, and to the diversion to be halted when water is not in use. This also permits the use of sprinklers, which are far more efficient than flood irrigation.

One of the most effective ways for people living off the grid to conserve power is to utilize a battery bank to store power when excess is being produced. Peak energy needs can then be met by combining the use of stored power and produced power. This allows residences and businesses to maintain power production facilities that produce a fraction of the watts they need during peak usage. And a large portion of the time, a residence or business can operate exclusively off of a battery bank.

With the exception of the Marble Mountain Ranch, all residences and businesses known to KFA which operate off the grid, utilize most, if not all of the aforementioned power conservation methods. According to NMFS officials, grants are available for reallocation of power generation capacity. Tribal, SWRCB and DFG employees have offered to help the Coles locate and apply for grants to bring their operation into compliance with the law. It appears that many options are available to the Coles if they would pursue them. Considerable benefit would accrue to the public trust resources of Stanshaw Creek if the Coles' implemented an appropriate physical solution.

II. THE COMPLAINT UNIT'S RECOMMENDATIONS ARE NOT SUPPORTED BY EVIDENCE

A. Recommendation Number 1

The Complaint Unit's recommended actions allow the Coles to continue their unlawful diversion of water from Stanshaw Creek unless the Coles maintain a flow in lower Stanshaw Creek below Highway 96 of approximately 0.7 cfs. The 0.7 cfs bypass requirement, however, is not based upon any scientific evaluation of the needs of Stanshaw Creek and the public trust resources that rely upon flow from Stanshaw Creek, including coho salmon, a threatened species. (See 50 C.F.R. § 102(a)(4).) The 0.7 cfs bypass requirement is based solely upon the SWRCB staff's observations of the flows at the time of the field investigation. In contrast, DFG stated that a 2.5-cfs bypass flow must be required in order to maintain existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead. (See November 21, 2001, Memorandum from Donald B. Koch, Regional Manager, to Edward C. Anton, at p. 2.) Additionally, NMFS' investigation resulted in a recommendation that a 1.5 cfs bypass flow be maintained at all times.

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Recommendation 1 is also not supported by the evidence as it references a post-1914 appropriative right derived from Application 29449. The Coles have derived no right to divert water from this application as the SWRCB has not approved the application. Prior to approving the application, the SWRCB must make a determination as to whether unappropriated water is available, and whether the diversion would impact public trust resources and/or other vested water rights.

B. Recommendation Number 2

Recommendation 2(a) provides for the Coles to visually estimate the bypass requirement. Not only is the recommended bypass not supported by evidence, but even if it were implemented, a visual estimation of the bypass provides no ability to ensure compliance with the requirement, or any other appropriate bypass requirement. The SWRCB's recommendation does not indicate how the 0.7 cfs would be monitored or enforced. This is a particular concern to KFA and others as the Coles have expressed their disagreement with any bypass requirements. NMFS recommended that the Coles should be required to install and maintain permanent staff gages at the point of diversion. The installation of such gages would also allow for further investigation as to whether the quantity of water diverted for power generation is in fact simply incidental to the Coles' domestic and irrigation needs.

With regards to recommendation 2(b), any diversion, full diversion of the of the Creek into the Coles ditch would have significant impacts to Stanshaw Creek from the point of diversion to Highway 96. Approval of any such diversion facilities must undergo environmental review under CEQA, and may require formal consultation with the U.S. Forest Service under section 7 of the ESA. (16 U.S.C. § 1536.)

C. Recommendation Number 3

Recommendation 3 states that KFA's complaint against the Coles should be closed. For the reasons stated throughout this response, KFA strongly disagrees with this recommendation. As the Complaint Unit's conclusions and recommendations fail to adequately address the issues raised by the SWRCB staff, NMFS, DFG, and KFA, the complaint should not be closed.

III. The SWRCB Has Failed to Rule on the Coles' Pending Application

The Coles' current Application (A029449) was accepted by the SWRCB on March 27, 1989. In 13 years, however, the SWRCB has failed to conduct a hearing on this application or conduct any environmental review pursuant to the California Environmental Quality Act, Public Resources Code, section 21000 *et seq.* Moreover, despite the current controversy regarding the Coles' diversion

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and the impacts to a federally listed species, the SWRCB has provided no indication as to when it intends to conduct hearings on the application or release an environmental document for public review. In the meantime, the SWRCB is allowing the Coles to continue diverting water from a watershed that provides critical habitat to a threatened species.

Quite frankly, much of the current controversy surrounding the Coles' unlawful diversion from Stanshaw Creek can be attributed to the SWRCB's delay in processing the Coles' application and the Coles' lack of diligence in pursuing the application and completely any necessary environmental review. Had the SWRCB acted upon this application in a timely fashion, then the environmental impact report would have been prepared and circulated for public review. Instead, the SWRCB's decision to indefinitely allow the Coles' to continue the unlawful diversion amounts to *de facto* approval of the application without any necessary environmental review.

If the SWRCB does not have the financial resources to conduct the necessary environmental impact report for the Coles' application, then the SWRCB should direct the Coles to deposit an appropriate sum of money for the SWRCB to hire an outside consultant to prepare the EIR. If the Coles or the SWRCB decide not to conduct the environmental review, then the application should be immediately dismissed and the Coles directed to cease all unlawful diversions of water from Stanshaw Creek.

IV. CONCLUSION

The Complaint Unit's May 23, 2002, Memorandum to File states in part that:

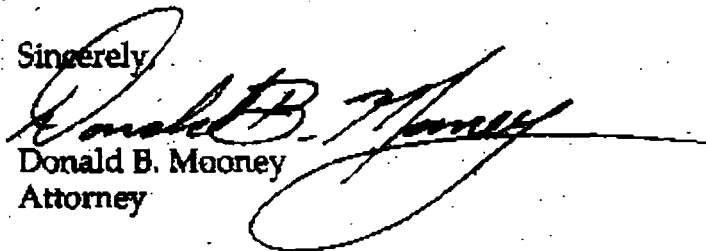
If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion. (Memorandum to File at p. 8.)

Although in the present action, the Coles have a pending application to appropriate water for power generation, the pending application has not been diligently pursued by either the Coles or the SWRCB. The Coles' application has languished for over 13 years, no environmental review has been conducted, no hearings have been conducted, and no hearing date has been set. Additionally, as demonstrated in this response, as well as in KFA's November 30, 2001, letter, and in DFG and NMFS's respective comment letters, *prima facie* evidence exists to support a finding that the Coles' unlawful diversion adversely impacts public

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trust resources, including coho salmon, a federally listed species. Moreover, the Complaint Unit's recommendation for a 0.7 cfs bypass is not supported by any evidence, and in fact directly contradicts the evidence and recommendations submitted by DFG and NMFS. Therefore, based upon the foregoing, the SWRCB should direct the Coles to cease and desist all unlawful diversions.

Sincerely,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Doug and Heidi Cole
Ron Prestly, Department of Fish and Game
Tim Broadman, National Marine Fisheries Services
Margaret Tauzer, National Marine Fisheries Services
William M. Heitler, United States Forest Service, Orleans Ranger District
Jim De Pree, Siskiyou County Planning Department
Konrad Fisher
T. James Fisher, Fisher Logging Co.
Toz Soto, Karuk Tribe, Department of Natural Resources
Mr. Edward C. Anton, Chief, SWRCB Division of Water Rights

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June 24, 2002

VIA FACSIMILE

Mr. Michael Contreras
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Water Rights Complaint Submitted by the Klamath Forest Alliance Alleging Unlawful Diversion of Water From Stanshaw Creek

Dear Mr. Contreras:

The Klamath Forest Alliance ("KFA") disagrees with the Complaint Unit's conclusions and recommendations contained in your letter dated May 23, 2002, regarding Doug and Heidi Cole's unlawful diversion of water from Stanshaw Creek. The Complaint Unit's conclusions and recommendations are not supported by the evidence or by California water law.

I. THE SWRCB COMPLAINT UNIT'S CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE OR CALIFORNIA WATER LAW

A. Response to Conclusion Number 1

Conclusion Number 1 states that:

A court of competent jurisdiction would most likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch

The primary problem with Conclusion Number 1 is that it states that the Coles' have a pre-1914 appropriative water right "for full domestic and irrigation purposes." This statement fails to quantify the pre-1914 appropriative water right and is inconsistent with the SWRCB staff's previous conclusions regarding the Cole's pre-1914 appropriative water right. Moreover, this statement implies that the Coles may increase their pe-1914 appropriative water right so long as it is used for domestic and irrigation purposes. Such a conclusion is in direct conflict with California water law. Additionally, the conclusion contradicts the

Complaint Unit's May 23, 2002, Memorandum to File which states that "[t]his right has not been quantified. . . ." Thus, if the right has not been quantified and the SWRCB does not know the current or historical demand for domestic and irrigation, a conclusion that a court would find that the Coles have a valid right for "full domestic and irrigation purposes" simply cannot be supported by either the evidence or the law.

"The right of priority . . . attaches to the definite quantity of water that the appropriator has put to reasonable beneficial use in consummating his appropriation." (Hutchins, *The California Law of Water Rights*, at p. 132.) The specific quantity of water is one of its most distinctive features. (*Id.*) Therefore, assuming that the Coles' have a pre-1914 appropriative water right for Marble Mountain Ranch, the Coles are only entitled to the quantity of water that has been continuously diverted and put to a reasonable and beneficial use.

The SWRCB staff has concluded on two separate occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1998 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, Land and Water Use in Klamath River Hydrographic Unit, Table 4 at p. 55) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists. Although the Coles questioned the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles failed to provide any evidence to dispute the estimated demand and they provided no alternate estimate of a higher demand.

When the Coles' predecessors sought an application to appropriate water for domestic and irrigation, the SWRCB staff assessed the ranch's overall domestic requirement to be 0.02 cfs, or approximately 14-acre feet per year. (See Letter dated February 4, 1993, from Katherine Mrowka to Robert E. and Mary Judith Young.) The SWRCB staff further concluded that the water demand for irrigation is that which is required to irrigate 7 acres of alfalfa. (*Id.*) Based upon these assessments and utilizing standard conversion equations, the Coles' combined domestic and irrigation water uses can be met with 0.11 cfs.¹

Domestic:	0.02 cfs multiplied by the conversion factor of 1.98 multiplied by 365 days per year equals approximately 14.4 acre feet per day.
Irrigation:	The SWRCB staff has previously determined that 1 cfs for each 80 acres of irrigated area is considered reasonable for Siskiyou county. (See letter dated February 4, 1993, from Katherine Mrowka SWRCB staff, to Robert E. and Mary Judith Young, Coles' predecessors-in-interest.) Using the SWRCB staff's methodology, irrigating 7 acres would require approximately 0.09 cfs.
Combined:	Combining the irrigation demand of 0.09 cfs with the domestic demand of 0.02 cfs results in an overall demand rate of 0.11 cfs.

Therefore, if a court of competent jurisdiction held that the Cole's had a valid pre-1914 appropriative water right, it would most likely quantify that any such right does not exceed 0.11 cfs. The highest amount that the Coles could show that either they or their predecessors have put to a reasonable and beneficial use.

To the extent the Coles rely solely on the historic Stanshaw pre-1914 appropriative water rights, the Coles rights may be further diminished as the Coles' predecessors did not acquire all of the interests in land and water from Stanshaw. (See Exhibit C to letter dated August 20, 2001, from Janet Goldsmith to Harry M. Schueller.) The Coles only obtained a small portion of the original Stanshaw property. Moreover, the Coles have presented no evidence as to the quantity of Stanshaw's pre-1914 appropriative water right that was used on the property now owned by the Coles, or the quantity of water right that was transferred to the Coles.

Thus, neither the evidence nor California water law supports the Complaint's Unit's Conclusion Number 1. As the Complaint Unit failed to address the quantity of water that may be diverted under a claim to a pre-1914 appropriative water right for irrigation and domestic uses, the subsequent conclusion regarding the incidental use of water for power generation amounts to pure speculation.

B. Response to Conclusion Number 2

KFA agrees with Conclusion Number 2 which states in part that "[e]vidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes . . ."

C. Response to Conclusion Number 3

KFA disagrees with Conclusion Number 3, which states that:

With the current irrigation system, most diversions for power purposes during the low-flow periods of the year are incidental to domestic and irrigation needs.

The primary problem with Conclusion Number 3 stems from the Complaint Unit's Conclusion Number 1, which failed to quantify the pre-1914 appropriative water right. By providing an "open ended right", there is no way to determine or conclude that the diversions for power purposes are incidental to the Coles' domestic and irrigation needs.

Based upon the Coles' Application (A029449), the Coles claim a need for 3 cfs for power production. As the Coles' pre-1914 appropriative water right does

not exceed 0.11 cfs, such power generation cannot be characterized as incidental to the Coles' domestic and irrigation needs. If the Coles' diversion for power purposes were incidental to their diversion for consumptive uses, there would not be the significant "return flow" from the Coles' property into Irving creek that exceeds the amount of water flowing in Stanshaw Creek below the Coles' diversion.

The Coles have indicated that if they limit their diversion from Stanshaw Creek to the amount used only for domestic and irrigation, it is not enough water to operate their hydroelectric generator. This is supported by the fact that on the day of the October 16, 2001, field investigation, the Coles were diverting 50 percent of the stream flow and none of it was being applied towards power generation. Therefore, the evidence simply cannot support a finding that the Coles' purported need for 3 cfs for power generation is incidental to any pre-1914 right they may have for domestic and irrigation uses. In fact, the evidence, and the Coles' own admissions support the conclusion that in order for the Coles to generate power, they must divert water from Stanshaw Creek at a rate substantially higher than any rate they may claim under a pre-1914 appropriative water right for domestic and irrigation purposes.

D. Response to Conclusion Number 4

Klamath Forest Alliance agrees with the Conclusion Number 4. It should be noted, however, that more than just *prima facie* evidence supports the conclusion that lower Stanshaw Creek provides critical habitat. Uncontested expert opinions from the California Department of Fish and Game ("DFG"), the National Marine Fisheries Service ("NMFS"), Toz Soto, a fisheries biologist with the Karuk Tribe, and Terry D. Roelófs, Professor, Department of Fisheries Biology, Humboldt State University, support Conclusion Number 4. Despite repeated opportunities, the Coles have submitted no evidence to the contrary.

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² It should be noted that the Coles' could have halved their water consumption by merely utilizing all 400 feet, rather than 200 feet of the drop available between their 1,200 foot point of diversion and the 800 foot low-point on their property.

Whatever the ultimate source of the Coles' water, the Coles must take steps to utilize it more efficiently. Following recommendations from the SWRCB's Complaint Unit, water should be transported by pipe to prevent loss, and to the diversion to be halted when water is not in use. This also permits the use of sprinklers, which are far more efficient than flood irrigation.

One of the most effective ways for people living off the grid to conserve power is to utilize a battery bank to store power when excess is being produced. Peak energy needs can then be met by combining the use of stored power and produced power. This allows residences and businesses to maintain power production facilities that produce a fraction of the watts they need during peak usage. And a large portion of the time, a residence or business can operate exclusively off of a battery bank.

With the exception of the Marble Mountain Ranch, all residences and businesses known to KFA which operate off the grid, utilize most, if not all of the aforementioned power conservation methods. According to NMFS officials, grants are available for reallocation of power generation capacity. Tribal, SWRCB and DFG employees have offered to help the Coles locate and apply for grants to bring their operation into compliance with the law. It appears that many options are available to the Coles if they would pursue them. Considerable benefit would accrue to the public trust resources of Stanshaw Creek if the Coles' implemented an appropriate physical solution.

II. THE COMPLAINT UNIT'S RECOMMENDATIONS ARE NOT SUPPORTED BY EVIDENCE

A. Recommendation Number 1

The Complaint Unit's recommended actions allow the Coles to continue their unlawful diversion of water from Stanshaw Creek unless the Coles maintain a flow in lower Stanshaw Creek below Highway 96 of approximately 0.7 cfs. The 0.7 cfs bypass requirement, however, is not based upon any scientific evaluation of the needs of Stanshaw Creek and the public trust resources that rely upon flow from Stanshaw Creek, including coho salmon, a threatened species. (See 50 C.F.R. § 102(a)(4).) The 0.7 cfs bypass requirement is based solely upon the SWRCB staff's observations of the flows at the time of the field investigation. In contrast, DFG stated that a 2.5-cfs bypass flow must be required in order to maintain existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead. (See November 21, 2001, Memorandum from Donald B. Koch, Regional Manager, to Edward C. Anton, at p. 2.) Additionally, NMFS' investigation resulted in a recommendation that a 1.5 cfs bypass flow be maintained at all times.

Recommendation 1 is also not supported by the evidence as it references a post-1914 appropriative right derived from Application 29449. The Coles have derived no right to divert water from this application as the SWRCB has not approved the application. Prior to approving the application, the SWRCB must make a determination as to whether unappropriated water is available, and whether the diversion would impact public trust resources and/or other vested water rights.

B. Recommendation Number 2

Recommendation 2(a) provides for the Coles to visually estimate the bypass requirement. Not only is the recommended bypass not supported by evidence, but even if it were implemented, a visual estimation of the bypass provides no ability to ensure compliance with the requirement, or any other appropriate bypass requirement. The SWRCB's recommendation does not indicate how the 0.7 cfs would be monitored or enforced. This is a particular concern to KFA and others as the Coles have expressed their disagreement with any bypass requirements. NMFS recommended that the Coles should be required to install and maintain permanent staff gages at the point of diversion. The installation of such gages would also allow for further investigation as to whether the quantity of water diverted for power generation is in fact simply incidental to the Coles' domestic and irrigation needs.

With regards to recommendation 2(b), any diversion, full diversion of the of the Creek into the Coles ditch would have significant impacts to Stanshaw Creek from the point of diversion to Highway 96. Approval of any such diversion facilities must undergo environmental review under CEQA, and may require formal consultation with the U.S. Forest Service under section 7 of the ESA. (16 U.S.C. § 1536.)

C. Recommendation Number 3

Recommendation 3 states that KFA's complaint against the Coles should be closed. For the reasons stated throughout this response, KFA strongly disagrees with this recommendation. As the Complaint Unit's conclusions and recommendations fail to adequately address the issues raised by the SWRCB staff, NMFS, DFG, and KFA, the complaint should not be closed.

III. The SWRCB Has Failed to Rule on the Coles' Pending Application

The Coles' current Application (A029449) was accepted by the SWRCB on March 27, 1989. In 13 years, however, the SWRCB has failed to conduct a hearing on this application or conduct any environmental review pursuant to the California Environmental Quality Act, Public Resources Code, section 21000 *et seq.* Moreover, despite the current controversy regarding the Coles' diversion

and the impacts to a federally listed species, the SWRCB has provided no indication as to when it intends to conduct hearings on the application or release an environmental document for public review. In the meantime, the SWRCB is allowing the Coles to continue diverting water from a watershed that provides critical habitat to a threatened species.

Quite frankly, much of the current controversy surrounding the Coles' unlawful diversion from Stanshaw Creek can be attributed to the SWRCB's delay in processing the Coles' application and the Coles' lack of diligence in pursuing the application and completely any necessary environmental review. Had the SWRCB acted upon this application in a timely fashion, then the environmental impact report would have been prepared and circulated for public review. Instead, the SWRCB's decision to indefinitely allow the Coles' to continue the unlawful diversion amounts to *de facto* approval of the application without any necessary environmental review.

If the SWRCB does not have the financial resources to conduct the necessary environmental impact report for the Coles' application, then the SWRCB should direct the Coles to deposit an appropriate sum of money for the SWRCB to hire an outside consultant to prepare the EIR. If the Coles or the SWRCB decide not to conduct the environmental review, then the application should be immediately dismissed and the Coles directed to cease all unlawful diversions of water from Stanshaw Creek.

IV. CONCLUSION

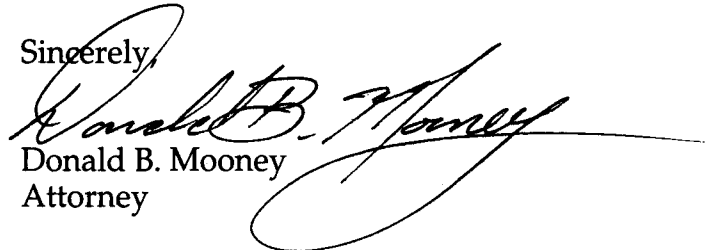
The Complaint Unit's May 23, 2002, Memorandum to File states in part that:

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion. (Memorandum to File at p. 8.)

Although in the present action, the Coles have a pending application to appropriate water for power generation, the pending application has not been diligently pursued by either the Coles or the SWRCB. The Coles' application has languished for over 13 years, no environmental review has been conducted, no hearings have been conducted, and no hearing date has been set. Additionally, as demonstrated in this response, as well as in KFA's November 30, 2001, letter, and in DFG and NMFS's respective comment letters, *prima facie* evidence exists to support a finding that the Coles' unlawful diversion adversely impacts public

trust resources, including coho salmon, a federally listed species. Moreover, the Complaint Unit's recommendation for a 0.7 cfs bypass is not supported by any evidence, and in fact directly contradicts the evidence and recommendations submitted by DFG and NMFS. Therefore, based upon the foregoing, the SWRCB should direct the Coles to cease and desist all unlawful diversions.

Sincerely,



Donald B. Mooney
Attorney

cc: Janet Goldsmith
Doug and Heidi Cole
Ron Prestly, Department of Fish and Game
Tim Broadman, National Marine Fisheries Services
Margaret Tauzer, National Marine Fisheries Services
William M. Heitler, United States Forest Service, Orleans Ranger District
Jim De Pree, Siskiyou County Planning Department
Konrad Fisher
T. James Fisher, Fisher Logging Co.
Toz Soto, Karuk Tribe, Department of Natural Resources
Mr. Edward C. Anton, Chief, SWRCB Division of Water Rights

MC



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Southwest Region
Northern Area Office
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404



FAX: (707) 578-3435

FAX TRANSMISSION

NUMBER OF PAGES _____ INCLUDING COVER

DATE 7-9-02

TO: SWRCB

FROM: NMFS

NAME: Michael Contreras

NAME: James Bybee

ORGANIZATION: _____

ORGANIZATION: _____

PHONE #: (916) 341-5400

PHONE #: (707) 575-6050

SUBJECT/MESSAGE:



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
 NATIONAL MARINE FISHERIES SERVICE

Southwest Region
 777 Sonoma Avenue, Room 325
 Santa Rosa, California 95404

In Response Refer To:

July 8, 2002 151416- SWR-02-SR-6338:SKL

Mr. Michael Contreras
 State Water Resources Control Board
 Division of Water Rights
 P.O. Box 2000
 Sacramento, California 95812-2000

Dear Mr. Contreras:

Thank you for extending the comment period for your letter in regards to your investigation into water rights complaint submitted by the Klamath Forest Alliance alleging unreasonable diversion.

The National Marine Fisheries Service is surprised that SWRCB Complaints Unit has not fully considered the comments by either NMFS or the California Department of Fish and Game (CDFG) in this case. We are forced to disagree with the SWRCB Complaint Unit's conclusions.

NMFS has not been presented any evidence that the Coles have pre-1914 water rights for domestic, irrigation, and hydroelectric generation. It is our understanding that only 0.11 cfs has been used historically, whereas 3 cfs is required for hydroelectric generation. If this is not the case, NMFS requests that documentation.

The SWRCB bypass flow of 0.7 cubic feet per second (cfs) is based solely on a single measurement of the stream at the time of the site visit last October. It therefore does not account for long term stream discharge pattern of Stanshaw Creek and is clearly inadequate. While Stanshaw Creek is not gaged, its flow magnitude, frequency, duration, and timing can be estimated by prorating by area a nearby gaged stream. Margaret Tauzer of NMFS Arcata has estimated the median, minimum, and average flows in cfs of Stanshaw Creek during August, September, and October (the driest months) based upon prorated estimates from the USGS gage records of Ti Creek. They are:

	August	September	October
Median	2.99	2.58	3.05
Minimum	2.58	2.04	1.02
Average	3.16	2.63	4.09



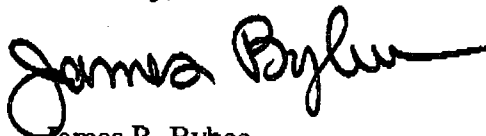
In addition to inadequate bypass flows, the SWRCB complaint unit's proposed conditions do not protect federally listed species. First, there is no provision to return the diverted flow back to Stanshaw Creek. Without these flows, the summer thermal refuge at the mouth of Stanshaw Creek will warm sooner and be warmer, degrading its value to juvenile coho salmon. These degraded conditions increase the likelihood of take of a federally listed species. The Colcs verbally offered to return flows to Stanshaw Creek during the field site visit, so NMFS does not understand why this provision is not included. NMFS' bypass recommendation was contingent upon returning diverted flow to Stanshaw Creek to maintain the thermal refuge at its mouth. Therefore, we reiterate our recommendation to return diverted flow back to Stanshaw Creek.

The SWRCB Complaints Unit proposed solution also does not mention adequate fish screening at the point of diversion (POD) to prevent entrainment of fish. Adequate fish screening was included as conditions to remove our protest.

Finally, NMFS does not see how visual estimation of flow in the creek can be implemented as a condition. This would make any monitoring or compliance meaningless.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning the contents of this letter please contact Dr. Stacy K. Li at (707) 575-6082.

Sincerely,



James R. Bybee
Habitat Manager
Northern California

cc: Doug and Heidi Cole
Margaret Tauzer, PRD, NMFS, Arcata
Tim Broadman, Law Enforcement, NMFS, Arcata
Ron Prestly, CDFG, Redding
William Heitler, USFS
Jim De Pree, Siskiyou County Planning Department
Konrad Fisher
Karuk Tribe of California



WR-6 MC

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

In Response Refer To:
July 8, 2002 151416- SWR-02-SR-6338:SKL

Mr. Michael Contreras
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

Dear Mr. Contreras:

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NMFS has not been presented any evidence that the Coles have pre-1914 water rights for domestic, irrigation, and hydroelectric generation. It is our understanding that only 0.11 cfs has been used historically, whereas 3 cfs is required for hydroelectric generation. If this is not the case, NMFS requests that documentation.

The SWRCB bypass flow of 0.7 cubic feet per second (cfs) is based solely on a single measurement of the stream at the time of the site visit last October. It therefore does not account for long term stream discharge pattern of Stanshaw Creek and is clearly inadequate. While Stanshaw Creek is not gaged, its flow magnitude, frequency, duration, and timing can be estimated by prorating by area a nearby gaged stream. Margaret Tauzer of NMFS Arcata has estimated the median, minimum, and average flows in cfs of Stanshaw Creek during August, September, and October (the driest months) based upon prorated estimates from the USGS gage records of Ti Creek. They are:

	August	September	October
Median	2.99	2.58	3.05
Minimum	2.58	2.04	1.02
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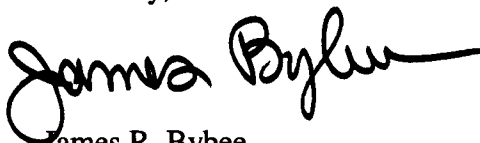
In addition to inadequate bypass flows, the SWRCB complaint unit's proposed conditions do not protect federally listed species. First, there is no provision to return the diverted flow back to Stanshaw Creek. Without these flows, the summer thermal refuge at the mouth of Stanshaw Creek will warm sooner and be warmer, degrading its value to juvenile coho salmon. These degraded conditions increase the likelihood of take of a federally listed species. The Coles verbally offered to return flows to Stanshaw Creek during the field site visit, so NMFS does not understand why this provision is not included. NMFS' bypass recommendation was contingent upon returning diverted flow to Stanshaw Creek to maintain the thermal refuge at its mouth. Therefore, we reiterate our recommendation to return diverted flow back to Stanshaw Creek.

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Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning the contents of this letter please contact Dr. Stacy K. Li at (707) 575-6082.

Sincerely,



James R. Bybee
Habitat Manager
Northern California

cc: Doug and Heidi Cole
Margaret Tauzer, PRD, NMFS, Arcata
Tim Broadman, Law Enforcement, NMFS, Arcata
Ron Prestly, CDFG, Redding
William Heitler, USFS
Jim De Pree, Siskiyou County Planning Department
Konrad Fisher
Karuk Tribe of California

From: Don Mooney <dbmooney@dcn.davis.ca.us>
To: Michael Contreras <mcontreras@waterrights.swrcb.ca.gov>
Date: 6/21/02 3:19PM
Subject: Stanshaw Creek

Michael,

This email serves to confirm our telephone conversation this morning wherein you agreed that since the 30 days in which to respond falls on the weekend, that the Klamath Forest Alliance has until Monday, June 24 to file its response and objections.

Don



State Water Resources Control Board

WR-6



Gray Davis
Governor

Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

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

MAY 23 2002

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

Mr. Doug and Mrs. Heidi Cole
c/o Ms. Jan Goldsmith
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Ladies and Gentlemen:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE – ALLEGING UNREASONABLE DIVERSION

Complaint Unit staff of the Division of Water Rights have completed their investigation of the complaint lodged by the Klamath Forest Alliance (KFA) against Doug and Heidi Cole (dba Marble Mountain Ranch). A copy of the Staff Report of Investigation regarding this matter is enclosed. Complaint Unit staff reached the following conclusions:

1. A court of competent jurisdiction would most likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should cover all diversions for power purposes.
3. With the current irrigation system, most diversions for power purposes during the low-flow periods of the year are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is not practical. Any requirement to measure minimum bypass flows should **not** be established unless the requirement acknowledges that a sufficient diversion of water will be allowed into the Coles' ditch to cover both the diversion and bypass requirement with subsequent measurement and release of a bypass back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

California Environmental Protection Agency

Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

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MAY 23 2002

Based on these conclusions, Complaint Unit staff believe the following actions are appropriate:

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their Point of Diversion to maintain a flow in lower Stanshaw Creek below the Highway 96 culverts similar to that present during the October 16, 2001, field investigation (≈ 0.7 cfs).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Coles' ditch is **not** allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small, hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or
 - b) if full diversion of the creek into the Coles' ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
4. That the parties give serious consideration to a physical solution similar to that discussed in the Staff Report of Investigation.

If either party to the complaint disagrees with the conclusions reached by Complaint Unit staff, please let me know of the points with which you disagree and the specific evidence you believe is available to substantiate or justify a different conclusion or action. If we do not hear from you within 30 days from the date of this letter, we will assume that you agree with the conclusions and recommendations contained therein. If the Coles are unable to produce evidence to justify a different recommendation, failure on their part to maintain the bypass flows as specified may result in appropriate enforcement action without further notice. Similarly, if the KFA is unable to provide evidence to justify a different course of action, this complaint would be subject to closure without further notice.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,



Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

3

MAY 23 2002

cc: Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman
Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klingle Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556



State Water Resources Control Board

WR-6



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.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

Memorandum to File

To: File Number 262.0 (47-40-01)

Date: MAY 23 2002

From: Charles A. Rich Charles A. Rich, Chief
Complaint Unit
Michael Contreras Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

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measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 – 200 feet above the terminal

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommend that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for **power** purposes in her letter of August 20, 2001, Complaint Unit staff are not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believe that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The 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 enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. 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.

Another weighed factor is the extent of injury caused by the water diversion. If an 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 enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phylis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. Pre-1914 appropriative claim of right for domestic / irrigation use. This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. Application A029449 – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. Small Domestic Registration D030945R – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "*innocent until proven guilty*" concept of the law.

- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: *"The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage."* While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of $\pm 50\%$.

problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of ½ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 – 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of ½ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

CONCLUSIONS

1. A court of competent jurisdiction would most likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should cover all diversions for power purposes.
3. With the current irrigation system, most diversions for power purposes during the low-flow periods of the year are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is not practical. Any requirement to measure minimum bypass flows should **not** be established unless the requirement acknowledges that a sufficient diversion of water will be allowed into the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their POD to maintain a flow in lower Stanshaw Creek below the Highway 96 culverts similar to that present during the October 17, 2001, field investigation (≈ 0.7 cfs).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Cole's ditch is **not** allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) if full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.



State Water Resources Control Board

SURNAME/FILES
WR-6



Gray Davis
Governor

Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
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Division of Water Rights: <http://www.waterrights.ca.gov>

Winston H. Hickox
Secretary for
Environmental
Protection

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

MAY 23 2002

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

Mr. Doug and Mrs. Heidi Cole
c/o Ms. Jan Goldsmith
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-3363

Ladies and Gentlemen:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE – ALLEGING UNREASONABLE DIVERSION

Complaint Unit staff of the Division of Water Rights have completed their investigation of the complaint lodged by the Klamath Forest Alliance (KFA) against Doug and Heidi Cole (dba Marble Mountain Ranch). A copy of the Staff Report of Investigation regarding this matter is enclosed. Complaint Unit staff reached the following conclusions:

1. A court of competent jurisdiction would most likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should cover all diversions for power purposes.
3. With the current irrigation system, most diversions for power purposes during the low-flow periods of the year are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is not practical. Any requirement to measure minimum bypass flows should not be established unless the requirement acknowledges that a sufficient diversion of water will be allowed into the Coles' ditch to cover both the diversion and bypass requirement with subsequent measurement and release of a bypass back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

California Environmental Protection Agency

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Handwritten notes: *McG...*, *1/2/02*, *CR 5/23/02*

Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

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MAY 23 2002

Based on these conclusions, Complaint Unit staff believe the following actions are appropriate:

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their Point of Diversion to maintain a flow in lower Stanshaw Creek below the Highway 96 culverts similar to that present during the October 16, 2001, field investigation (≈ 0.7 cfs).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Coles' ditch is **not** allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small, hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or
 - b) if full diversion of the creek into the Coles' ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
4. That the parties give serious consideration to a physical solution similar to that discussed in the Staff Report of Investigation.

If either party to the complaint disagrees with the conclusions reached by Complaint Unit staff, please let me know of the points with which you disagree and the specific evidence you believe is available to substantiate or justify a different conclusion or action. If we do not hear from you within 30 days from the date of this letter, we will assume that you agree with the conclusions and recommendations contained therein. If the Coles are unable to produce evidence to justify a different recommendation, failure on their part to maintain the bypass flows as specified may result in appropriate enforcement action without further notice. Similarly, if the KFA is unable to provide evidence to justify a different course of action, this complaint would be subject to closure without further notice.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,

ORIGINAL SIGNED BY

Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

Klamath Forest Alliance
Mr. Doug and Mrs. Heidi Cole

3

MAY 23 2002

cc: Mr. Doug and Mrs. Heidi Cole
92250 Highway 96
Somes Bar, CA 95568

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman
Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klinge Road NW
Washington, D.C. 20008

Karuk Tribe of California
Department of Natural Resources
Attention Mr. Toz Soto
P.O. Box 282
Orleans, CA 95556

bcc: RAS

MContreras\lfischer 5/22/02
U:\Comdrv\MContreras\Cole closure letter



State Water Resources Control Board

WR-6



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
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Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

Memorandum to File

To: File Number 262.0 (47-40-01)

Date:

From: Charles A. Rich
Charles A. Rich, Chief
Complaint Unit

Michael Contreras
Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 – 200 feet above the terminal

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommend that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for **power** purposes in her letter of August 20, 2001, Complaint Unit staff are not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believe that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The 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 enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. 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.

Another weighed factor is the extent of injury caused by the water diversion. If an 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 enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phylis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. Pre-1914 appropriative claim of right for domestic / irrigation use. This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. Application A029449 – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. Small Domestic Registration D030945R – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "*innocent until proven guilty*" concept of the law.

- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: "*The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage.*" While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of ±50%.

problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of ½ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 – 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of ½ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

CONCLUSIONS

1. A court of competent jurisdiction would most likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should cover all diversions for power purposes.
3. With the current irrigation system, most diversions for power purposes during the low-flow periods of the year are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is not practical. Any requirement to measure minimum bypass flows should **not** be established unless the requirement acknowledges that a sufficient diversion of water will be allowed into the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their POD to maintain a flow in lower Stanshaw Creek below the Highway 96 culverts similar to that present during the October 17, 2001, field investigation (≈ 0.7 cfs).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Cole's ditch is **not** allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

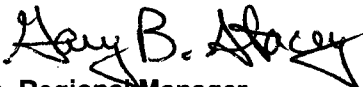
- b) if full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.

State of California

Memorandum

To: Mr. Edward C. Anton, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-2000

Date: November 20, 2001

From: 
for Donald B. Koch, Regional Manager
Northern California-North Coast Region
Department of Fish and Game
601 Locust Street, Redding, California 96001

Subject: Complaint Investigation Relating to Application 29449 Doug Cole – Stanshaw Creek, Tributary to Klamath River, Siskiyou County

The Department of Fish and Game has reviewed the subject application and attended two site visits with State Water Resources Control Board (Board) staff. The first field investigation was conducted by the Board's application and environmental section on July 26, 2000, and the latest complaint inspection was held on October 17, 2001. On March 17, 2000, we submitted a protest on the application which was accepted by the Board on April 4, 2000. Our protest is based on adverse environmental impacts which could result from reduced flows in Stanshaw Creek. Both the complaint and application refer to an existing unpermitted diversion of water from Stanshaw Creek.

At the time our protest of this application was filed in March 2000, our primary concern was protection of anadromous fish habitat in about a 0.25 mile reach of Stanshaw Creek from the Highway 96 crossing to the stream's confluence with the Klamath River. On April 27, 2001, the California Fish and Game Commission (Commission) accepted a petition to list coho salmon north of San Francisco Bay as an endangered species. Consequently, coho salmon are now considered as a candidate species pursuant to the California Endangered Species Act (CESA). On April 26, 2001, emergency regulations adopted by the Commission pursuant to Fish and Game Code Section 2084 went into effect. These regulations remain in effect during the 12-month candidacy period and authorize the incidental take of coho salmon resulting from diversion of water. The Commission will likely make its final listing decision in early June 2002 and if they decide to list the species, the current Section 2084 incidental-take authorization for water diversions will terminate. After listing, take of coho salmon will be prohibited unless authorized under Fish and Game Code Section 2081(b) or 2080.1. We urge the Board to consider the implications of their actions regarding subject complaint and final decision on water rights application #29449 in light of Fish and Game Code Section 2053 and the potential listing of coho salmon next year.

During the complaint inspection, we were told that the merits of the complaint would be reviewed within 30 days and, therefore, we are submitting these comments and recommendations for the Board's consideration. Formal protest dismissal terms will be submitted to the application unit at a future date.

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November 20, 2001
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Federally Listed coho salmon (*Onchorhynchus kisutch*) are known to exist in Stanshaw Creek. Coho salmon were listed as threatened under the Federal Endangered Species Act effective June 5, 1997, and as a candidate under the California Endangered Species Act on April 27, 2001. On two recent occasions, the Department has collected field information within Stanshaw Creek below the subject diversion in the area near its confluence with the Klamath River. On May 25, 2000, we collected 8 young of the year and 18 yearling steelhead trout in this area of Stanshaw Creek. On July 26, 2000, we sampled and found one juvenile coho salmon in Stanshaw Creek below the culverts which run under Highway 96. We believe the Highway 96 culverts are currently a barrier to upstream migration of fish and have, therefore, focused our concerns and mitigation measures on the 0.25 mile stream reach downstream of these culverts. This stream reach is characterized by deep pools, large woody debris, dense overhanging riparian cover shading the stream and generally cool water temperatures and thus provides good rearing and refuge habitat for juvenile coho salmon and steelhead trout. Coldwater habitats such as those provided by Stanshaw Creek are important refuges for juvenile coho salmon which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical cold water refuge habitats for coho salmon and steelhead in lower Stanshaw Creek need to be accessible to the fish so sufficient water needs to stay in the stream to maintain connectivity to the Klamath River all year.

The Department currently proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

It is our understanding from discussions with Board staff that water is currently diverted from Stanshaw Creek even when there is not enough flow to run the hydroelectric generators. We believe this procedure results in water being wasted and not being put to beneficial use. This procedure typically occurs during critically dry periods when natural flows are needed to maintain salmonid access from the Klamath River to cooler water, rearing and refuge habitat found in Stanshaw Creek. If the stream flow in Stanshaw Creek is less than the amount needed to run the hydroelectric plant (3 cfs), then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed to maintain the downstream fishery resources.

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November 20, 2001
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During both inspections, various options were discussed which could help satisfy the required downstream flow conditions. We believe two options have merit for the Board and the owner to consider. One option would be returning diverted flows back to Stanshaw Creek after the water is used to generate electricity. Currently, tailwater is discharged to the adjacent drainage of Irvine Creek. Second, improvements to the open ditch system and/or updating the hydroelectric generation system may also allow the applicant to divert less water while still meeting the needs for domestic purposes and electric generation.

If you have any questions or comments regarding this memorandum, please contact Environmental Scientist Jane Vorpapel at (530) 225-2124.

cc: Mr. James R. Bybee
National Marine Fishery Service
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

Mr. Doug Cole, et al.
92520 Highway 96
Somes Bar, California 95568

Ms. Jane Vorpapel
Department of Fish and Game
601 Locust Street
Redding, California 96001

CONTACT REPORT

WHO CONTACTED	METHOD	DATE
Jane Vorpapel, Dept. of Fish & Game	Phone / Site Visit (530) 225-2124	December 13, 2001
STAFF	Michael Contreras, ESIII (916) 341-5307 / mcontreras@waterrights.swrcb.ca.gov	
SUBJECT	Complaint Lodged Against Cole	
LOCATION	Happy Camp (Stanshaw Creek)	

NOTES

DFG's comments (best professional judgement) are based on Field review, during which they measured 2.6 cfs - and observed connectivity and adequate temperature in the pools.

They have *not* conducted an "IBIM" study (typically done in conjunction with power projects).

They are also not concerned with screening the diversion because coho are unlikely to get up there, nor are they concerned with native trout or any fish spawning between the culvert and the POD.

They have retained their position of "no" regarding the small domestic registration in order to maintain consistency with their opposition of the current application.

Phap sim



State Water Resources Control Board

WR-6



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
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Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

Memorandum to File

To: File Number 262.0 (47-40-01)

Date: **MAY 23 2002**

From: Charles A. Rich Charles A. Rich, Chief
Complaint Unit

Michael Contreras Michael Contreras
Environmental Specialist III
Complaint Unit

SUBJECT: WATER RIGHTS COMPLAINT LODGED BY THE KLAMATH FOREST ALLIANCE AGAINST DOUG AND HEIDI COLE REGARDING DIVERSION OF WATER FROM STANSHAW CREEK IN SISKIYOU COUNTY

BACKGROUND

The Division of Water Rights (Division) received a complaint on June 18, 2001 from the Klamath Forest Alliance against Doug and Heidi Cole. This complaint contains the following allegations:

1. The Cole's diversions are unauthorized as they exceed pre-1914 appropriative rights and the Cole's have no post-1914 appropriative rights for power diversions, as a permit has not been issued pursuant to pending Application A029449; and
2. The Cole's diversions adversely impact public trust resources in an unreasonable manner.

Ms. Janet Goldsmith, legal counsel for the Coles, responded to this complaint via a letter dated August 20, 2001. This response contains the following assertions:

1. The Cole's diversions have been continuous since before 1914 and are covered by a valid pre-1914 appropriative claim of right.
2. The complainant has not provided any factual evidence indicating that the Cole's diversions are adversely impacting fishery resources in either Stanshaw Creek or the Klamath River.

FIELD INVESTIGATION

On October 17, 2001, staff of the Complaint Unit conducted a field investigation for the subject complaint. Prior to meeting the parties, Complaint Unit staff undertook a flow

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measurement in Stanshaw Creek approximately 60 feet downstream of two culverts that pass underneath Highway 96. A flow of 0.61 cubic feet per second (cfs) was measured using a current velocity meter. Water temperature was measured at 8:30 a.m. to be 52°F. The twin, semicircular culverts that carry the creek under Highway 96 are approximately 320 feet long, 6 feet high, and 10 feet wide each. The slope of the floor of these culverts is about 9%. All of these measurements were made with the aid of a laser range finder and/or tape measure. No debris was observed in the culverts, indicating that they were designed to be and function quite well as self-cleaning conduits.

Complaint Unit staff then located the downstream end of the tailwater ditch coming from the Cole property a short distance above the point where unused water is discharged to Irving Creek. Flow was measured to be 0.1 cfs with a current velocity meter. Water temperature was measured to be 54°F.

Complaint Unit staff next met with the parties at the Marble Mountain Ranch dining room. Approximately 30 individuals participated representing the following entities:

- the Coles; including Mr. & Mrs. Cole and their legal counsel, Jan Goldsmith,
- the Klamath Forest Alliance (KFA); including Felice Pace for the KFA and their legal counsel, Don Mooney,
- representatives of the California Department of Fish & Game (DF&G),
- representatives of the National Marine Fisheries Service (NMFS); including Dr. Stacy Li,
- the Karuk Tribe; including Toz Soto, their fisheries biologist, several tribal elders and numerous tribe members,
- Konrad Fischer, son of James Fischer, who owns the property along the southern bank of Stanshaw Creek between Highway 96 and the Klamath River, and the caretaker for this property who lives there on a continuous basis, and
- Charles Rich and Michael Contreras from the Division's Complaint Unit

Complaint Unit staff started the meeting by explaining the typical complaint process:

- 1) complaint is filed,
- 2) answer is requested,
- 3) answer to complaint is provided at the option of the respondent,
- 4) Complaint Unit staff conduct field investigation if necessary, and
- 5) a Report of Investigation is prepared and transmitted to the parties along with recommendations for action regarding the complaint.

Complaint Unit staff also explained the adjudicatory authority of the State Water Resources Control Board (SWRCB) with respect to pre-1914 appropriative rights. The pre-1914 appropriative claims of right of the Coles were discussed.

After this discussion, several parties stated that they believe the Cole's diversions are adversely impacting anadromous fish that frequent Stanshaw Creek. Complaint Unit staff pursued this topic and asked what evidence is available to support these allegations. The parties present were unable to identify much evidence. They indicated that no formal studies regarding public trust resources in Stanshaw Creek have been undertaken. Visual observations of juvenile fish in the creek have been made. Several biologists indicated that they believe lower Stanshaw Creek provides a thermal refuge or "refugia" for juvenile fish when temperatures in the Klamath River reach lethal levels. They stated that sufficient flow to maintain a continuous connection with the river are very important.

Some of the parties also argued that Stanshaw Creek may provide spawning habitat for adult salmon or steelhead trout. However, they were unable to provide any substantial evidence in support of these allegations.

Complaint Unit staff asked if the Cole's tailwater that is discharged into Irving Creek provides more benefit to fish life in Irving Creek than it would to fish life if left in Stanshaw Creek. All of the biologists present indicated that Irving Creek has sufficient water to provide adequate habitat. Adding water diverted from Stanshaw Creek would not increase this habitat significantly. They felt, however, that leaving the water in Stanshaw Creek would be more beneficial if additional areas of thermal refuge were generated as a result.

After the discussion in the dining room ended, the parties proceeded to the Cole's powerplant and then on to the point of diversion (POD) on Stanshaw Creek. The flow was too low to generate power but water was being bypassed around the plant for irrigation. Complaint Unit staff visually estimated this flow to be approximately 0.6 cfs. The flow in Stanshaw Creek immediately upstream of the POD was measured with a current velocity meter to be 1.16 cfs. The creek in this reach consists of large boulders that form a fairly continuous group of cascading pools. There was no section where a highly accurate flow measurement could be made due to the steep grade and large numbers of rocks, many of which can be washed downstream during high flow events. The flow in the diversion canal just below the POD was measured to be 0.68 cfs using a current velocity meter.

The inspection party then proceeded to the lower reach of Stanshaw Creek along the property owned by Mr. Fischer. The creek would normally end in a small pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. The Fisher's caretaker indicated that he maintains a hand-dug channel between this pond and the river along the downstream periphery of the sand bar during the summer, low-flow period, to enable juvenile fish to enter the lower reach of the creek. Flow in the creek about 100 – 200 feet above the terminal

pool was estimated¹ to be no more than 0.41 cfs. Water temperature was measured during the mid-afternoon period to be 56°F. At low flows², the entire reach of Stanshaw Creek between the highway and the confluence with the Klamath River is essentially a series of cascading pools. The stream in this reach is covered by a dense riparian canopy. Complaint Unit staff asked Dr. Li if juvenile fish would have a difficult time accessing these pools with the existing flows as there were no runs or riffles present, only cascades between each pool. Dr. Li stated that juvenile fish would have no problem accessing the pools with the flows occurring during the inspection. The inspection ended at this time.

ANALYSIS

The following issues need to be addressed in order to resolve the current complaint:

1. Unauthorized diversion
2. Adverse impacts to prior right holders
3. Unreasonable impacts to public trust resources

Unauthorized Diversion of Water

The KFA contends that the Coles do not have sufficient pre-1914 appropriative rights to justify current diversions. The Cole's legal counsel has responded by claiming pre-1914 appropriative rights for all diversions. Past correspondence prepared by various individuals within the Division has contained questions about the validity of these claims. However, the SWRCB does not have adjudicatory authority regarding pre-1914 appropriative rights. When allegations are made that a pre-1914 appropriative right does not exist or is inadequate to justify all existing diversions, Complaint Unit staff analyze the situation to see if they believe sufficient evidence is available to dispute the claimed rights such that a court of competent jurisdiction would likely agree. If such evidence exists, Complaint Unit staff typically recommend that the diverter be asked to take action to rectify the unauthorized diversion. If the diverter fails to take adequate action, appropriate enforcement action may follow.

At the meeting previous to the physical investigation, Complaint Unit staff explained that recently provided evidence by the Cole's legal counsel in response to the complaint appeared to support a claim that diversion from Stanshaw Creek to the Marble

¹ - The stream did not contain a smooth flowing section in this reach in which to take a standardized flow measurement. Consequently, the flow was estimated with a current velocity meter by measuring the general dimensions of a "v"-shaped spill plume from a pool and the central velocity of the plume.

² - Based on visual observation of the hydraulic characteristics of the lower stream channel in relation to the flow measured during the field investigation, Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become large in comparison to the Cole's ability to divert water (e.g., >15 cfs flow vs 3 cfs diversion).

Mountain Ranch was initiated well before 1914 for domestic and irrigation purposes, and has been maintained in a continuous or diligent fashion ever since. Complaint Unit staff believe that the current diversion and use of water for domestic and irrigation purposes is no greater than and, quite possibly, somewhat smaller than maximum historic diversions as a portion of the area that was apparently irrigated for many years both before and after 1914 has been converted to resort housing or other facilities, and is no longer being irrigated.

Even though legal counsel for the Coles claimed a pre-1914 appropriative right for power purposes in her letter of August 20, 2001, Complaint Unit staff are not aware of any specific evidence supporting such a claim. Based on previous discussions with Mrs. Cole's father, Mr. Squires, Complaint Unit staff currently believe that the initial application of water for power purposes occurred shortly after the end of World War II, even though the original pelton wheel employed dates from the early 1900's. However, Application A029449 is pending and, if approved, would cover all existing and anticipated diversions for power purposes.

While diversions pursuant to a pending application are technically not authorized until a permit is actually issued, diversions prior to a determination regarding issuance of a permit is very common, especially for long-standing diversions such as the Cole's. The 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 enforce against a person who files an application promptly upon notification of the complaint, and diligently pursues the application, including cooperation in providing information requested by the SWRCB and compliance with other requirements of the application process. 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.

Another weighed factor is the extent of injury caused by the water diversion. If an 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 enforcement would impose on persons who rely on the diversion of water in deciding whether to take enforcement action in response to a complaint. The application of these factors, as they apply to this complaint, are discussed below.

Adverse Impacts to Prior Right Holders

While the KFA complaint does not contain allegations that the Cole's diversions are adversely impacting downstream diverters, a protest was filed against A029449 by T. James Fisher, J.W. Fisher Logging Company, and Phylis Fisher alleging potential injury to prior rights. In view of the KFA complaint and the inspection by Complaint Unit staff, the potential for adverse impacts to downstream diverters along Stanshaw Creek is also being evaluated as part of this investigation.

According to the caretaker for the Fisher property, water is diverted from Stanshaw Creek a short distance downstream of the Highway 96 culverts for domestic and some minor irrigation use. Diversions at this location apparently began after 1914. The Division has no record of a post-1914 appropriative right covering this diversion. Consequently, these diversions are presumably made under a riparian claim of right³. Complaint Unit staff are not aware of any evidence that would suggest that such a claim of right would not be upheld by a court of competent jurisdiction.

Complaint Unit staff understand that the Cole's basis of right for diversion from Stanshaw Creek consists of:

1. Pre-1914 appropriative claim of right for domestic / irrigation use. This right has not been quantified or a definitive priority established by court action. The maximum diversion rate that might be justified is the capacity of the ditch. The date of priority for this right may be as early as 1880.
2. Application A029449 – This pending application is for 3.0 cfs year round diversion for power purposes. A permit has not been issued for this application. Consequently, diversion of water under this right has not been approved. The date of priority for this right, if the application is approved, would be March 27, 1989.
3. Small Domestic Registration D030945R – This certificate authorizes year round diversion to off-stream storage of up to 10 acre-feet per annum in the small reservoir located near the bottom end of the Cole ditch. The date of priority for this right is September 17, 1999.

The Fisher riparian claim of right has a higher priority than that of A029449 and D030945R. The relative priorities of the Fisher riparian claim and the Cole's pre-1914 appropriative claim of right is more difficult to evaluate. Only a court of competent jurisdiction has the power to adjudicate these rights. Riparian rights typically have the highest priority in California. However, a riparian right attaching to a particular parcel of

³ - The Division has no record of a Statement of Water Diversion and Use (Statement) being filed for this diversion and use of water. Unless this diversion and use is included in the reports of some other entity, a Statement should be filed.

land is generally subject to appropriative rights established by diversion upon the vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream. Because diversion of water to the Cole's property may have been initiated before steps were taken to obtain the Fisher property from the government, the Cole's pre-1914 appropriative claim of right may have a higher priority than the Fisher riparian claim of right.

Flows in Stanshaw Creek will most likely be sufficient to satisfy the demands of both the Cole and the Fisher interests except during the low flow periods of the irrigation season. During this period of time, the diversion of water pursuant A029449 and D030945R is often incidental to the Cole's pre-1914 claim of right. Consequently, unless all or a portion of the Cole's diversion of water is being made exclusively for: (1) power purposes or (2) to fill the small reservoir on the Cole property, any disputes over competing rights would need to be resolved in the court system by determining the relative priorities of the riparian and pre-1914 appropriative claims of right.

Unreasonable Impacts to Public Trust Resources

Complaints containing allegations of unreasonable adverse impacts to public trust resources by diverters are often evaluated differently depending upon the basis of right. If the diverter appears to possess a valid basis of right for the diversion, evidence must be available to support allegations that the water diverted has caused, or is likely to cause, an unreasonable adverse impact to the public trust, i.e. the public's right to use the State's waters for instream purposes such as recreation, navigation, and fish and wildlife⁴. In order to make this finding, evidence should be available to demonstrate that:

- a. public trust resources exist in the stream;
- b. these resources are being adversely impacted due to the diversions from the stream by the water right holder and not by normal variances in the water supply or other factors that are beyond the control of the water right holder, such as land use development, discharge of pollutants, etc. by other parties;
- c. the impacts on public trust resources are significant, considering both the magnitude of the impact and the sensitivity and significance of the public trust resources affected; and

⁴ - In other words, evidence must be available to demonstrate the likelihood that unreasonable impacts are occurring rather than requiring the diverter to demonstrate that adverse impacts are not likely to occur. This is synonymous with the "*innocent until proven guilty*" concept of the law.

- d. the protection of public trust resources is feasible, considering any reduction or cessation of diversions that may be necessary to protect the public trust and whether the public interest in those diversions may outweigh the adverse impacts on the public trust.

If the diversion is being made pursuant to a pending application for which a permit is being diligently pursued and "prima facie" evidence is available suggesting that the diversion may be causing adverse impacts to public trust resources, the Division will typically direct the diverter to take action to prevent or mitigate the impacts or, if necessary, terminate the diversion.

With respect to the Cole's diversion pursuant to their pre-1914 appropriative claim and D030945R, the burden of demonstrating that public trust resources are being adversely impacted in an unreasonable fashion rests with the KFA. The test of potential harm and need for corrective action is considerably less for the Cole's pending application.

The KFA alleges that the Cole's diversion of water is adversely impacting anadromous fish that utilize Stanshaw Creek. Very little information is available regarding the use of this water body by anadromous fish. The DF&G submitted a memorandum dated November 20, 2001, and the NMFS submitted a letter dated November 15, 2001, (copies attached) regarding the Cole's diversion of water. Both documents discuss the status of anadromous fish pursuant to state and federal endangered species laws and make recommendations regarding "protest dismissal terms". However, the complaint investigation process is not intended to resolve "protests". Instead, the purpose of a complaint investigation is to determine what type of evidence is currently available. Neither one of these documents provides or references much evidence.

Complaint Unit staff believe that use of Stanshaw Creek by anadromous fish is generally limited to the reach from the Highway 96 culverts to the Klamath River. These culverts appear to have been designed to be self-cleaning due to the steep slope. Complaint Unit staff noted that there was essentially no sediment or debris inside these culverts, indicative that high scour velocities are maintained. High water velocities coupled with the length of these conduits probably prevent movement of spawning or juvenile fish upstream. This conclusion appears to be consistent with those of both the DF&G and the NMFS. The NMFS letter states: "*The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage.*" While removal of the culverts might change the situation, this task will be a significant undertaking and is not likely to occur anytime soon. Consequently, until such time as the culverts are actually removed, Complaint Unit staff believe that only those actions by the Coles that would have a bearing on the health and well being of fishery resources in Stanshaw Creek between Highway 96 and the Klamath River need be addressed.

The DF&G memo contains the following recommendation:

The Department proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

During the meeting portion of the inspection, biologists representing the DF&G, the NMFS, and the Karuk Tribe all stated that temperatures in the Klamath River often reach lethal levels during the warmer months of the year. They believe that small, side tributaries with cold water flows such as Stanshaw Creek provide "thermal refuges" that are crucial to the survival of juvenile anadromous fish.

On the day of the complaint inspection, water temperature was measured at 52°F in the early morning with a flow of 0.61 cfs⁵. Water temperature in the mid-afternoon downstream of the "Fisher" POD was measured at 56°F with a flow of 0.41 cfs⁶. Water temperature was measured by Division staff on July 26, 2000, and found to be 54°F. No flow measurements were taken at that time, but photographs of the culverts indicate that flows were higher; possibly in the 2-3+ cfs range. According to the Environmental Field Report for this visit, water temperature is not an issue. Complaint Unit staff agree. The lower portion of Stanshaw Creek contains excellent cover and there is no evidence currently available to indicate that the Cole's diversion of water creates a temperature

⁵ - Making good flow measurements in a channel containing mainly pools and cascades with a current velocity meter is extremely difficult. Consequently, these measurements are not considered highly accurate, but instead should only be used for an idea of the relative amounts of flow present.

⁶ - This measurement was made at the request of KFA and fishery representatives. Complaint Unit staff were reluctant to undertake a measurement in a reach of the creek that consisted solely of pools and cascades. This measurement was quite rudimentary and may only have an accuracy of $\pm 50\%$.

problem in the reach between Highway 96 and the Klamath River as long as minimum flows are maintained similar to those occurring during the complaint investigation.

The reach of Stanshaw Creek between the Highway 96 culverts and the Klamath River consists of a series of cascading pools with essentially no runs or riffles present during periods of low flow. Complaint Unit staff believe that this lower reach of Stanshaw Creek remains a series of cascading pools until flows in the creek become quite large in comparison to the Cole's ability to divert water. Bypass flows on the order of ½ to 1 cfs should produce essentially the same amount and quality of habitat as flows on the order of 2 – 3 cfs. Consequently, as summer flows decrease due to either a recession in the natural hydrograph or diversions by the Coles, there shouldn't be much change in the spatial habitat available to fish.

The channel configuration indicates that winter flows are much higher than the flows the Coles might divert. These flows may produce conditions that allow anadromous fish to spawn. However, diversion by the Coles during these periods should also have negligible effect on the fish.

The fishery biologists pointed out that the cold water habitat of Stanshaw Creek is of little value if the Coles do not bypass sufficient flows of water to provide access between the river and the creek. Our inspection revealed that there was no natural surface connection between the creek and the river at the time of the inspection. Flows in the creek terminated in a pool that is separated at low flows from the river by a sand bar on which extensive amounts of phreatophytic vegetation exists. Significant quantities of water can no doubt seep through the sand bar before a natural surface flow connection with the river occurs. The sand bar is most likely a dynamic phenomenon and may not be in place every year or at all times of the year. However, the extent of the vegetation on the sand bar indicates that this is not a fleeting fixture.

While at times there may not be a natural surface connection with the river, the caretaker for the Fisher property showed us a hand-dug channel that he maintains between the river and the pond. This channel provides some access to the creek and the thermal refuge found therein. Consequently, there is a benefit in maintaining sufficient flow in the lower reach to keep the artificial channel flowing. Dr. Li indicated that the flows existing at the time of the inspection were quite adequate to provide for passage of juvenile fish from the river to the thermal refuge in the pools. Consequently, flows similar to those observed during the inspection on October 17, 2001, would appear to be adequate.

Undertaking measurements of flows in the creek would be an extremely difficult, if not impossible, task. Conditions in the creek are such that installation of a device(s) that would enable measurement of flows (e.g., flume, weir, or stage vs. flow correlation) would require a major construction effort coupled with maintenance and possible reconstruction on a continual basis. A more practical method of measuring bypasses

would be to divert all of the low flows into the Cole's ditch and use an appropriately designed "splitter box" to ensure that a minimum flow is returned back to the creek in the immediate vicinity of the diversion. However, this would require the construction of a dam to direct all flow into the ditch before returning a set amount or percentage of flow back to the creek. The DF&G has obtained an injunction that prohibits installation of such a dam. Consequently, a reasonable request would be that the Coles bypass sufficient flow at all times at their POD to provide continuity of flow between Stanshaw Creek below the Highway 96 culverts and the Klamath River. If the Fisher's caretaker does not maintain the artificial channel between the terminal pool and the river, the Coles should still bypass sufficient water to maintain flow between the pools located downstream of the Highway 96 culverts in order to maintain habitat for any fishlife that is present in this reach. If the DF&G is willing to allow full diversion of the creek into the Cole's ditch, a measurable bypass requirement should be established, probably on the order of ½ to 1 cfs based on further analysis of the amount of bypass necessary to maintain hydraulic continuity between lower Stanshaw Creek and the Klamath River.

The KFA did not file a complaint against the Fishers and neither the DF&G or the NMFS have indicated any concerns with their diversion. However, the Fisher diversion is capable of removing water from Stanshaw Creek in the same manner as the Cole's diversion; albeit at a smaller rate. Consequently, if flows in lower Stanshaw Creek are inadequate to maintain public trust resources, the Fishers may also need to reduce their diversion of water. Determining which diversion needed to be reduced first, either the Cole's or the Fisher's, could only be established after a court rules on the relative priorities of both diversions.

PHYSICAL SOLUTION

There may be a physical solution that would be of benefit to all sides of this situation. The "fishery advocates" would like to see more water passed below the Cole's POD. The Coles want to be able to divert sufficient water to generate power and maintain consumptive water uses at their guest ranch. One way of possibly meeting both interests would be to move the power generation facility completely into the Stanshaw Creek watershed. This would require construction of a diversion dam capable of diverting most, if not all, of the flow of the creek into a penstock. The generating unit would be located down gradient along the creek, possibly immediately upstream of the Highway 96 culverts. Power would be transmitted over the drainage divide to the guest ranch. The diversion dam could be designed and constructed to provide a minimum bypass flow before any water is diverted from the creek to maintain a minimum flow between the diversion structure and powerplant discharge. A consumptive use water supply line(s) could also be run from the diversion dam to the ranch to provide a pressurized water system capable of operating an automated sprinkler irrigation system and domestic water supply system.

The Coles would benefit with increased power production especially during the summer, low flow season. This would save them considerable costs associated with generating power using an expensive fossil fuel generator. The pressurized water line(s) would also allow them to develop a more efficient irrigation system that could be automated; thus saving labor costs as well. The pressurized system would also reduce the amount of labor required to maintain the current ditch; especially during storm events when overland runoff coupled with fallen leaves and tree limbs pose a significant threat to the integrity of the ditch.

The "fishery advocates" would benefit by seeing dramatically increased flows in the lower reaches of Stanshaw Creek during the summer, low-flow period due to a reduction in the amount of water diversions necessary to maintain the current irrigation, domestic, and power uses⁷. Complaint Unit staff are not currently aware of compelling evidence suggesting that a significant benefit would accrue to instream uses of water by increasing the flow over that currently existing in this reach of the creek during the low-flow period of the year. However, the complainant, DF&G, NMFS, and many interested parties seem to believe that substantial benefit would be gained. Because determining appropriate instream flow needs is not an exact science, providing additional flows might provide some, as yet, undocumented benefits to instream uses. Complaint Unit staff are not aware of any adverse impacts that would occur by increasing instream flows if a physical solution were to be implemented. Erring on the side of public trust uses is always desirable; especially if the rights of consumptive water users can be maintained or enhanced at the same time.

In order to implement a physical solution such as described above, the penstock and powerplant would need to be relocated onto land currently owned by the U.S. Forest Service. The Cole's diversion and conveyance ditch were initiated before the National Forest was established. This has essentially "grandfathered" these facilities and has most likely significantly reduced the amount of regulatory authority the Forest Service has over these facilities. Moving the penstock and powerplant would subject the Coles to additional regulation by the Forest Service. In view of the concerns expressed by the "fishery advocates" including the protests and complaints filed, the Coles are not likely to be willing to enter into a physical solution unless adequate guarantees can be provided that their diversion and use of water would not be placed in any greater jeopardy than currently exists. This might necessitate a land exchange with the Forest Service or development of some other type of legal agreement or contract between the parties.

⁷ - Application 29449 has not yet been approved. Complaint Unit staff assume that any permit that may be issued pursuant to this filing will be conditioned upon compliance with all necessary activities to prevent any unreasonable adverse impacts to instream uses. Consequently, a physical solution would not provide much benefit based strictly upon diversions for power purposes. Most of the benefit would be based on reductions to diversions for irrigation and/or domestic uses.

CONCLUSIONS

1. A court of competent jurisdiction would most likely confirm that the Coles have a valid pre-1914 appropriative right to divert water from Stanshaw Creek for full domestic and irrigation purposes at the Marble Mountain Ranch.
2. Evidence has not been submitted to substantiate a pre-1914 appropriative right for power purposes but A029449, if approved, should cover all diversions for power purposes.
3. With the current irrigation system, most diversions for power purposes during the low-flow periods of the year are incidental to domestic and irrigation needs.
4. Prima facie evidence is available to indicate that lower Stanshaw Creek does provide habitat for "thermal refuge" when temperatures in the Klamath River become detrimental to the health and well being of fish life.
5. Bypasses similar to those present during the field investigation should provide adequate habitat for thermal refuge purposes.
6. Measuring flows on a regular basis in Stanshaw Creek is not practical. Any requirement to measure minimum bypass flows should **not** be established unless the requirement acknowledges that a sufficient diversion of water will be allowed into the Cole's ditch to cover both the diversion and bypass requirement with subsequent measurement and release of bypasses back into the stream.
7. Considerable benefit might accrue to all sides of this dispute if an appropriate physical solution were to be implemented.

RECOMMENDATIONS

1. That the Coles be directed to cease all diversion of water whether pursuant to a pre-1914 appropriative claim of right or post-1914 appropriative rights derived from Application 29449 or Small Domestic Registration D030945R unless sufficient flow is passed below their POD to maintain a flow in lower Stanshaw Creek below the Highway 96 culverts similar to that present during the October 17, 2001, field investigation (≈ 0.7 cfs).
2. That the required bypass flow be determined in one of two fashions:
 - a) if full diversion of the creek into the Cole's ditch is **not** allowed, the flow should be visually estimated so that sufficient flow would be available to fill a small,

hand-dug ditch between the terminal pool of Stanshaw Creek and the Klamath River; or

- b) if full diversion of the creek into the Cole's ditch is allowed, a device shall be installed capable of bypassing sufficient flow to maintain 0.7 cfs in the creek below the Highway 96 culverts before any water is passed down the diversion ditch to Marble Mountain Ranch.
3. That the complaint filed by KFA against the Coles be closed.
 4. That the parties give serious consideration to a physical solution similar to that discussed above.

LAW OFFICES OF DONALD B. MOONEY

MR. AR

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November 30, 2001

VIA FACSIMILE AND REGULAR MAIL

Charles Rich
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Unlawful Diversion of Water by Doug and Heidi Cole from Stanshaw
Creek, Siskiyou County*

Dear Mr. Rich:

This letter serves as the Klamath Forest Alliance's ("KFA") response to Janet Goldsmith's letter dated August 20, 2001 on behalf of Doug and Heidi Cole, and as a follow-up to the October 17, 2001, site visit to the Marble Mountain Ranch and Stanshaw Creek. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. The Coles' unlawful diversion of water from Stanshaw Creek poses a risk to these public trust resources, primarily coho salmon and steelhead. To this end, KFA requests that the State Water Resources Control Board ("SWRCB") take all appropriate action to curtail the unlawful diversions and to protect the public trust resources that are at risk from the unlawful diversions.

The unauthorized diversion of water subject to appropriation under the provisions of the Water Code is a trespass. (Water Code, § 1052.) Moreover, Water Code, § 1825 provides that "[i]t is the intent of the Legislature that the state should take vigorous action to . . . prevent the unlawful diversion of water. In the present case, the SWRCB staff has already determined that the Coles' diversion of water in excess of 0.11 cfs constitutes an unauthorized diversion of water. Additionally, the SWRCB staff has determined that any diversion of water for the generation of hydroelectric generation requires an appropriative water right permit. Thus, the Coles' current diversion of water from Stanshaw Creek constitutes an unlawful diversion of water.

The Coles' current diversion practices can be separated into two areas. First, the extent of the Coles' pre-1914 appropriative water rights for domestic and irrigation uses and whether their current diversion from Stanshaw Creek and water use exceed any claim to a pre-1914 appropriative water right, and thus constitutes an unlawful diversion. Second, whether the Coles' diversion of water for hydroelectric generation constitutes an unlawful diversion of water. If it does

constitute an unlawful diversion of water, then should the SWRCB take action to prevent the unlawful diversion of water as provided for in Water Code sections 1052 and 1825? As discussed below, the Coles' current diversion of water exceeds any pre-1914 appropriative right for domestic and irrigation uses. Additionally, the Coles' do not possess a pre-1914 appropriative water for hydroelectric generation. Finally, and most importantly, the Coles' unlawful diversion harms coho salmon and steelhead.

1. The Coles' Current Diversions for Domestic and Irrigation Exceed Any Claim to a Pre-1914 Appropriative Water Right

Assuming the Coles can establish that they are the successors in interest to the Stanshaw pre-1914 appropriative water right, any pre-1914 appropriative water right is limited to the amount of water put to a reasonable and beneficial use. (Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) The SWRCB staff has concluded on at least two occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1998 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, *Land and Water Use in Klamath River Hydrographic Unit*, Table 4 at p. 55.) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists.

Although the Coles question the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles provide absolutely no evidence to dispute the estimated demand and they provide no alternate estimate of a higher demand. The Coles argue that Mr. Hayes believes that he *may* have underestimated his existing uses because it was based upon a single flow measurement at a time when he was not irrigating. The Coles, however, provide no evidence to support a higher demand rate at that time. Moreover, as indicated in the SWRCB's September 15, 1998, letter, the information contained in DWR Bulletin 94-6 was verified by Marvin Goss, Forest Service hydrologist, who lived on the Coles' property while it was under prior ownership. "Mr. Goss evaluated the capacity of the ditch as well as measuring the actual amount of water put to generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel." (Schueller Letter at p. 1.)

The SWRCB's September 15, 1998, letter indicates that in 1998, the Coles constructed a reservoir upon their property. Any claim the Coles may have to a pre-1914 appropriative water does not support the diversion of water to a reservoir constructed in 1998. Such use constitutes an expansion of the water right for which an application to appropriate water must be filed. Even though the SWRCB brought this matter to the Coles' attention over three years ago, it is KFA's understanding that the Coles continue to use of the reservoir and have not

filed any application to appropriate water for such use. This constitutes an unauthorized diversion of water for which the Coles have made no attempt to remedy. Thus, the SWRCB should direct the Coles to cease and desist from diverting water to this storage facility, unless and until the Coles obtain a permit for such use.

At the site visit on October 16th, the SWRCB staff measured the flow of Stanshaw Creek at the point of diversion ("POD") to be approximately 1.6 cubic feet per second ("cfs"). The Coles were diverting approximately 50 percent of stream flow. At the time, however, the Coles were not generating any power from the diverted water. Thus, the entire diversion was for domestic and irrigation uses. This quantity of diversion exceeds the Coles' pre-1914 appropriative water right for domestic and irrigation purposes. As indicated in the SWRCB's September 15, 1998, letter, the Coles' pre-1914 appropriative water right for domestic and irrigation use is limited to 0.11 cfs. This amount is supported by Katherine Mrowka's February 4, 1993, letter to the Robert and Mary Young, the Coles' predecessors' in interest.

Based upon the substantial evidence, and essentially, uncontested evidence, any quantity of water diverted from Stanshaw Creek used for domestic and irrigation that exceeds 0.11 cfs constitutes a trespass and unlawful diversion of water

2. The Coles' Do Not Possess the Right to Divert Water For Hydroelectric Generation

The Coles' August 20th letter implies that the Coles have a pre-1914 appropriative water right to divert 3.0 cfs from Stanshaw Creek. The substantial evidence, however, indicates that no such water rights exist and that the Coles' current diversions constitute a trespass and unlawful diversion of water. In fact, the evidence submitted by the Coles, as well as Doug Cole's own admissions, demonstrate that hydroelectric generation began after 1945 and has increased since that time. In a letter dated April 9, 2000, from Doug Cole to Konrad Fisher, Mr. Cole stated that:

Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

(A copy of Mr. Coles' April 9, 2000, letter is attached as Exhibit A.)

Mr. Hayes' April 30, 2000, Declaration submitted with the Coles' August 20th letter also supports the conclusion that hydroelectric generation has been expanded over the years. Mr. Hayes' Declaration indicates that in 1945, there existed a 4 kw pelton wheel which was upgraded to a 9 kw pelton wheel, and in

1965, upgraded to a 100 kw pelton wheel. It should be noted also, as discussed above, in 1963, the quantity of water being diverted from Stanshaw Creek was 0.49 cfs and the ditch capacity was only 1.25 cfs.

The evidence supports Mr. Coles' statement that in about 1945, the ranch began hydroelectric generation. Mr. Cole's contention, however that no increase in stream contention that such use did not increase the quantity of water diverted from Stanshaw Creek is not supported by the evidence, in light of the fact that the Coles seek to divert up to 3 cfs for hydroelectric generation: an amount six times greater than previously documented uses from Stanshaw Creek.

The Coles' August 20th letter provides a description of the history of uses in which it describes hydroelectric generation as one of the historical uses of water on the ranch. This discussion, however, fails to state when such hydroelectric uses commenced. The Coles' letter implies that since an old pelton wheel was used for the generation of power, the date power generation commenced can be traced to the age of the pelton wheel. This does not allow for the possibility that when power generation began in 1945 as acknowledged by Doug Cole, that the previous owners used an older pelton wheel. Without some type of corroborating evidence, the mere existence of an old pelton wheel does not establish a pre-1914 appropriative water right. Additionally, the mere existence of a pelton wheel does not establish that any claimed water right has been continuously used since 1914. Finally, the old pelton wheel, along with Mr. Hayes' Declaration does not address the issue that since 1955, the ranch has increased its use of water for the hydroelectric generation. A trend followed by the Coles in their current diversions.

3. The SWRCB Should Direct the Coles to Cease All Unlawful Diversions

The Coles state that KFA failed to provide any factual basis that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. Additionally, the Coles' assert that no specifics are given of just how their unauthorized diversion of the waters of Stanshaw Creek are affecting either coho salmon or steelhead.

These questions were answered unequivocally at the site visit, as well as in the National Marine Fisheries Service's ("NMFS") November 15, 2001, letter to Charles Rich. There is uniform agreement among the fisheries biologists that have visited the Stanshaw Creek and analyzed the impacts of the Coles' diversions that the thermal refugia at the mouth of Stanshaw Creek is an important habitat element. (See NMFS' Letter dated November 15, 2001, Memorandum dated November 29, 2001 from Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University (Exhibit B); and Memorandum dated November 30, 2001, from Toz Soto, Fisheries Biologist, Karuk Tribe, Department of Natural Resources (Exhibit C).) As indicated in NMFS' letter, and by Mr. Soto, the natural flows from Stanshaw Creek provide

the necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek.

Currently there exists no instream flow requirements for Stanshaw Creek. As a result, without any regulatory oversight, the Coles have diverted up to 3.0 cfs from Stanshaw Creek regardless of amount of instream flow remaining in Stanshaw Creek. The United States Forest Service's flow data from September 2000, indicates that the Coles were diverting nearly 3.0 cfs from Stanshaw Creek when there averaged only 3.26 cfs above the point of diversion. Thus, flow at the culvert averaged less than 0.4 cfs. (See Select Middle Klamath Tributary Flow Summary, Table 1: 2000 Low- Flow Discharge Rates, Exhibit D)

According to Mr. Soto's review and analysis, "Stanshaw Creek provides important thermal refugia habitat or anadromous salmonids in the Klamath River." (See Exhibit C.) Additionally, "[w]ith proper flow, habitat in Stanshaw Creek is suitable for summer and winter rearing coho salmon." (*Id.*) The Coles' current diversion limits thermal refugia habitat at the mouth of Stanshaw Creek. (*Id.*) In order to maintain a properly functioning thermal refugia habitat at the mouth of Stanshaw Creek, the water diverted from Stanshaw Creek must be returned to Stanshaw. (*Id.*)

In Professor Roelofs' analysis, he concluded that::

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkel) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. (Exhibit B.)

The reduced stream flows also limit access to the creek for adult and juvenile salmonids. (Exhibit C.) The reduced flows and velocity also reduce adult spawning and nest building opportunities in lower Stanshaw Creek. (*Id.*) Another problem with the Coles' current diversion practices is that the diversion intake is not screened and salmonids are being entrained in the diversion ditch. (*Id.*) Finally, the Coles' rock dam has no ability to control or measure the amount of flow diverted from Stanshaw Creek. (*Id.*)

Based upon the foregoing, substantial evidence demonstrates that the Coles' current diversion practices have a direct impact on coho and steelhead, as well as their habitat. The Coles, however, have offered no expert opinion or analysis as to the harm and potential harm resulting from their unlawful

Mr. Charles Rich
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diversions. Such harm to and potential harm to coho salmon and steelhead justify, and in fact mandate, that the SWRCB direct the Coles to cease their unlawful diversions unless and until the Coles obtain an appropriative water right and have taken appropriate steps to ensure that the downstream resources are not harmed by their diversion.

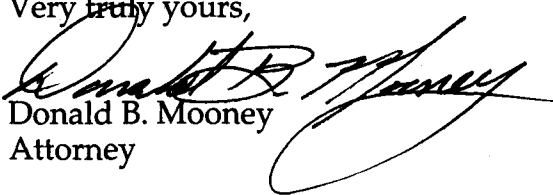
4. Conditions to Protect Public Trust Resources Must Be Imposed Upon Any Future Diversions

If the SWRCB does not direct the Coles to cease their unlawful diversions, then the SWRCB must require that the Coles maintain a minimum instream flow in Stanshaw Creek below the point of diversion and below the Highway 96 culvert.

If the SWRCB allows the Coles to continue their unlawful diversions, then, at an absolute minimum, it must impose the conditions outlined in NMFS' November 15, 2001, letter, in order to reduce any harm to downstream habitat and public trust resources. Such conditions include returning the flows to Stanshaw Creek before creek crosses Highway 96; install a fish screen at the point of diversion, install a diversion structure at point of diversion in order to control and limit the quantity of water diverted, install stream flow measuring device at the point of diversion and the point of return on Stanshaw Creek; provide access to Department of Fish and Game and NMFS for monitoring. Finally, the SWRCB should impose minimum instream flow and bypass requirements as recommended by NMFS.

As any instream flow and bypass requirements at this time would only be interim, pending the SWRCB's consideration of the Coles' application to appropriate water, KFA retains the right to reevaluate the minimum bypass and instream flow recommendations, as well as the point of return to Stanshaw Creek, KFA determines that such activities raise creek temperature and/or harm fish and public trust resources.

Very truly yours,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Felice Pace
Michael Contreras

Attachments

April 9, 2000

Konrad Fisher
1721 Court Street
Redding, California 96001

Dear Mr. Fisher:

We have received a copy of your protest of water rights application #29449 and hereby wish to respond to your concerns.

Our application has resulted from the process of the State's ongoing review of water usage in the State of California and the consequent updating and refining of all water usage permits. We currently operate a sixty-acre, year-round guest ranch which borders on the Klamath River and which lies between Irving Creek to the east and Stanshaw Creek to the west. Water has been continuously diverted from Stanshaw Creek to this property since about 1865. Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

In the second paragraph of the application notice, the wording is such as to suggest that we have the intention of diverting new water from Stanshaw Creek when, in fact, we are not. Apparently, the wording here is standard for all water rights applications, regardless of the specific nature of the project(s) involved. This application is being made for the sole purpose of satisfying a requirement of the State that any hydroelectric generation plant such as ours, regardless of how long it has been in operation, must now be formally permitted.

Approval of this permit application will

- not injure any existing water rights, since no reduction in Stanshaw Creek flow will result.
- not result in any adverse impact on the environment since nothing in the project description calls for any changes in the habitats bordering on the existing project. The power plant in question is situated within a waterway closed to migratory fish by a culvert under highway 96 and cannot, therefore, have any adverse effect on migratory fish. The existing project has been carefully studied by representatives of the State Department Of Fish And Game (Yreka office), the

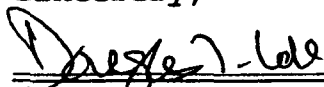
(Page 1 of 2 pages)

Federal Department Of Forestry, and the State Water Resources Control Board and ~~no complaints have been registered by any of~~ these agencies regarding the health of the ecosystems adjoining the project.

- not work counter to public interest. In fact, the existance of the water canal along which the generation plant is situated provides for a better year-round flow in Irving ^{tree} Creek, thus aiding fish spawning there. In addition, property immediately to our southwest, owned by a Mr. Neil Tocher, is supplied by water diverted from our system. Mr. Tocher has responded favorably to our permit request. Finally, the operation of our hydroelectric plant eliminates the need for our dependence on over-burdened public utilities.-
- not be contrary to any laws, either county or state. Our current diversion of water from Stanshaw Creek is authorized under a pre-1914 water rights agreement which is on file in the Siskyou County offices. .

Please reconsider your protest of our application to preserve (not expand) a project which has been in existence for over 55 years and which is essential to our livelihood. If you have any questions or further concerns, please contact us directly at the address or phone number given below.

Sincerely,



Marble Mountain Ranch
Douglas and Heidi Cole, owners
92520 Hwy 96
Somes Bar, Calif. 95568
(530) 469-3322



Department of Fisheries Biology

29 November 2001

To: Whom It May Concern

Terry D. Roelofs
From: Terry D. Roelofs, Professor

Subject: Appropriative Water Rights Application 29449 on Stanshaw Creek

Several months ago I was asked by Mr. Konrad Fisher to render an opinion regarding a water rights application to divert water from Stanshaw Creek, a Klamath River tributary in Siskiyou County, California. On 17 November 2001 I inspected the portion of Stanshaw Creek between Highway 96 and the Klamath River. Joining me on this site visit were Dr. Walt Duffy, Leader, California Cooperative Fisheries Research Unit at Humboldt State University, Mr Toz Soto representing the Karuk Tribe of California, and Mr. Michael David Fellows, caretaker of the Fisher Ranch. I have read an Environmental Field Report written by Robert E. Miller of the California State Water Resources Control Board describing a site visit to Stanshaw Creek attended by representatives of the National Marine Fisheries Service, California Department of Fish and Game, Karuk Tribe of California, and several non-agency personnel. I have also reviewed a letter dated 15 November 2001 by James R. Bybee of the National Marine Fisheries Service addressed to Mr. Charles Rich of the California State Water Resources Control Board.

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkle) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. I believe that these concerns should be addressed before Application 29449 is approved.

Karuk Tribe of California

**Department of Natural Resources**

Post Office Box 282
Orleans, CA 95556
(530) 627-3446 Fax (530) 627-3448

Administrative Office

Post Office Box 1016
Happy Camp, CA 96039
(530) 493-5305 Fax (530) 493-5322

Karuk Tribal Health Clinic

Post Office Drawer 249
Orleans, CA 95556
(530) 627-3452 Fax (530) 627-3445

Karuk Department of Natural Resources

November 30, 2001

Comments on the Stanshaw Creek Diversion

Stanshaw creek provides important thermal refugia habitat for anadromous salmonids in the Klamath River. Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for outmigrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids. Spawning and nest building sites for adult coho and steelhead are limited by the diversion. With augmented flows, established spawning sites are at risk of being dewatered.

Problems

1. The current diversion limits thermal refugia habitat associated with cold water input to the Klamath River. Diverted water must be returned to maintain properly functioning thermal refugia habitat at the mouth and in the lower reach of the creek.
2. Access to the creek for adult and juvenile salmonids is limited because of the diversion. Connectivity to the temperature-impaired Klamath River must be maintained to allow migration of cold-water dependant salmonids into Stanshaw Creek.
3. The diversion intake is not screened and salmonids are being entrained in the diversion ditch. A fish screen is needed to keep fish from being trapped and harmed by the hydro generator.
4. Reduced flows and reduced stream velocity limits adult spawning and nest building opportunities in lower Stanshaw Creek.
5. Flow below the diversion intake is not adequate for salmonid migration and rearing.
6. Slope failures associated with overtopping along the diversion ditch are a sediment sources to Stanshaw Creek.
7. The primitive nature of the rock dam type intake has no provision to control the amount of flow diverted.

For questions pertaining to these comments please contact the director of Karuk Department of Natural Resources, Leaf Hillman or fisheries biologist, Toz Soto at (530) 627-3446.

Sincerely,

Toz Soto, Fisheries Biologist

Select Middle Klamath Tributary Flow Summary
Table 1: 2000 Low-Flow Discharge Rates

Stream	Location	Date	Flow #1	Flow #2	Average
Portuguese	above culvert	9/19	1.50	1.84	1.67
Indian	at mouth	9/19	56.71	54.68	55.70
Walker	first bridge	9/19	6.14	5.60	5.87
Grider	near bridge across Grider	9/19	22.15	20.29	21.22
Independence	300' up from mouth	9/20	15.52	13.78	14.65
Oak Flat	under the bridge	9/20	1.49	1.46	1.48
Elk	near mouth, near bridge	9/20	42.61	40.27	41.44
China	near culvert	9/20	1.70	1.66	1.68
Clear	under bridge	9/20	43.66	45.25	44.46
Swillup	400' up from Highway 96 (under hanging water line)	9/21	3.40	3.33	3.37
Coon	300' up from culvert	9/21	1.06	1.08	1.07
Dillon	200' downstream from 96 bridge	9/21	27.00	26.23	26.62
Tillamook	200' upstream from water filling station	9/21	4.91	5.40	5.16
Sandy Bar	300' from mouth	9/21	3.05	2.88	2.97
Irving	at end of foot trail	9/21	7.41	7.59	7.50
Stanshaw	at culvert	9/22	0.35	0.40	0.38
Stanshaw	above water intake	9/27	3.09	3.42	3.26
Rogers	200' from mouth	9/22	4.38	4.71	4.55
Fort Goff	below culvert	9/26	4.27	4.00	4.14
Seiad	*not surveyed				
Thompson	at bridge	9/26	10.56	12.15	11.36
Rock	at mouth	9/27	12.02	11.87	11.95

* not surveyed due to private property
source: USFS Happy Camp Fisheries Dept.

From: Robert E. Miller
To: Doug Cole; Jane Vorpapel; Konrad Fisher; Margaret Tauzer
Date: 11/28/01 4:51PM
Subject: New contact

Regarding water right Application 29449 (not the Complaint filed by KFA):

I am leaving for a new job this Friday, Nov 30. Ross Swenerton (916)341-5398
RSWENERTON@waterrights.swrcb.ca.gov will be the contact on this application until another
Environmental Scientist is assigned.

mc
WR-6

LAW OFFICES OF DONALD B. MOONEY

DONALD B. MOONEY
Admitted in California and Oregon

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November 30, 2001

**VIA FACSIMILE AND
REGULAR MAIL**

Charles Rich
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Unlawful Diversion of Water by Doug and Heidi Cole from Stanshaw
Creek, Siskiyou County*

Dear Mr. Rich:

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The unauthorized diversion of water subject to appropriation under the provisions of the Water Code is a trespass. (Water Code, § 1052.) Moreover, Water Code, § 1825 provides that "[i]t is the intent of the Legislature that the state should take vigorous action to . . . prevent the unlawful diversion of water. In the present case, the SWRCB staff has already determined that the Coles' diversion of water in excess of 0.11 cfs constitutes an unauthorized diversion of water. Additionally, the SWRCB staff has determined that any diversion of water for the generation of hydroelectric generation requires an appropriative water right permit. Thus, the Coles' current diversion of water from Stanshaw Creek constitutes an unlawful diversion of water.

The Coles' current diversion practices can be separated into two areas. First, the extent of the Coles' pre-1914 appropriative water rights for domestic and irrigation uses and whether their current diversion from Stanshaw Creek and water use exceed any claim to a pre-1914 appropriative water right, and thus constitutes an unlawful diversion. Second, whether the Coles' diversion of water for hydroelectric generation constitutes an unlawful diversion of water. If it does

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November 30, 2001
Page 2

constitute an unlawful diversion of water, then should the SWRCB take action to prevent the unlawful diversion of water as provided for in Water Code sections 1052 and 1825? As discussed below, the Coles' current diversion of water exceeds any pre-1914 appropriative right for domestic and irrigation uses. Additionally, the Coles' do not possess a pre-1914 appropriative water for hydroelectric generation. Finally, and most importantly, the Coles' unlawful diversion harms coho salmon and steelhead.

1. The Coles' Current Diversions for Domestic and Irrigation Exceed Any Claim to a Pre-1914 Appropriative Water Right

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filed any application to appropriate water for such use. This constitutes an unauthorized diversion of water for which the Coles have made no attempt to remedy. Thus, the SWRCB should direct the Coles to cease and desist from diverting water to this storage facility, unless and until the Coles obtain a permit for such use.

At the site visit on October 16th, the SWRCB staff measured the flow of Stanshaw Creek at the point of diversion ("POD") to be approximately 1.6 cubic feet per second ("cfs"). The Coles were diverting approximately 50 percent of stream flow. At the time, however, the Coles were not generating any power from the diverted water. Thus, the entire diversion was for domestic and irrigation uses. This quantity of diversion exceeds the Coles' pre-1914 appropriative water right for domestic and irrigation purposes. As indicated in the SWRCB's September 15, 1998, letter, the Coles' pre-1914 appropriative water right for domestic and irrigation use is limited to 0.11 cfs. This amount is supported by Katherine Mrowka's February 4, 1993, letter to the Robert and Mary Young, the Coles' predecessors' in interest.

Based upon the substantial evidence, and essentially, uncontested evidence, any quantity of water diverted from Stanshaw Creek used for domestic and irrigation that exceeds 0.11 cfs constitutes a trespass and unlawful diversion of water

2. The Coles' Do Not Possess the Right to Divert Water For Hydroelectric Generation

The Coles' August 20th letter implies that the Coles have a pre-1914 appropriative water right to divert 3.0 cfs from Stanshaw Creek. The substantial evidence, however, indicates that no such water rights exist and that the Coles' current diversions constitute a trespass and unlawful diversion of water. In fact, the evidence submitted by the Coles, as well as Doug Cole's own admissions, demonstrate that hydroelectric generation began after 1945 and has increased since that time. In a letter dated April 9, 2000, from Doug Cole to Konrad Fisher, Mr. Cole stated that:

Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

(A copy of Mr. Coles' April 9, 2000, letter is attached as Exhibit A.)

Mr. Hayes' April 30, 2000, Declaration submitted with the Coles' August 20th letter also supports the conclusion that hydroelectric generation has been expanded over the years. Mr. Hayes' Declaration indicates that in 1945, there existed a 4 kw pelton wheel which was upgraded to a 9 kw pelton wheel, and in

Mr. Charles Rich
November 30, 2001
Page 4

1965, upgraded to a 100 kw pelton wheel. It should be noted also, as discussed above, in 1963, the quantity of water being diverted from Stanshaw Creek was 0.49 cfs and the ditch capacity was only 1.25 cfs.

The evidence supports Mr. Coles' statement that in about 1945, the ranch began hydroelectric generation. Mr. Cole's contention, however that no increase in stream contention that such use did not increase the quantity of water diverted from Stanshaw Creek is not supported by the evidence, in light of the fact that the Coles seek to divert up to 3 cfs for hydroelectric generation: an amount six times greater than previously documented uses from Stanshaw Creek.

The Coles' August 20th letter provides a description of the history of uses in which it describes hydroelectric generation as one of the historical uses of water on the ranch. This discussion, however, fails to state when such hydroelectric uses commenced. The Coles' letter implies that since an old pelton wheel was used for the generation of power, the date power generation commenced can be traced to the age of the pelton wheel. This does not allow for the possibility that when power generation began in 1945 as acknowledged by Doug Cole, that the previous owners used an older pelton wheel. Without some type of corroborating evidence, the mere existence of an old pelton wheel does not establish a pre-1914 appropriative water right. Additionally, the mere existence of a pelton wheel does not establish that any claimed water right has been continuously used since 1914. Finally, the old pelton wheel, along with Mr. Hayes' Declaration does not address the issue that since 1955, the ranch has increased its use of water for the hydroelectric generation. A trend followed by the Coles in their current diversions.

3. The SWRCB Should Direct the Coles to Cease All Unlawful Diversions

The Coles state that KFA failed to provide any factual basis that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. Additionally, the Coles' assert that no specifics are given of just how their unauthorized diversion of the waters of Stanshaw Creek are affecting either coho salmon or steelhead.

These questions were answered unequivocally at the site visit, as well as in the National Marine Fisheries Service's ("NMFS") November 15, 2001, letter to Charles Rich. There is uniform agreement among the fisheries biologists that have visited the Stanshaw Creek and analyzed the impacts of the Coles' diversions that the thermal refugia at the mouth of Stanshaw Creek is an important habitat element. (See NMFS' Letter dated November 15, 2001, Memorandum dated November 29, 2001 from Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University (Exhibit B); and Memorandum dated November 30, 2001, from Toz Soto, Fisheries Biologist, Karuk Tribe, Department of Natural Resources (Exhibit C).) As indicated in NMFS' letter, and by Mr. Soto, the natural flows from Stanshaw Creek provide

the necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek.

Currently there exists no instream flow requirements for Stanshaw Creek. As a result, without any regulatory oversight, the Coles have diverted up to 3.0 cfs from Stanshaw Creek regardless of amount of instream flow remaining in Stanshaw Creek. The United States Forest Service's flow data from September 2000, indicates that the Coles were diverting nearly 3.0 cfs from Stanshaw Creek when there averaged only 3.26 cfs above the point of diversion. Thus, flow at the culvert averaged less than 0.4 cfs. (See Select Middle Klamath Tributary Flow Summary, Table 1: 2000 Low-Flow Discharge Rates, Exhibit D)

According to Mr. Soto's review and analysis, "Stanshaw Creek provides important thermal refugia habitat or anadromous salmonids in the Klamath River." (See Exhibit C.) Additionally, "[w]ith proper flow, habitat in Stanshaw Creek is suitable for summer and winter rearing coho salmon." (*Id.*) The Coles' current diversion limits thermal refugia habitat at the mouth of Stanshaw Creek. (*Id.*) In order to maintain a properly functioning thermal refugia habitat at the mouth of Stanshaw Creek, the water diverted from Stanshaw Creek must be returned to Stanshaw. (*Id.*)

In Professor Roelofs' analysis, he concluded that::

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkel) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. (Exhibit B.)

The reduced stream flows also limit access to the creek for adult and juvenile salmonids. (Exhibit C.) The reduced flows and velocity also reduce adult spawning and nest building opportunities in lower Stanshaw Creek. (*Id.*) Another problem with the Coles' current diversion practices is that the diversion intake is not screened and salmonids are being entrained in the diversion ditch. (*Id.*) Finally, the Coles' rock dam has no ability to control or measure the amount of flow diverted from Stanshaw Creek. (*Id.*)

Based upon the foregoing, substantial evidence demonstrates that the Coles' current diversion practices have a direct impact on coho and steelhead, as well as their habitat. The Coles, however, have offered no expert opinion or analysis as to the harm and potential harm resulting from their unlawful

diversions. Such harm to and potential harm to coho salmon and steelhead justify, and in fact mandate, that the SWRCB direct the Coles to cease their unlawful diversions unless and until the Coles obtain an appropriate water right and have taken appropriate steps to ensure that the downstream resources are not harmed by their diversion.

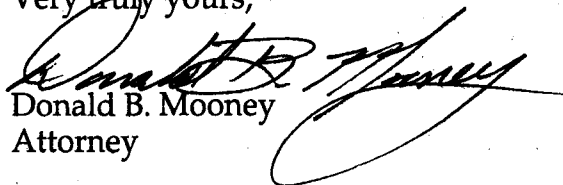
4. Conditions to Protect Public Trust Resources Must Be Imposed Upon Any Future Diversions

If the SWRCB does not direct the Coles to cease their unlawful diversions, then the SWRCB must require that the Coles maintain a minimum instream flow in Stanshaw Creek below the point of diversion and below the Highway 96 culvert.

If the SWRCB allows the Coles to continue their unlawful diversions, then, at an absolute minimum, it must impose the conditions outlined in NMFS' November 15, 2001, letter, in order to reduce any harm to downstream habitat and public trust resources. Such conditions include returning the flows to Stanshaw Creek before creek crosses Highway 96; install a fish screen at the point of diversion, install a diversion structure at point of diversion in order to control and limit the quantity of water diverted, install stream flow measuring device at the point of diversion and the point of return on Stanshaw Creek; provide access to Department of Fish and Game and NMFS for monitoring. Finally, the SWRCB should impose minimum instream flow and bypass requirements as recommended by NMFS.

As any instream flow and bypass requirements at this time would only be interim, pending the SWRCB's consideration of the Coles' application to appropriate water, KFA retains the right to reevaluate the minimum bypass and instream flow recommendations, as well as the point of return to Stanshaw Creek, KFA determines that such activities raise creek temperature and/or harm fish and public trust resources.

Very truly yours,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Felice Pace
Michael Contreras

Attachments

EXHIBIT A

000852

April 9, 2000

Konrad Fisher
1721 Court Street
Redding, California 96001

Dear Mr. Fisher:

We have received a copy of your protest of water rights application #29449 and hereby wish to respond to your concerns.

Our application has resulted from the process of the State's ongoing review of water usage in the State of California and the consequent updating and refining of all water usage permits. We currently operate a sixty-acre, year-round guest ranch which borders on the Klamath River and which lies between Irving Creek to the east and Stanshaw Creek to the west. Water has been continuously diverted from Stanshaw Creek to this property since about 1865. Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

In the second paragraph of the application notice, the wording is such as to suggest that we have the intention of diverting new water from Stanshaw Creek when, in fact, we are not. Apparently, the wording here is standard for all water rights applications, regardless of the specific nature of the project(s) involved. This application is being made for the sole purpose of satisfying a requirement of the State that any hydroelectric generation plant such as ours, regardless of how long it has been in operation, must now be formally permitted.

Approval of this permit application will

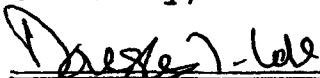
- not injure any existing water rights, since no reduction in Stanshaw Creek flow will result.
- not result in any adverse impact on the environment since nothing in the project description calls for any changes in the habitats bordering on the existing project. The power plant in question is situated within a waterway closed to migratory fish by a culvert under highway 96 and cannot, therefore, have any adverse effect on migratory fish. The existing project has been carefully studied by representatives of the State Department Of Fish And Game (Yreka office), the

Federal Department Of Forestry, and the State Water Resources Control Board and ~~no complaints have been registered by any of~~ these agencies regarding the health of the ecosystems adjoining the project.

- not work counter to public interest. In fact, the existance of the water canal along which the generation plant is situated provides for a better year-round flow in Irving ^{tree} Creek, thus aiding fish spawning there. In addition, property immediately to our southwest, owned by a Mr. Neil Tocher, is supplied by water diverted from our system. Mr. Tocher has responded favorably to our permit request. Finally, the operation of our hydroelectric plant eliminates the need for our dependence on over-burdened public utilities.-
- not be contrary to any laws, either county or state. Our current diversion of water from Stanshaw Creek is authorized under a pre-1914 water rights agreement which is on file in the Siskyou County offices. .

Please reconsider your protest of our application to preserve (not expand) a project which has been in existence for over 55 years and which is essential to our livelihood. If you have any questions or further concerns, please contact us directly at the address or phone number given below.

Sincerely,



Marble Mountain Ranch
Douglas and Heidi Cole, owners
92520 Hwy 96
Somes Bar, Calif. 95568
(530) 469-3322



Department of Fisheries Biology

29 November 2001

To: Whom It May Concern

Terry D. Roelofs
 From: Terry D. Roelofs, Professor

Subject: Appropriative Water Rights Application 29449 on Stanshaw Creek

Several months ago I was asked by Mr. Konrad Fisher to render an opinion regarding a water rights application to divert water from Stanshaw Creek, a Klamath River tributary in Siskiyou County, California. On 17 November 2001 I inspected the portion of Stanshaw Creek between Highway 96 and the Klamath River. Joining me on this site visit were Dr. Walt Duffy, Leader, California Cooperative Fisheries Research Unit at Humboldt State University, Mr Toz Soto representing the Karuk Tribe of California, and Mr. Michael David Fellows, caretaker of the Fisher Ranch. I have read an Environmental Field Report written by Robert E. Miller of the California State Water Resources Control Board describing a site visit to Stanshaw Creek attended by representatives of the National Marine Fisheries Service, California Department of Fish and Game, Karuk Tribe of California, and several non-agency personnel. I have also reviewed a letter dated 15 November 2001 by James R. Bybee of the National Marine Fisheries Service addressed to Mr. Charles Rich of the California State Water Resources Control Board.

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkle) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. I believe that these concerns should be addressed before Application 29449 is approved.

EXHIBIT C

000857

Karuk Tribe of California



Department of Natural Resources
Post Office Box 282
Orleans, CA 95556
(530) 627-3446 Fax (530) 627-3448

Administrative Office
Post Office Box 1016
Happy Camp, CA 96039
(530) 493-5305 Fax (530) 493-5322

Karuk Tribal Health Clinic
Post Office Drawer 249
Orleans, CA 95556
(530) 627-3452 Fax (530) 627-3445

Karuk Department of Natural Resources

November 30, 2001

Comments on the Stanshaw Creek Diversion

Stanshaw creek provides important thermal refugia habitat for anadromous salmonids in the Klamath River. Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for outmigrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids. Spawning and nest building sites for adult coho and steelhead are limited by the diversion. With augmented flows, established spawning sites are at risk of being dewatered.

Problems

1. The current diversion limits thermal refugia habitat associated with cold water input to the Klamath River. Diverted water must be returned to maintain properly functioning thermal refugia habitat at the mouth and in the lower reach of the creek.
2. Access to the creek for adult and juvenile salmonids is limited because of the diversion. Connectivity to the temperature-impaired Klamath River must be maintained to allow migration of cold-water dependant salmonids into Stanshaw Creek.
3. The diversion intake is not screened and salmonids are being entrained in the diversion ditch. A fish screen is needed to keep fish from being trapped and harmed by the hydro generator.
4. Reduced flows and reduced stream velocity limits adult spawning and nest building opportunities in lower Stanshaw Creek.
5. Flow below the diversion intake is not adequate for salmonid migration and rearing.
6. Slope failures associated with overtopping along the diversion ditch are a sediment sources to Stanshaw Creek.
7. The primitive nature of the rock dam type intake has no provision to control the amount of flow diverted.

For questions pertaining to these comments please contact the director of Karuk Department of Natural Resources, Leaf Hillman or fisheries biologist, Toz Soto at (530) 627-3446.

Sincerely,

Toz Soto, Fisheries Biologist

EXHIBIT D

000859

Select Middle Klamath Tributary Flow Summary

Table 1: 2000 Low-Flow Discharge Rates

Stream	Location	Date	Flow #1	Flow #2	Average
Portuguese	above culvert	9/19	1.50	1.84	1.67
Indian	at mouth	9/19	56.71	54.68	55.70
Walker	first bridge	9/19	6.14	5.60	5.87
Grider	near bridge across Grider	9/19	22.15	20.29	21.22
Independence	300' up from mouth	9/20	15.52	13.78	14.65
Oak Flat	under the bridge	9/20	1.49	1.46	1.48
Elk	near mouth, near bridge	9/20	42.61	40.27	41.44
China	near culvert	9/20	1.70	1.66	1.68
Clear	under bridge	9/20	43.66	45.25	44.46
Swillup	400' up from Highway 96 (under hanging water line)	9/21	3.40	3.33	3.37
Coon	300' up from culvert	9/21	1.06	1.08	1.07
Dillon	200' downstream from 96 bridge	9/21	27.00	26.23	26.62
Ti	200' upstream from water filling station	9/21	4.91	5.40	5.16
Sandy Bar	300' from mouth	9/21	3.05	2.88	2.97
Irving	at end of foot trail	9/21	7.41	7.59	7.50
Stanshaw	at culvert	9/22	0.35	0.40	0.38
Stanshaw	above water intake	9/27	3.09	3.42	3.26
Rogers	200' from mouth	9/22	4.38	4.71	4.55
Fort Goff	below culvert	9/26	4.27	4.00	4.14
Seiad	*not surveyed				
Thompson	at bridge	9/26	10.56	12.15	11.36
Rock	at mouth	9/27	12.02	11.87	11.95

* not surveyed due to private property
source: USFS Happy Camp Fisheries Dept.

FACSIMILE COVER SHEET

To: Charles Rich
Michael Contreras

Firm: State Water Resources Control Board

Fax Number: 916-341-5400

Office Number:

From: Don Mooney

Total number of pages: 16 (including cover letter)

Date Transmitted: November 30, 2001

Time Transmitted: 4:50 PM

**LAW OFFICES OF
DONALD B. MOONEY**
129 C STREET, SUITE 2
DAVIS, CA 95616
530-758-2377
530-758-7169 (Fax)

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via the U.S. Postal Service. Thank you.

LAW OFFICES OF DONALD B. MOONEY**DONALD B. MOONEY**
Admitted in California and Oregon129 C Street, Suite 2
Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

November 30, 2001

**VIA FACSIMILE AND
REGULAR MAIL**Charles Rich
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000Re: *Unlawful Diversion of Water by Doug and Heidi Cole from Stanshaw
Creek, Siskiyou County*

Dear Mr. Rich:

This letter serves as the Klamath Forest Alliance's ("KFA") response to Janet Goldsmith's letter dated August 20, 2001 on behalf of Doug and Heidi Cole, and as a follow-up to the October 17, 2001, site visit to the Marble Mountain Ranch and Stanshaw Creek. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. The Coles' unlawful diversion of water from Stanshaw Creek poses a risk to these public trust resources, primarily coho salmon and steelhead. To this end, KFA requests that the State Water Resources Control Board ("SWRCB") take all appropriate action to curtail the unlawful diversions and to protect the public trust resources that are at risk from the unlawful diversions.

The unauthorized diversion of water subject to appropriation under the provisions of the Water Code is a trespass. (Water Code, § 1052.) Moreover, Water Code, § 1825 provides that "[i]t is the intent of the Legislature that the state should take vigorous action to . . . prevent the unlawful diversion of water. In the present case, the SWRCB staff has already determined that the Coles' diversion of water in excess of 0.11 cfs constitutes an unauthorized diversion of water. Additionally, the SWRCB staff has determined that any diversion of water for the generation of hydroelectric generation requires an appropriative water right permit. Thus, the Coles' current diversion of water from Stanshaw Creek constitutes an unlawful diversion of water.

The Coles' current diversion practices can be separated into two areas. First, the extent of the Coles' pre-1914 appropriative water rights for domestic and irrigation uses and whether their current diversion from Stanshaw Creek and water use exceed any claim to a pre-1914 appropriative water right, and thus constitutes an unlawful diversion. Second, whether the Coles' diversion of water for hydroelectric generation constitutes an unlawful diversion of water. If it does

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constitute an unlawful diversion of water, then should the SWRCB take action to prevent the unlawful diversion of water as provided for in Water Code sections 1052 and 1825? As discussed below, the Coles' current diversion of water exceeds any pre-1914 appropriative right for domestic and irrigation uses. Additionally, the Coles' do not possess a pre-1914 appropriative water for hydroelectric generation. Finally, and most importantly, the Coles' unlawful diversion harms coho salmon and steelhead.

1. The Coles' Current Diversions for Domestic and Irrigation Exceed Any Claim to a Pre-1914 Appropriative Water Right

Assuming the Coles can establish that they are the successors in interest to the Stanshaw pre-1914 appropriative water right, any pre-1914 appropriative water right is limited to the amount of water put to a reasonable and beneficial use. (Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) The SWRCB staff has concluded on at least two occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1998 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, *Land and Water Use in Klamath River Hydrographic Unit*, Table 4 at p. 55.) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists.

Although the Coles question the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles provide absolutely no evidence to dispute the estimated demand and they provide no alternate estimate of a higher demand. The Coles argue that Mr. Hayes believes that he *may* have underestimated his existing uses because it was based upon a single flow measurement at a time when he was not irrigating. The Coles, however, provide no evidence to support a higher demand rate at that time. Moreover, as indicated in the SWRCB's September 15, 1998, letter, the information contained in DWR Bulletin 94-6 was verified by Marvin Goss, Forest Service hydrologist, who lived on the Coles' property while it was under prior ownership. "Mr. Goss evaluated the capacity of the ditch as well as measuring the actual amount of water put to generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel." (Schueller Letter at p. 1.)

The SWRCB's September 15, 1998, letter indicates that in 1998, the Coles constructed a reservoir upon their property. Any claim the Coles may have to a pre-1914 appropriative water does not support the diversion of water to a reservoir constructed in 1998. Such use constitutes an expansion of the water right for which an application to appropriate water must be filed. Even though the SWRCB brought this matter to the Coles' attention over three years ago, it is KFA's understanding that the Coles continue to use of the reservoir and have not

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filed any application to appropriate water for such use. This constitutes an unauthorized diversion of water for which the Coles have made no attempt to remedy. Thus, the SWRCB should direct the Coles to cease and desist from diverting water to this storage facility, unless and until the Coles obtain a permit for such use.

At the site visit on October 16th, the SWRCB staff measured the flow of Stanshaw Creek at the point of diversion ("POD") to be approximately 1.6 cubic feet per second ("cfs"). The Coles were diverting approximately 50 percent of stream flow. At the time, however, the Coles were not generating any power from the diverted water. Thus, the entire diversion was for domestic and irrigation uses. This quantity of diversion exceeds the Coles' pre-1914 appropriative water right for domestic and irrigation purposes. As indicated in the SWRCB's September 15, 1998, letter, the Coles' pre-1914 appropriative water right for domestic and irrigation use is limited to 0.11 cfs. This amount is supported by Katherine Mrowka's February 4, 1993, letter to the Robert and Mary Young, the Coles' predecessors' in interest.

Based upon the substantial evidence, and essentially, uncontested evidence, any quantity of water diverted from Stanshaw Creek used for domestic and irrigation that exceeds 0.11 cfs constitutes a trespass and unlawful diversion of water

2. The Coles' Do Not Possess the Right to Divert Water For Hydroelectric Generation

The Coles' August 20th letter implies that the Coles have a pre-1914 appropriative water right to divert 3.0 cfs from Stanshaw Creek. The substantial evidence, however, indicates that no such water rights exist and that the Coles' current diversions constitute a trespass and unlawful diversion of water. In fact, the evidence submitted by the Coles, as well as Doug Cole's own admissions, demonstrate that hydroelectric generation began after 1945 and has increased since that time. In a letter dated April 9, 2000, from Doug Cole to Konrad Fisher, Mr. Cole stated that:

Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

(A copy of Mr. Coles' April 9, 2000, letter is attached as Exhibit A.)

Mr. Hayes' April 30, 2000, Declaration submitted with the Coles' August 20th letter also supports the conclusion that hydroelectric generation has been expanded over the years. Mr. Hayes' Declaration indicates that in 1945, there existed a 4 kw pelton wheel which was upgraded to a 9 kw pelton wheel, and in

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Page 4

1965, upgraded to a 100 kw pelton wheel. It should be noted also, as discussed above, in 1963, the quantity of water being diverted from Stanshaw Creek was 0.49 cfs and the ditch capacity was only 1.25 cfs.

The evidence supports Mr. Coles' statement that in about 1945, the ranch began hydroelectric generation. Mr. Cole's contention, however that no increase in stream contention that such use did not increase the quantity of water diverted from Stanshaw Creek is not supported by the evidence, in light of the fact that the Coles seek to divert up to 3 cfs for hydroelectric generation: an amount six times greater than previously documented uses from Stanshaw Creek.

The Coles' August 20th letter provides a description of the history of uses in which it describes hydroelectric generation as one of the historical uses of water on the ranch. This discussion, however, fails to state when such hydroelectric uses commenced. The Coles' letter implies that since an old pelton wheel was used for the generation of power, the date power generation commenced can be traced to the age of the pelton wheel. This does not allow for the possibility that when power generation began in 1945 as acknowledged by Doug Cole, that the previous owners used an older pelton wheel. Without some type of corroborating evidence, the mere existence of an old pelton wheel does not establish a pre-1914 appropriative water right. Additionally, the mere existence of a pelton wheel does not establish that any claimed water right has been continuously used since 1914. Finally, the old pelton wheel, along with Mr. Hayes' Declaration does not address the issue that since 1955, the ranch has increased its use of water for the hydroelectric generation. A trend followed by the Coles in their current diversions.

3. The SWRCB Should Direct the Coles to Cease All Unlawful Diversions

The Coles state that KFA failed to provide any factual basis that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. Additionally, the Coles' assert that no specifics are given of just how their unauthorized diversion of the waters of Stanshaw Creek are affecting either coho salmon or steelhead.

These questions were answered unequivocally at the site visit, as well as in the National Marine Fisheries Service's ("NMFS") November 15, 2001, letter to Charles Rich. There is uniform agreement among the fisheries biologists that have visited the Stanshaw Creek and analyzed the impacts of the Coles' diversions that the thermal refugia at the mouth of Stanshaw Creek is an important habitat element. (See NMFS' Letter dated November 15, 2001, Memorandum dated November 29, 2001 from Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University (Exhibit B); and Memorandum dated November 30, 2001, from Toz Soto, Fisheries Biologist, Karuk Tribe, Department of Natural Resources (Exhibit C).) As indicated in NMFS' letter, and by Mr. Soto, the natural flows from Stanshaw Creek provide

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Page 5

the necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek.

Currently there exists no instream flow requirements for Stanshaw Creek. As a result, without any regulatory oversight, the Coles have diverted up to 3.0 cfs from Stanshaw Creek regardless of amount of instream flow remaining in Stanshaw Creek. The United States Forest Service's flow data from September 2000, indicates that the Coles were diverting nearly 3.0 cfs from Stanshaw Creek when there averaged only 3.26 cfs above the point of diversion. Thus, flow at the culvert averaged less than 0.4 cfs. (See Select Middle Klamath Tributary Flow Summary, Table 1: 2000 Low- Flow Discharge Rates, Exhibit D)

According to Mr. Soto's review and analysis, "Stanshaw Creek provides important thermal refugia habitat or anadromous salmonids in the Klamath River." (See Exhibit C.) Additionally, "[w]ith proper flow, habitat in Stanshaw Creek is suitable for summer and winter rearing coho salmon." (*Id.*) The Coles' current diversion limits thermal refugia habitat at the mouth of Stanshaw Creek. (*Id.*) In order to maintain a properly functioning thermal refugia habitat at the mouth of Stanshaw Creek, the water diverted from Stanshaw Creek must be returned to Stanshaw. (*Id.*)

In Professor Roelofs' analysis, he concluded that::

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkel) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. (Exhibit B.)

The reduced stream flows also limit access to the creek for adult and juvenile salmonids. (Exhibit C.) The reduced flows and velocity also reduce adult spawning and nest building opportunities in lower Stanshaw Creek. (*Id.*) Another problem with the Coles' current diversion practices is that the diversion intake is not screened and salmonids are being entrained in the diversion ditch. (*Id.*) Finally, the Coles' rock dam has no ability to control or measure the amount of flow diverted from Stanshaw Creek. (*Id.*)

Based upon the foregoing, substantial evidence demonstrates that the Coles' current diversion practices have a direct impact on coho and steelhead, as well as their habitat. The Coles, however, have offered no expert opinion or analysis as to the harm and potential harm resulting from their unlawful

Mr. Charles Rich
November 30, 2001
Page 6

diversions. Such harm to and potential harm to coho salmon and steelhead justify, and in fact mandate, that the SWRCB direct the Coles to cease their unlawful diversions unless and until the Coles obtain an appropriate water right and have taken appropriate steps to ensure that the downstream resources are not harmed by their diversion.

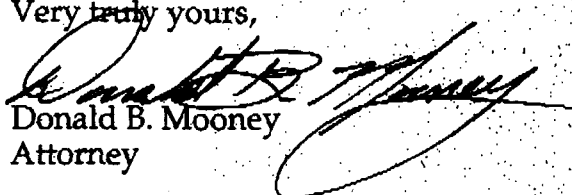
4. Conditions to Protect Public Trust Resources Must Be Imposed Upon Any Future Diversions

If the SWRCB does not direct the Coles to cease their unlawful diversions, then the SWRCB must require that the Coles maintain a minimum instream flow in Stanshaw Creek below the point of diversion and below the Highway 96 culvert.

If the SWRCB allows the Coles to continue their unlawful diversions, then, at an absolute minimum, it must impose the conditions outlined in NMFS' November 15, 2001, letter, in order to reduce any harm to downstream habitat and public trust resources. Such conditions include returning the flows to Stanshaw Creek before creek crosses Highway 96; install a fish screen at the point of diversion, install a diversion structure at point of diversion in order to control and limit the quantity of water diverted, install stream flow measuring device at the point of diversion and the point of return on Stanshaw Creek; provide access to Department of Fish and Game and NMFS for monitoring. Finally, the SWRCB should impose minimum instream flow and bypass requirements as recommended by NMFS.

As any instream flow and bypass requirements at this time would only be interim, pending the SWRCB's consideration of the Coles' application to appropriate water, KFA retains the right to reevaluate the minimum bypass and instream flow recommendations, as well as the point of return to Stanshaw Creek, KFA determines that such activities raise creek temperature and/or harm fish and public trust resources.

Very truly yours,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Felice Pace
Michael Contreras

Attachments

EXHIBIT A

000868

April 9, 2000

Konrad Fisher
1721 Court Street
Redding, California 96001

Dear Mr. Fisher:

We have received a copy of your protest of water rights application #29449 and hereby wish to respond to your concerns.

Our application has resulted from the process of the State's ongoing review of water usage in the State of California and the consequent updating and refining of all water usage permits. We currently operate a sixty-acre, year-round guest ranch which borders on the Klamath River and which lies between Irving Creek to the east and Stanshaw Creek to the west. Water has been continuously diverted from Stanshaw Creek to this property since about 1865. Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

In the second paragraph of the application notice, the wording is such as to suggest that we have the intention of diverting new water from Stanshaw Creek when, in fact, we are not. Apparently, the wording here is standard for all water rights applications, regardless of the specific nature of the project(s) involved. This application is being made for the sole purpose of satisfying a requirement of the State that any hydroelectric generation plant such as ours, regardless of how long it has been in operation, must now be formally permitted.

Approval of this permit application will

- not injure any existing water rights, since no reduction in Stanshaw Creek flow will result.
- not result in any adverse impact on the environment since nothing in the project description calls for any changes in the habitats bordering on the existing project. The power plant in question is situated within a waterway closed to migratory fish by a culvert under highway 96 and cannot, therefore, have any adverse effect on migratory fish. The existing project has been carefully studied by representatives of the State Department Of Fish And Game (Yreka office), the

(Page 1 of 2 pages)

Federal Department Of Forestry, and the State Water Resources Control Board and no complaints have been registered by any of these agencies regarding the health of the ecosystems adjoining the project.

- not work counter to public interest. In fact, the existance of the water canal along which the generation plant is situated provides for a better year-round flow in Irving ~~trunk~~ Creek, thus aiding fish spawning there. In addition, property immediately to our southwest, owned by a Mr. Neil Tocher, is supplied by water diverted from our system. Mr. Tocher has responded favorably to our permit request. Finally, the operation of our hydroelectric plant eliminates the need for our dependence on over-burdened public utilities.
- not be contrary to any laws, either county or state. Our current diversion of water from Stanshaw Creek is authorized under a pre-1914 water rights agreement which is on file in the Siskyou County offices..

Please reconsider your protest of our application to preserve (not expand) a project which has been in existence for over 55 years and which is essential to our livelihood. If you have any questions or further concerns, please contact us directly at the address or phone number given below.

Sincerely,



Marble Mountain Ranch
Douglas and Heidi Cole, owners
92520 Hwy 96
Somers Bar, Calif. 95568
(530) 469-3322

EXHIBIT B

000871

EXHIBIT C

000873

Karuk Tribe of California



Department of Natural Resources
Post Office Box 282
Orleans, CA 95556
(530) 627-3446 Fax (530) 627-3448

Administrative Office
Post Office Box 1016
Happy Camp, CA 96039
(530) 493-5305 Fax (530) 493-5322

Karuk Tribal Health Clinic
Post Office Drawer 249
Orleans, CA 95556
(530) 627-3452 Fax (530) 627-3445

Karuk Department of Natural Resources

November 30, 2001

Comments on the Stanshaw Creek Diversion

Stanshaw creek provides important thermal refugia habitat for anadromous salmonids in the Klamath River. Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for outmigrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids. Spawning and nest building sites for adult coho and steelhead are limited by the diversion. With augmented flows, established spawning sites are at risk of being dewatered.

Problems

1. The current diversion limits thermal refugia habitat associated with cold water input to the Klamath River. Diverted water must be returned to maintain properly functioning thermal refugia habitat at the mouth and in the lower reach of the creek.
2. Access to the creek for adult and juvenile salmonids is limited because of the diversion. Connectivity to the temperature-impaired Klamath River must be maintained to allow migration of cold-water dependant salmonids into Stanshaw Creek.
3. The diversion intake is not screened and salmonids are being entrained in the diversion ditch. A fish screen is needed to keep fish from being trapped and harmed by the hydro generator.
4. Reduced flows and reduced stream velocity limits adult spawning and nest building opportunities in lower Stanshaw Creek.
5. Flow below the diversion intake is not adequate for salmonid migration and rearing.
6. Slope failures associated with overtopping along the diversion ditch are a sediment sources to Stanshaw Creek.
7. The primitive nature of the rock dam type intake has no provision to control the amount of flow diverted.

For questions pertaining to these comments please contact the director of Karuk Department of Natural Resources, Leaf Hillman or fisheries biologist, Toz Soto at (530) 627-3446.

Sincerely,

Toz Soto, Fisheries Biologist

MC
copy to:
CAR

FACSIMILE COVER SHEET

To: Charles Rich
Michael Contreras

Firm: State Water Resources Control Board

Fax Number: 916-341-5400

Office Number:

From: Don Mooney

Total number of pages: 16 (including cover letter)

Date Transmitted: November 30, 2001

Time Transmitted: 4:50 PM

LAW OFFICES OF
DONALD B. MOONEY
 129 C STREET, SUITE 2
 DAVIS, CA 95616
 530-758-2377
 530-758-7169 (Fax)

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via the U.S. Postal Service. Thank you.

LAW OFFICES OF DONALD B. MOONEY

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dbmooney@dcn.davis.ca.us

November 30, 2001

VIA FACSIMILE AND
REGULAR MAILCharles Rich
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000Re: *Unlawful Diversion of Water by Doug and Heidi Cole from Stanshaw
Creek, Siskiyou County*

Dear Mr. Rich:

This letter serves as the Klamath Forest Alliance's ("KFA") response to Janet Goldsmith's letter dated August 20, 2001 on behalf of Doug and Heidi Cole, and as a follow-up to the October 17, 2001, site visit to the Marble Mountain Ranch and Stanshaw Creek. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. The Coles' unlawful diversion of water from Stanshaw Creek poses a risk to these public trust resources, primarily coho salmon and steelhead. To this end, KFA requests that the State Water Resources Control Board ("SWRCB") take all appropriate action to curtail the unlawful diversions and to protect the public trust resources that are at risk from the unlawful diversions.

The unauthorized diversion of water subject to appropriation under the provisions of the Water Code is a trespass. (Water Code, § 1052.) Moreover, Water Code, § 1825 provides that "[i]t is the intent of the Legislature that the state should take vigorous action to . . . prevent the unlawful diversion of water. In the present case, the SWRCB staff has already determined that the Coles' diversion of water in excess of 0.11 cfs constitutes an unauthorized diversion of water. Additionally, the SWRCB staff has determined that any diversion of water for the generation of hydroelectric generation requires an appropriative water right permit. Thus, the Coles' current diversion of water from Stanshaw Creek constitutes an unlawful diversion of water.

The Coles' current diversion practices can be separated into two areas. First, the extent of the Coles' pre-1914 appropriative water rights for domestic and irrigation uses and whether their current diversion from Stanshaw Creek and water use exceed any claim to a pre-1914 appropriative water right, and thus constitutes an unlawful diversion. Second, whether the Coles' diversion of water for hydroelectric generation constitutes an unlawful diversion of water. If it does

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DIV. OF WATER RIGHTS
SACRAMENTO

Mr. Charles Rich
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constitute an unlawful diversion of water, then should the SWRCB take action to prevent the unlawful diversion of water as provided for in Water Code sections 1052 and 1825? As discussed below, the Coles' current diversion of water exceeds any pre-1914 appropriative right for domestic and irrigation uses. Additionally, the Coles' do not possess a pre-1914 appropriative water for hydroelectric generation. Finally, and most importantly, the Coles' unlawful diversion harms coho salmon and steelhead.

1. The Coles' Current Diversions for Domestic and Irrigation Exceed Any Claim to a Pre-1914 Appropriative Water Right

Assuming the Coles can establish that they are the successors in interest to the Stanshaw pre-1914 appropriative water right, any pre-1914 appropriative water right is limited to the amount of water put to a reasonable and beneficial use. (Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) The SWRCB staff has concluded on at least two occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1998 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, *Land and Water Use in Klamath River Hydrographic Unit*, Table 4 at p. 55.) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists.

Although the Coles question the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles provide absolutely no evidence to dispute the estimated demand and they provide no alternate estimate of a higher demand. The Coles argue that Mr. Hayes believes that he *may* have underestimated his existing uses because it was based upon a single flow measurement at a time when he was not irrigating. The Coles, however, provide no evidence to support a higher demand rate at that time. Moreover, as indicated in the SWRCB's September 15, 1998, letter, the information contained in DWR Bulletin 94-6 was verified by Marvin Goss, Forest Service hydrologist, who lived on the Coles' property while it was under prior ownership. "Mr. Goss evaluated the capacity of the ditch as well as measuring the actual amount of water put to generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel." (Schueller Letter at p. 1.)

The SWRCB's September 15, 1998, letter indicates that in 1998, the Coles constructed a reservoir upon their property. Any claim the Coles may have to a pre-1914 appropriative water does not support the diversion of water to a reservoir constructed in 1998. Such use constitutes an expansion of the water right for which an application to appropriate water must be filed. Even though the SWRCB brought this matter to the Coles' attention over three years ago, it is KFA's understanding that the Coles continue to use of the reservoir and have not

Mr. Charles Rich
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filed any application to appropriate water for such use. This constitutes an unauthorized diversion of water for which the Coles have made no attempt to remedy. Thus, the SWRCB should direct the Coles to cease and desist from diverting water to this storage facility, unless and until the Coles obtain a permit for such use.

At the site visit on October 16th, the SWRCB staff measured the flow of Stanshaw Creek at the point of diversion ("POD") to be approximately 1.6 cubic feet per second ("cfs"). The Coles were diverting approximately 50 percent of stream flow. At the time, however, the Coles were not generating any power from the diverted water. Thus, the entire diversion was for domestic and irrigation uses. This quantity of diversion exceeds the Coles' pre-1914 appropriative water right for domestic and irrigation purposes. As indicated in the SWRCB's September 15, 1998, letter, the Coles' pre-1914 appropriative water right for domestic and irrigation use is limited to 0.11 cfs. This amount is supported by Katherine Mrowka's February 4, 1993, letter to the Robert and Mary Young, the Coles' predecessors' in interest.

Based upon the substantial evidence, and essentially, uncontested evidence, any quantity of water diverted from Stanshaw Creek used for domestic and irrigation that exceeds 0.11 cfs constitutes a trespass and unlawful diversion of water

2. The Coles' Do Not Possess the Right to Divert Water For Hydroelectric Generation

The Coles' August 20th letter implies that the Coles have a pre-1914 appropriative water right to divert 3.0 cfs from Stanshaw Creek. The substantial evidence, however, indicates that no such water rights exist and that the Coles' current diversions constitute a trespass and unlawful diversion of water. In fact, the evidence submitted by the Coles, as well as Doug Cole's own admissions, demonstrate that hydroelectric generation began after 1945 and has increased since that time. In a letter dated April 9, 2000, from Doug Cole to Konrad Fisher, Mr. Cole stated that:

Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

(A copy of Mr. Coles' April 9, 2000, letter is attached as Exhibit A.)

Mr. Hayes' April 30, 2000, Declaration submitted with the Coles' August 20th letter also supports the conclusion that hydroelectric generation has been expanded over the years. Mr. Hayes' Declaration indicates that in 1945, there existed a 4 kw pelton wheel which was upgraded to a 9 kw pelton wheel, and in

Mr. Charles Rich
November 30, 2001
Page 4

1965, upgraded to a 100 kw pelton wheel. It should be noted also, as discussed above, in 1963, the quantity of water being diverted from Stanshaw Creek was 0.49 cfs and the ditch capacity was only 1.25 cfs.

The evidence supports Mr. Coles' statement that in about 1945, the ranch began hydroelectric generation. Mr. Cole's contention, however that no increase in stream contention that such use did not increase the quantity of water diverted from Stanshaw Creek is not supported by the evidence, in light of the fact that the Coles seek to divert up to 3 cfs for hydroelectric generation: an amount six times greater than previously documented uses from Stanshaw Creek.

The Coles' August 20th letter provides a description of the history of uses in which it describes hydroelectric generation as one of the historical uses of water on the ranch. This discussion, however, fails to state when such hydroelectric uses commenced. The Coles' letter implies that since an old pelton wheel was used for the generation of power, the date power generation commenced can be traced to the age of the pelton wheel. This does not allow for the possibility that when power generation began in 1945 as acknowledged by Doug Cole, that the previous owners used an older pelton wheel. Without some type of corroborating evidence, the mere existence of an old pelton wheel does not establish a pre-1914 appropriative water right. Additionally, the mere existence of a pelton wheel does not establish that any claimed water right has been continuously used since 1914. Finally, the old pelton wheel, along with Mr. Hayes' Declaration does not address the issue that since 1955, the ranch has increased its use of water for the hydroelectric generation. A trend followed by the Coles in their current diversions.

3. The SWRCB Should Direct the Coles to Cease All Unlawful Diversions

The Coles state that KFA failed to provide any factual basis that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. Additionally, the Coles' assert that no specifics are given of just how their unauthorized diversion of the waters of Stanshaw Creek are affecting either coho salmon or steelhead.

These questions were answered unequivocally at the site visit, as well as in the National Marine Fisheries Service's ("NMFS") November 15, 2001, letter to Charles Rich. There is uniform agreement among the fisheries biologists that have visited the Stanshaw Creek and analyzed the impacts of the Coles' diversions that the thermal refugia at the mouth of Stanshaw Creek is an important habitat element. (See NMFS' Letter dated November 15, 2001, Memorandum dated November 29, 2001 from Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University (Exhibit B); and Memorandum dated November 30, 2001, from Toz Soto, Fisheries Biologist, Karuk Tribe, Department of Natural Resources (Exhibit C).) As indicated in NMFS' letter, and by Mr. Soto, the natural flows from Stanshaw Creek provide

Mr. Charles Rich
November 30, 2001
Page 5

the necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek.

Currently there exists no instream flow requirements for Stanshaw Creek. As a result, without any regulatory oversight, the Coles have diverted up to 3.0 cfs from Stanshaw Creek regardless of amount of instream flow remaining in Stanshaw Creek. The United States Forest Service's flow data from September 2000, indicates that the Coles were diverting nearly 3.0 cfs from Stanshaw Creek when there averaged only 3.26 cfs above the point of diversion. Thus, flow at the culvert averaged less than 0.4 cfs. (See Select Middle Klamath Tributary Flow Summary, Table 1: 2000 Low- Flow Discharge Rates, Exhibit D)

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In Professor Roelofs' analysis, he concluded that::

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkel) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. (Exhibit B.)

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Mr. Charles Rich
November 30, 2001
Page 6

diversions. Such harm to and potential harm to coho salmon and steelhead justify, and in fact mandate, that the SWRCB direct the Coles to cease their unlawful diversions unless and until the Coles obtain an appropriate water right and have taken appropriate steps to ensure that the downstream resources are not harmed by their diversion.

4. Conditions to Protect Public Trust Resources Must Be Imposed Upon Any Future Diversions

If the SWRCB does not direct the Coles to cease their unlawful diversions, then the SWRCB must require that the Coles maintain a minimum instream flow in Stanshaw Creek below the point of diversion and below the Highway 96 culvert.

If the SWRCB allows the Coles to continue their unlawful diversions, then, at an absolute minimum, it must impose the conditions outlined in NMFS' November 15, 2001, letter, in order to reduce any harm to downstream habitat and public trust resources. Such conditions include returning the flows to Stanshaw Creek before creek crosses Highway 96; install a fish screen at the point of diversion, install a diversion structure at point of diversion in order to control and limit the quantity of water diverted, install stream flow measuring device at the point of diversion and the point of return on Stanshaw Creek; provide access to Department of Fish and Game and NMFS for monitoring. Finally, the SWRCB should impose minimum instream flow and bypass requirements as recommended by NMFS.

As any instream flow and bypass requirements at this time would only be interim, pending the SWRCB's consideration of the Coles' application to appropriate water, KFA retains the right to reevaluate the minimum bypass and instream flow recommendations, as well as the point of return to Stanshaw Creek, KFA determines that such activities raise creek temperature and/or harm fish and public trust resources.

Very truly yours,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Felice Pace
Michael Contreras

Attachments

EXHIBIT A

000882

April 9, 2000

Konrad Fisher
1721 Court Street
Redding, California 96001

Dear Mr. Fisher:

We have received a copy of your protest of water rights application #29449 and hereby wish to respond to your concerns.

Our application has resulted from the process of the State's ongoing review of water usage in the State of California and the consequent updating and refining of all water usage permits. We currently operate a sixty-acre, year-round guest ranch which borders on the Klamath River and which lies between Irving Creek to the east and Stanshaw Creek to the west. Water has been continuously diverted from Stanshaw Creek to this property since about 1865. Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

In the second paragraph of the application notice, the wording is such as to suggest that we have the intention of diverting new water from Stanshaw Creek when, in fact, we are not. Apparently, the wording here is standard for all water rights applications, regardless of the specific nature of the project(s) involved. This application is being made for the sole purpose of satisfying a requirement of the State that any hydroelectric generation plant such as ours, regardless of how long it has been in operation, must now be formally permitted.

Approval of this permit application will

- not injure any existing water rights, since no reduction in Stanshaw Creek flow will result.
- not result in any adverse impact on the environment since nothing in the project description calls for any changes in the habitats bordering on the existing project. The power plant in question is situated within a waterway closed to migratory fish by a culvert under highway 96 and cannot, therefore, have any adverse effect on migratory fish. The existing project has been carefully studied by representatives of the State Department Of Fish And Game (Yreka office), the

(Page 1 of 2 pages)

Federal Department Of Forestry, and the State Water Resources Control Board and no complaints have been registered by any of these agencies regarding the health of the ecosystems adjoining the project.

- not work counter to public interest. In fact, the existance of the water canal along which the generation plant is situated provides for a better year-round flow in Irving ^{trule} Creek, thus aiding fish spawning there. In addition, property immediately to our southwest, owned by a Mr. Neil Tocher, is supplied by water diverted from our system. Mr. Tocher has responded favorably to our permit request. Finally, the operation of our hydroelectric plant eliminates the need for our dependence on over-burdened public utilities.
- not be contrary to any laws, either county or state. Our current diversion of water from Stanshaw Creek is authorized under a pre-1914 water rights agreement which is on file in the Siskyou County offices. .

Please reconsider your protest of our application to preserve (not expand) a project which has been in existence for over 55 years and which is essential to our livelihood. If you have any questions or further concerns, please contact us directly at the address or phone number given below.

Sincerely,

Douglas Cole

Marble Mountain Ranch
Douglas and Heidi Cole, owners
92520 Hwy 96
Somes Bar, Calif. 95568
(530) 469-3322

(Page 2 of 2 pages)

EXHIBIT B

000885



Department of Fisheries Biology

29 November 2001

To: Whom It May Concern

Terry D. Roelofs
From: Terry D. Roelofs, Professor

Subject: Appropriative Water Rights Application 29449 on Stanshaw Creek

Several months ago I was asked by Mr. Konrad Fisher to render an opinion regarding a water rights application to divert water from Stanshaw Creek, a Klamath River tributary in Siskiyou County, California. On 17 November 2001 I inspected the portion of Stanshaw Creek between Highway 96 and the Klamath River. Joining me on this site visit were Dr. Walt Duffy, Leader, California Cooperative Fisheries Research Unit at Humboldt State University, Mr Toz Soto representing the Karuk Tribe of California, and Mr. Michael David Fellows, caretaker of the Fisher Ranch. I have read an Environmental Field Report written by Robert E. Miller of the California State Water Resources Control Board describing a site visit to Stanshaw Creek attended by representatives of the National Marine Fisheries Service, California Department of Fish and Game, Karuk Tribe of California, and several non-agency personnel. I have also reviewed a letter dated 15 November 2001 by James R. Bybee of the National Marine Fisheries Service addressed to Mr. Charles Rich of the California State Water Resources Control Board.

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkle) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. I believe that these concerns should be addressed before Application 29449 is approved.

EXHIBIT C

000887

Karuk Tribe of California



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Administrative Office
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Karuk Department of Natural Resources
Comments on the Stanshaw Creek Diversion

November 30, 2001

Stanshaw creek provides important thermal refugia habitat for anadromous salmonids in the Klamath River. Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for outmigrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids. Spawning and nest building sites for adult coho and steelhead are limited by the diversion. With augmented flows, established spawning sites are at risk of being dewatered.

Problems

1. The current diversion limits thermal refugia habitat associated with cold water input to the Klamath River. Diverted water must be returned to maintain properly functioning thermal refugia habitat at the mouth and in the lower reach of the creek.
2. Access to the creek for adult and juvenile salmonids is limited because of the diversion. Connectivity to the temperature-impaired Klamath River must be maintained to allow migration of cold-water dependant salmonids into Stanshaw Creek.
3. The diversion intake is not screened and salmonids are being entrained in the diversion ditch. A fish screen is needed to keep fish from being trapped and harmed by the hydro generator.
4. Reduced flows and reduced stream velocity limits adult spawning and nest building opportunities in lower Stanshaw Creek.
5. Flow below the diversion intake is not adequate for salmonid migration and rearing.
6. Slope failures associated with overtopping along the diversion ditch are a sediment sources to Stanshaw Creek.
7. The primitive nature of the rock dam type intake has no provision to control the amount of flow diverted.

For questions pertaining to these comments please contact the director of Karuk Department of Natural Resources, Leaf Hillman or fisheries biologist, Toz Soto at (530) 627-3446.

Sincerely,

Toz Soto, Fisheries Biologist

EXHIBIT D

000889

Select Middle Klamath Tributary Flow Summary
Table 1: 2000 Low-Flow Discharge Rates

Stream	Location	Date	Flow #1	Flow #2	Average
Portuguese	above culvert	9/19	1.50	1.84	1.67
Indian	at mouth	9/19	56.71	54.68	55.70
Walker	first bridge	9/19	6.14	5.60	5.87
Grider	near bridge across Grider	9/19	22.15	20.29	21.22
Independence	300' up from mouth	9/20	15.52	13.78	14.65
Oak Flat	under the bridge	9/20	1.49	1.46	1.48
Elk	near mouth, near bridge	9/20	42.61	40.27	41.44
China	near culvert	9/20	1.70	1.66	1.68
Clear	under bridge	9/20	43.66	45.25	44.46
Swillup	400' up from Highway 96 (under hanging water line)	9/21	3.40	3.33	3.37
Coon	300' up from culvert	9/21	1.06	1.08	1.07
Dillon	200' downstream from 96 bridge	9/21	27.00	26.23	26.62
Ti	200' upstream from water filling station	9/21	4.91	5.40	5.16
Sandy Bar	300' from mouth	9/21	3.05	2.88	2.97
Irving	at end of foot trail	9/21	7.41	7.59	7.50
Stanshaw	at culvert	9/22	0.35	0.40	0.38
Stanshaw	above water intake	9/27	3.09	3.42	3.26
Rogers	200' from mouth	9/22	4.38	4.71	4.55
Fort Goff	below culvert	9/26	4.27	4.00	4.14
Seiad	*not surveyed				
Thompson	at bridge	9/26	10.56	12.15	11.36
Rock	at mouth	9/27	12.02	11.87	11.95

* not surveyed due to private property
source: USFS Happy Camp Fisheries Dept.

FACSIMILE COVER SHEET

To: Charles Rich
Michael Contreras

Firm: State Water Resources Control Board

Fax Number: 916-341-5400

Office Number:

From: Don Mooney

Total number of pages: 16 (including cover letter)

Date Transmitted: November 30, 2001

Time Transmitted: 4:50 PM

LAW OFFICES OF
DONALD B. MOONEY
 129 C STREET, SUITE 2
 DAVIS, CA 95616
 530-758-2377
 530-758-7169 (Fax)

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LAW OFFICES OF DONALD B. MOONEY

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November 30, 2001

**VIA FACSIMILE AND
REGULAR MAIL**

Charles Rich
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Unlawful Diversion of Water by Doug and Heidi Cole from Stanshaw
Creek, Siskiyou County*

Dear Mr. Rich:

This letter serves as the Klamath Forest Alliance's ("KFA") response to Janet Goldsmith's letter dated August 20, 2001 on behalf of Doug and Heidi Cole, and as a follow-up to the October 17, 2001, site visit to the Marble Mountain Ranch and Stanshaw Creek. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. The Coles' unlawful diversion of water from Stanshaw Creek poses a risk to these public trust resources, primarily coho salmon and steelhead. To this end, KFA requests that the State Water Resources Control Board ("SWRCB") take all appropriate action to curtail the unlawful diversions and to protect the public trust resources that are at risk from the unlawful diversions.

The unauthorized diversion of water subject to appropriation under the provisions of the Water Code is a trespass. (Water Code, § 1052.) Moreover, Water Code, § 1825 provides that "[i]t is the intent of the Legislature that the state should take vigorous action to . . . prevent the unlawful diversion of water. In the present case, the SWRCB staff has already determined that the Coles' diversion of water in excess of 0.11 cfs constitutes an unauthorized diversion of water. Additionally, the SWRCB staff has determined that any diversion of water for the generation of hydroelectric generation requires an appropriative water right permit. Thus, the Coles' current diversion of water from Stanshaw Creek constitutes an unlawful diversion of water.

The Coles' current diversion practices can be separated into two areas. First, the extent of the Coles' pre-1914 appropriative water rights for domestic and irrigation uses and whether their current diversion from Stanshaw Creek and water use exceed any claim to a pre-1914 appropriative water right, and thus constitutes an unlawful diversion. Second, whether the Coles' diversion of water for hydroelectric generation constitutes an unlawful diversion of water. If it does

Mr. Charles Rich
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Page 2

constitute an unlawful diversion of water, then should the SWRCB take action to prevent the unlawful diversion of water as provided for in Water Code sections 1052 and 1825? As discussed below, the Coles' current diversion of water exceeds any pre-1914 appropriative right for domestic and irrigation uses. Additionally, the Coles' do not possess a pre-1914 appropriative water for hydroelectric generation. Finally, and most importantly, the Coles' unlawful diversion harms coho salmon and steelhead.

1. The Coles' Current Diversions for Domestic and Irrigation Exceed Any Claim to a Pre-1914 Appropriative Water Right

Assuming the Coles can establish that they are the successors in interest to the Stanshaw pre-1914 appropriative water right, any pre-1914 appropriative water right is limited to the amount of water put to a reasonable and beneficial use. (Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) The SWRCB staff has concluded on at least two occasions that any pre-1914 appropriative water right is limited to approximately 0.11 cubic feet per second ("cfs"). (See letter dated September 15, 1998 from Harry M. Schueller to Doug Cole ("Schueller Letter"); and letter dated February 4, 1993 from Katherine Mrowka to Robert and Mary Young; see also 1963 DWR Bulletin 94-6, *Land and Water Use in Klamath River Hydrographic Unit*, Table 4 at p. 55.) DWR Bulletin 94-6 states that the total amount of water diverted for use on what is now the Coles' property is 362 acre-feet, a portion of which was for hydroelectric generation for which no pre-1914 appropriative water right exists.

Although the Coles question the SWRCB's estimate for the water demand for the uses on Marble Mountain Ranch, the Coles provide absolutely no evidence to dispute the estimated demand and they provide no alternate estimate of a higher demand. The Coles argue that Mr. Hayes believes that he *may* have underestimated his existing uses because it was based upon a single flow measurement at a time when he was not irrigating. The Coles, however, provide no evidence to support a higher demand rate at that time. Moreover, as indicated in the SWRCB's September 15, 1998, letter, the information contained in DWR Bulletin 94-6 was verified by Marvin Goss, Forest Service hydrologist, who lived on the Coles' property while it was under prior ownership. "Mr. Goss evaluated the capacity of the ditch as well as measuring the actual amount of water put to generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel." (Schueller Letter at p. 1.)

The SWRCB's September 15, 1998, letter indicates that in 1998, the Coles constructed a reservoir upon their property. Any claim the Coles may have to a pre-1914 appropriative water does not support the diversion of water to a reservoir constructed in 1998. Such use constitutes an expansion of the water right for which an application to appropriate water must be filed. Even though the SWRCB brought this matter to the Coles' attention over three years ago, it is KFA's understanding that the Coles continue to use of the reservoir and have not

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filed any application to appropriate water for such use. This constitutes an unauthorized diversion of water for which the Coles have made no attempt to remedy. Thus, the SWRCB should direct the Coles to cease and desist from diverting water to this storage facility, unless and until the Coles obtain a permit for such use.

At the site visit on October 16th, the SWRCB staff measured the flow of Stanshaw Creek at the point of diversion ("POD") to be approximately 1.6 cubic feet per second ("cfs"). The Coles were diverting approximately 50 percent of stream flow. At the time, however, the Coles were not generating any power from the diverted water. Thus, the entire diversion was for domestic and irrigation uses. This quantity of diversion exceeds the Coles' pre-1914 appropriative water right for domestic and irrigation purposes. As indicated in the SWRCB's September 15, 1998, letter, the Coles' pre-1914 appropriative water right for domestic and irrigation use is limited to 0.11 cfs. This amount is supported by Katherine Mrowka's February 4, 1993, letter to the Robert and Mary Young, the Coles' predecessors' in interest.

Based upon the substantial evidence, and essentially, uncontested evidence, any quantity of water diverted from Stanshaw Creek used for domestic and irrigation that exceeds 0.11 cfs constitutes a trespass and unlawful diversion of water

2. The Coles' Do Not Possess the Right to Divert Water For Hydroelectric Generation

The Coles' August 20th letter implies that the Coles have a pre-1914 appropriative water right to divert 3.0 cfs from Stanshaw Creek. The substantial evidence, however, indicates that no such water rights exist and that the Coles' current diversions constitute a trespass and unlawful diversion of water. In fact, the evidence submitted by the Coles, as well as Doug Cole's own admissions, demonstrate that hydroelectric generation began after 1945 and has increased since that time. In a letter dated April 9, 2000, from Doug Cole to Konrad Fisher, Mr. Cole stated that:

Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

(A copy of Mr. Coles' April 9, 2000, letter is attached as Exhibit A.)

Mr. Hayes' April 30, 2000, Declaration submitted with the Coles' August 20th letter also supports the conclusion that hydroelectric generation has been expanded over the years. Mr. Hayes' Declaration indicates that in 1945, there existed a 4 kw pelton wheel which was upgraded to a 9 kw pelton wheel, and in

Mr. Charles Rich
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1965, upgraded to a 100 kw pelton wheel. It should be noted also, as discussed above, in 1963, the quantity of water being diverted from Stanshaw Creek was 0.49 cfs and the ditch capacity was only 1.25 cfs.

The evidence supports Mr. Coles' statement that in about 1945, the ranch began hydroelectric generation. Mr. Cole's contention, however that no increase in stream contention that such use did not increase the quantity of water diverted from Stanshaw Creek is not supported by the evidence, in light of the fact that the Coles seek to divert up to 3 cfs for hydroelectric generation: an amount six times greater than previously documented uses from Stanshaw Creek.

The Coles' August 20th letter provides a description of the history of uses in which it describes hydroelectric generation as one of the historical uses of water on the ranch. This discussion, however, fails to state when such hydroelectric uses commenced. The Coles' letter implies that since an old pelton wheel was used for the generation of power, the date power generation commenced can be traced to the age of the pelton wheel. This does not allow for the possibility that when power generation began in 1945 as acknowledged by Doug Cole, that the previous owners used an older pelton wheel. Without some type of corroborating evidence, the mere existence of an old pelton wheel does not establish a pre-1914 appropriative water right. Additionally, the mere existence of a pelton wheel does not establish that any claimed water right has been continuously used since 1914. Finally, the old pelton wheel, along with Mr. Hayes' Declaration does not address the issue that since 1955, the ranch has increased its use of water for the hydroelectric generation. A trend followed by the Coles in their current diversions.

3. The SWRCB Should Direct the Coles to Cease All Unlawful Diversions

The Coles state that KFA failed to provide any factual basis that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. Additionally, the Coles' assert that no specifics are given of just how their unauthorized diversion of the waters of Stanshaw Creek are affecting either coho salmon or steelhead.

These questions were answered unequivocally at the site visit, as well as in the National Marine Fisheries Service's ("NMFS") November 15, 2001, letter to Charles Rich. There is uniform agreement among the fisheries biologists that have visited the Stanshaw Creek and analyzed the impacts of the Coles' diversions that the thermal refugia at the mouth of Stanshaw Creek is an important habitat element. (See NMFS' Letter dated November 15, 2001, Memorandum dated November 29, 2001 from Terry D. Roelofs, Professor, Department of Fisheries Biology, Humboldt State University (Exhibit B); and Memorandum dated November 30, 2001, from Toz Soto, Fisheries Biologist, Karuk Tribe, Department of Natural Resources (Exhibit C).) As indicated in NMFS' letter, and by Mr. Soto, the natural flows from Stanshaw Creek provide

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the necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek.

Currently there exists no instream flow requirements for Stanshaw Creek. As a result, without any regulatory oversight, the Coles have diverted up to 3.0 cfs from Stanshaw Creek regardless of amount of instream flow remaining in Stanshaw Creek. The United States Forest Service's flow data from September 2000, indicates that the Coles were diverting nearly 3.0 cfs from Stanshaw Creek when there averaged only 3.26 cfs above the point of diversion. Thus, flow at the culvert averaged less than 0.4 cfs. (See Select Middle Klamath Tributary Flow Summary, Table 1: 2000 Low- Flow Discharge Rates, Exhibit D)

According to Mr. Soto's review and analysis, "Stanshaw Creek provides important thermal refugia habitat or anadromous salmonids in the Klamath River." (See Exhibit C.) Additionally, "[w]ith proper flow, habitat in Stanshaw Creek is suitable for summer and winter rearing coho salmon." (*Id.*) The Coles' current diversion limits thermal refugia habitat at the mouth of Stanshaw Creek. (*Id.*) In order to maintain a properly functioning thermal refugia habitat at the mouth of Stanshaw Creek, the water diverted from Stanshaw Creek must be returned to Stanshaw. (*Id.*)

In Professor Roelofs' analysis, he concluded that::

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkel) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. (Exhibit B.)

The reduced stream flows also limit access to the creek for adult and juvenile salmonids. (Exhibit C.) The reduced flows and velocity also reduce adult spawning and nest building opportunities in lower Stanshaw Creek. (*Id.*) Another problem with the Coles' current diversion practices is that the diversion intake is not screened and salmonids are being entrained in the diversion ditch. (*Id.*) Finally, the Coles' rock dam has no ability to control or measure the amount of flow diverted from Stanshaw Creek. (*Id.*)

Based upon the foregoing, substantial evidence demonstrates that the Coles' current diversion practices have a direct impact on coho and steelhead, as well as their habitat. The Coles, however, have offered no expert opinion or analysis as to the harm and potential harm resulting from their unlawful

Mr. Charles Rich
November 30, 2001
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diversions. Such harm to and potential harm to coho salmon and steelhead justify, and in fact mandate, that the SWRCB direct the Coles to cease their unlawful diversions unless and until the Coles obtain an appropriate water right and have taken appropriate steps to ensure that the downstream resources are not harmed by their diversion.

4. Conditions to Protect Public Trust Resources Must Be Imposed Upon Any Future Diversions

If the SWRCB does not direct the Coles to cease their unlawful diversions, then the SWRCB must require that the Coles maintain a minimum instream flow in Stanshaw Creek below the point of diversion and below the Highway 96 culvert.

If the SWRCB allows the Coles to continue their unlawful diversions, then, at an absolute minimum, it must impose the conditions outlined in NMFS' November 15, 2001, letter, in order to reduce any harm to downstream habitat and public trust resources. Such conditions include returning the flows to Stanshaw Creek before creek crosses Highway 96; install a fish screen at the point of diversion, install a diversion structure at point of diversion in order to control and limit the quantity of water diverted, install stream flow measuring device at the point of diversion and the point of return on Stanshaw Creek; provide access to Department of Fish and Game and NMFS for monitoring. Finally, the SWRCB should impose minimum instream flow and bypass requirements as recommended by NMFS.

As any instream flow and bypass requirements at this time would only be interim, pending the SWRCB's consideration of the Coles' application to appropriate water, KFA retains the right to reevaluate the minimum bypass and instream flow recommendations, as well as the point of return to Stanshaw Creek, KFA determines that such activities raise creek temperature and/or harm fish and public trust resources.

Very truly yours,


Donald B. Mooney
Attorney

cc: Janet Goldsmith
Felice Pace
Michael Contreras

Attachments



April 9, 2000

Konrad Fisher
1721 Court Street
Redding, California 96001

Dear Mr. Fisher:

We have received a copy of your protest of water rights application #29449 and hereby wish to respond to your concerns.

Our application has resulted from the process of the State's ongoing review of water usage in the State of California and the consequent updating and refining of all water usage permits. We currently operate a sixty-acre, year-round guest ranch which borders on the Klamath River and which lies between Irving Creek to the east and Stanshaw Creek to the west. Water has been continuously diverted from Stanshaw Creek to this property since about 1865. Initially, the water was used primarily for mining and for irrigation of food crops. In ensuing years, uses shifted to agricultural and domestic and, in about 1945, to the additional use of hydroelectric generation for the ranch, with no increase in stream diversion being required.

In the second paragraph of the application notice, the wording is such as to suggest that we have the intention of diverting new water from Stanshaw Creek when, in fact, we are not. Apparently, the wording here is standard for all water rights applications, regardless of the specific nature of the project(s) involved. This application is being made for the sole purpose of satisfying a requirement of the State that any hydroelectric generation plant such as ours, regardless of how long it has been in operation, must now be formally permitted.

Approval of this permit application will

- not injure any existing water rights, since no reduction in Stanshaw Creek flow will result.
- not result in any adverse impact on the environment since nothing in the project description calls for any changes in the habitats bordering on the existing project. The power plant in question is situated within a waterway closed to migratory fish by a culvert under highway 96 and cannot, therefore, have any adverse effect on migratory fish. The existing project has been carefully studied by representatives of the State Department Of Fish And Game (Yreka office), the

(Page 1 of 2 pages)

Federal Department Of Forestry, and the State Water Resources Control Board and no complaints have been registered by any of these agencies regarding the health of the ecosystems adjoining the project.

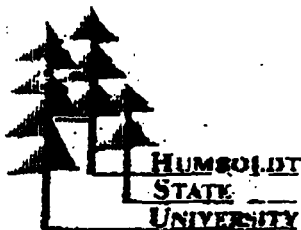
- not work counter to public interest. In fact, the existance of the water canal along which the generation plant is situated provides for a better year-round flow in Irving ~~trul~~ Creek, thus aiding fish spawning there. In addition, property immediatly to our southwest, owned by a Mr. Neil Tocher, is supplied by water diverted from our system. Mr. Tocher has responded favorably to our permit request. Finally, the operation of our hydroelectric plant eliminates the need for our dependence on over-burdened public utilities.
- not be contrary to any laws, either county or state. Our current diversion of water from Stanshaw Creek is authorized under a pre-1914 water rights agreement which is on file in the Siskyou County offices.

Please reconsider your protest of our application to preserve (not expand) a project which has been in existance for over 55 years and which is essential to our livelihood. If you have any questions or further concerns, please contact us directly at the address or phone number given below.

Sincerely,

Douglas & Heidi Cole

Marble Mountain Ranch
Douglas and Heidi Cole, owners
92520 Hwy 96
Somes Bar, Calif. 95568
(530) 469-3322



Department of Fisheries Biology

29 November 2001

To: Whom It May Concern

Terry D. Roelofs
 From: Terry D. Roelofs, Professor

Subject: Appropriative Water Rights Application 29449 on Stanshaw Creek

Several months ago I was asked by Mr. Konrad Fisher to render an opinion regarding a water rights application to divert water from Stanshaw Creek, a Klamath River tributary in Siskiyou County, California. On 17 November 2001 I inspected the portion of Stanshaw Creek between Highway 96 and the Klamath River. Joining me on this site visit were Dr. Walt Duffy, Leader, California Cooperative Fisheries Research Unit at Humboldt State University, Mr Toz Soto representing the Karuk Tribe of California, and Mr. Michael David Fellows, caretaker of the Fisher Ranch. I have read an Environmental Field Report written by Robert E. Miller of the California State Water Resources Control Board describing a site visit to Stanshaw Creek attended by representatives of the National Marine Fisheries Service, California Department of Fish and Game, Karuk Tribe of California, and several non-agency personnel. I have also reviewed a letter dated 15 November 2001 by James R. Bybee of the National Marine Fisheries Service addressed to Mr. Charles Rich of the California State Water Resources Control Board.

It is my professional opinion that diversion of water (up to 3 cubic feet per second, most of the summer base flow) from Stanshaw Creek in to Irving Creek during the summer and early fall months poses a threat to coho salmon and steelhead trout. Direct observation (mask and snorkle) surveys and electrofishing data show that juvenile coho salmon rear in lower Stanshaw Creek between the Klamath River and Highway 96. Reducing the low summer flow in this portion of the Stanshaw Creek decreases the amount of habitat available for coho salmon and may lead to increased daily temperatures, both of which could constitute a take of this federally listed species. I believe that these concerns should be addressed before Application 29449 is approved.

000902



Karuk Tribe of California



Department of Natural Resources
Post Office Box 282
Orleans, CA 95556
(530) 627-3446 Fax (530) 627-3448

Administrative Office
Post Office Box 1016
Happy Camp, CA 96039
(530) 493-5305 Fax (530) 493-5322

Karuk Tribal Health Clinic
Post Office Drawer 249
Orleans, CA 95556
(530) 627-3452 Fax (530) 627-3445

Karuk Department of Natural Resources

November 30, 2001

Comments on the Stanshaw Creek Diversion

Stanshaw creek provides important thermal refugia habitat for anadromous salmonids in the Klamath River. Salmonids using the creek include endangered coho salmon, steelhead (resident and anadromous) and chinook salmon. With proper flow, habitat in Stanshaw creek is suitable for summer and winter rearing coho salmon. During summer months, mainstem Klamath River water temperatures can become intolerable and salmonids must find cold-water thermal refugia areas associated with tributary mouths (Stanshaw Creek). Large boulders near the mouth of the creek combined with adequate cold-water flow coming from Stanshaw Creek could provide habitat suitable for adult summer steelhead and spring chinook holding. Cold-water plumes at creek mouths provide critical thermal refugia for outmigrant juvenile salmonids and returning adults. Loss of flow from Stanshaw Creek limits the size of the cold-water plume at the mouth and limits access up the creek for cold water seeking salmonids. Spawning and nest building sites for adult coho and steelhead are limited by the diversion. With augmented flows, established spawning sites are at risk of being dewatered.

Problems

1. The current diversion limits thermal refugia habitat associated with cold water input to the Klamath River. Diverted water must be returned to maintain properly functioning thermal refugia habitat at the mouth and in the lower reach of the creek.
2. Access to the creek for adult and juvenile salmonids is limited because of the diversion. Connectivity to the temperature-impaired Klamath River must be maintained to allow migration of cold-water dependant salmonids into Stanshaw Creek.
3. The diversion intake is not screened and salmonids are being entrained in the diversion ditch. A fish screen is needed to keep fish from being trapped and harmed by the hydro generator.
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5. Flow below the diversion intake is not adequate for salmonid migration and rearing.
6. Slope failures associated with overtopping along the diversion ditch are a sediment sources to Stanshaw Creek.
7. The primitive nature of the rock dam type intake has no provision to control the amount of flow diverted.

For questions pertaining to these comments please contact the director of Karuk Department of Natural Resources, Leaf Hillman or fisheries biologist, Toz Soto at (530) 627-3446.

Sincerely,

Toz Soto, Fisheries Biologist

CONTACT REPORT

WHO CONTACTED	METHOD	DATE
Jane Vorpapel, Dept. of Fish & Game	Phone / Site Visit (530) 225-2124	Tuesday, November 27, 2001
STAFF	Michael Contreras, ESIII (916) 341-5307 / mcontreras@waterrights.swrcb.ca.gov	
SUBJECT	Complaint Lodged Against Cole	
LOCATION	Stanshaw Creek/Irving Creek, Tributaries to the Klamath River	

NOTES

Phone call to Jane Vorpapel re: "best professional judgement" and requiring 2.5 cfs.

Request explanation of how 2.5 cfs was arrived at to "maintain connectivity and an adequate channel."

How will additional flow increase the refuge provided by the plunge pools?

Stanshaw Creek retains its accessibility to the Klamath River by the tender.

Jane, this is MC. We received the memo signed by Gary Stacey regarding the complaint investigation related to Doug and Heidi Cole on Stanshaw Creek. We have questions about the proposed bypass flow requirement. From your voice mail greeting, I understand that you are currently in the field. Please telephone me at (916) 341-5307 to discuss this matter. Thanks.

Her voice mail greeting indicates that out in the field or on vacation from


essence of msg left

11/26 - 12/7

CAR
29449**Memorandum**

To: Mr. Edward C. Anton, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-2000

Date: November 20, 2001

From:  Donald B. Koch, Regional Manager
Northern California-North Coast Region
Department of Fish and Game
601 Locust Street, Redding, California 96001

Subject: Complaint Investigation Relating to Application 29449 Doug Cole – Stanshaw Creek,
Tributary to Klamath River, Siskiyou County

The Department of Fish and Game has reviewed the subject application and attended two site visits with State Water Resources Control Board (Board) staff. The first field investigation was conducted by the Board's application and environmental section on July 26, 2000, and the latest complaint inspection was held on October 17, 2001. On March 17, 2000, we submitted a protest on the application which was accepted by the Board on April 4, 2000. Our protest is based on adverse environmental impacts which could result from reduced flows in Stanshaw Creek. Both the complaint and application refer to an existing unpermitted diversion of water from Stanshaw Creek.

At the time our protest of this application was filed in March 2000, our primary concern was protection of anadromous fish habitat in about a 0.25 mile reach of Stanshaw Creek from the Highway 96 crossing to the stream's confluence with the Klamath River. On April 27, 2001, the California Fish and Game Commission (Commission) accepted a petition to list coho salmon north of San Francisco Bay as an endangered species. Consequently, coho salmon are now considered as a candidate species pursuant to the California Endangered Species Act (CESA). On April 26, 2001, emergency regulations adopted by the Commission pursuant to Fish and Game Code Section 2084 went into effect. These regulations remain in effect during the 12-month candidacy period and authorize the incidental take of coho salmon resulting from diversion of water. The Commission will likely make its final listing decision in early June 2002 and if they decide to list the species, the current Section 2084 incidental-take authorization for water diversions will terminate. After listing, take of coho salmon will be prohibited unless authorized under Fish and Game Code Section 2081(b) or 2080.1. We urge the Board to consider the implications of their actions regarding subject complaint and final decision on water rights application #29449 in light of Fish and Game Code Section 2053 and the potential listing of coho salmon next year.

During the complaint inspection, we were told that the merits of the complaint would be reviewed within 30 days and, therefore, we are submitting these comments and recommendations for the Board's consideration. Formal protest dismissal terms will be submitted to the application unit at a future date.

Mr. Edward C. Anton
November 20, 2001
Page Two

Federally Listed coho salmon (*Onchorhynchus kisutch*) are known to exist in Stanshaw Creek. Coho salmon were listed as threatened under the Federal Endangered Species Act effective June 5, 1997, and as a candidate under the California Endangered Species Act on April 27, 2001. On two recent occasions, the Department has collected field information within Stanshaw Creek below the subject diversion in the area near its confluence with the Klamath River. On May 25, 2000, we collected 8 young of the year and 18 yearling steelhead trout in this area of Stanshaw Creek. On July 26, 2000, we sampled and found one juvenile coho salmon in Stanshaw Creek below the culverts which run under Highway 96. We believe the Highway 96 culverts are currently a barrier to upstream migration of fish and have, therefore, focused our concerns and mitigation measures on the 0.25 mile stream reach downstream of these culverts. This stream reach is characterized by deep pools, large woody debris, dense overhanging riparian cover shading the stream and generally cool water temperatures and thus provides good rearing and refuge habitat for juvenile coho salmon and steelhead trout. Coldwater habitats such as those provided by Stanshaw Creek are important refuges for juvenile coho salmon which may need to escape the warmer temperatures and low dissolved oxygen levels occasionally found in the Klamath River during the warm summer and early fall months. However, critical cold water refuge habitats for coho salmon and steelhead in lower Stanshaw Creek need to be accessible to the fish so sufficient water needs to stay in the stream to maintain connectivity to the Klamath River all year.

The Department currently proposes year-round bypass flows of 2.5 cubic feet per second (cfs) to be measured at the culverts below Highway 96 to mitigate potential impacts from the diversion on Stanshaw Creek. Our objective for these flows is to ensure existing instream habitat conditions in Stanshaw Creek for coho salmon and steelhead are maintained, water temperatures remain cold and year-round access to the stream from the Klamath River is guaranteed. To accomplish this objective, we recommend the total stream flow be bypassed whenever it is less than the designated amount. Based on field reviews and best professional judgment, it was determined that 2.5 cfs should maintain connectivity and an adequate channel which allows young salmonids access to Stanshaw Creek from the Klamath River. However, the Department may require additional bypass flows in the future if conditions change such that 2.5 cfs is no longer adequate to allow salmonid passage at the mouth of Stanshaw Creek. Future modification of the barriers or more detailed studies may also indicate a need for higher instream flows.

It is our understanding from discussions with Board staff that water is currently diverted from Stanshaw Creek even when there is not enough flow to run the hydroelectric generators. We believe this procedure results in water being wasted and not being put to beneficial use. This procedure typically occurs during critically dry periods when natural flows are needed to maintain salmonid access from the Klamath River to cooler water, rearing and refuge habitat found in Stanshaw Creek. If the stream flow in Stanshaw Creek is less than the amount needed to run the hydroelectric plant (3 cfs), then water for power generation should not be diverted and the entire natural flow of Stanshaw Creek should be bypassed to maintain the downstream fishery resources.

Mr. Edward C. Anton
November 20, 2001
Page Three

During both inspections, various options were discussed which could help satisfy the required downstream flow conditions. We believe two options have merit for the Board and the owner to consider. One option would be returning diverted flows back to Stanshaw Creek after the water is used to generate electricity. Currently, tailwater is discharged to the adjacent drainage of Irvine Creek. Second, improvements to the open ditch system and/or updating the hydroelectric generation system may also allow the applicant to divert less water while still meeting the needs for domestic purposes and electric generation.

If you have any questions or comments regarding this memorandum, please contact Environmental Scientist Jane Vorpapel at (530) 225-2124.

cc: Mr. James R. Bybee
National Marine Fishery Service
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

Mr. Doug Cole, et al.
92520 Highway 96
Somes Bar, California 95568

Ms. Jane Vorpapel
Department of Fish and Game
601 Locust Street
Redding, California 96001

U.S. DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

National Marine Fisheries Service
Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, Ca 95404-6515

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, \$300

AN EQUAL OPPORTUNITY EMPLOYER

Mr. Charles Rich, Chief
Complaints Unit
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

U.S. OFFICIAL MAIL



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MC



FACSIMILE TRANSMISSION

CALIFORNIA DEPARTMENT OF FISH AND GAME
NORTHERN CALIFORNIA-NORTH COAST REGION
601 LOCUST STREET
REDDING, CALIFORNIA 96001

INFORMATION (530) 225-2360

FAX (530) 225-2381

To: Michael Conteras

Date: 11/20/01

Fax #: 916 341-5400

Pages: 4, including this cover sheet.

From: Don Koch/sharon

Telephone: 225-2125

Subject: Coleman Complaint

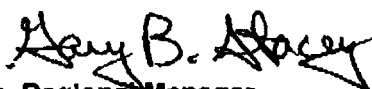
ADDITIONAL INSTRUCTIONS:

State of California

Memorandum

To: Mr. Edward C. Anton, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812-2000

Date: November 20, 2001

From: 
Donald B. Koch, Regional Manager
Northern California-North Coast Region
Department of Fish and Game
601 Locust Street, Redding, California 96001

Subject: Complaint Investigation Relating to Application 29449 Doug Cole – Stanshaw Creek,
Tributary to Klamath River, Siskiyou County

The Department of Fish and Game has reviewed the subject application and attended two site visits with State Water Resources Control Board (Board) staff. The first field investigation was conducted by the Board's application and environmental section on July 26, 2000, and the latest complaint inspection was held on October 17, 2001. On March 17, 2000, we submitted a protest on the application which was accepted by the Board on April 4, 2000. Our protest is based on adverse environmental impacts which could result from reduced flows in Stanshaw Creek. Both the complaint and application refer to an existing unpermitted diversion of water from Stanshaw Creek.

At the time our protest of this application was filed in March 2000, our primary concern was protection of anadromous fish habitat in about a 0.25 mile reach of Stanshaw Creek from the Highway 96 crossing to the stream's confluence with the Klamath River. On April 27, 2001, the California Fish and Game Commission (Commission) accepted a petition to list coho salmon north of San Francisco Bay as an endangered species. Consequently, coho salmon are now considered as a candidate species pursuant to the California Endangered Species Act (CESA). On April 26, 2001, emergency regulations adopted by the Commission pursuant to Fish and Game Code Section 2084 went into effect. These regulations remain in effect during the 12-month candidacy period and authorize the incidental take of coho salmon resulting from diversion of water. The Commission will likely make its final listing decision in early June 2002 and if they decide to list the species, the current Section 2084 incidental-take authorization for water diversions will terminate. After listing, take of coho salmon will be prohibited unless authorized under Fish and Game Code Section 2081(b) or 2080.1. We urge the Board to consider the implications of their actions regarding subject complaint and final decision on water rights application #29449 in light of Fish and Game Code Section 2053 and the potential listing of coho salmon next year.

During the complaint inspection, we were told that the merits of the complaint would be reviewed within 30 days and, therefore, we are submitting these comments and recommendations for the Board's consideration. Formal protest dismissal terms will be submitted to the application unit at a future date.

Mr. Edward C. Anton
November 20, 2001
Page Two

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Mr. Edward C. Anton
November 20, 2001
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If you have any questions or comments regarding this memorandum, please contact Environmental Scientist Jane Vorpapel at (530) 225-2124.

cc: Mr. James R. Bybee
National Marine Fishery Service
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

Mr. Doug Cole, et al.
92520 Highway 96
Somes Bar, California 95568

Ms. Jane Vorpapel
Department of Fish and Game
601 Locust Street
Redding, California 96001

CONTACT REPORT

WHO CONTACTED

METHOD

DATE

Don Mooney

Phone / Office Visit
(530) 758-2377

Friday, November 16, 2001

STAFF

Michael Contreras, ESIII
(916) 341-5307 / mcontreras@waterrights.swrcb.ca.gov

SUBJECT

Complaint Lodged Against Cole by KFA

LOCATION

Happy Camp

NOTES

I received a telephone call from Don Mooney, requesting additional time (2 weeks - 11/30/01) in which to get his information together. As a basis for the request, he drew a distinction between his letter requesting clarification of Harry Scheuller's letter and our processing it as a complaint.

After speaking with CAR, I left the following message on Don's voice mail, per his earlier request.

"I spoke with Chuck regarding your request for additional time. I relayed your distinction between submitting a letter requesting clarification and our processing it as a complaint.

Chuck reminded me that we had notified you that we had received your complaint, that we have spoken with you under the premise that this is a complaint, and that we began our field investigation by telling all present in Cole's dining room that this was a step in the complaint process.

He intends to move forward under the timeframe agreed to.

As I mentioned before, Chuck will be out next week, so if you wish to speak with him directly, please call now. He can be reached at 341-5377"



WR-6
CAR
29449
UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

November 15, 2001 151416-SWR-01-SR-928:SKL

Mr. Charles Rich, Chief
Complaints Unit
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

Dear Mr. Rich:

This letter represents our findings and protest dismissal terms of appropriative water rights application 29449. It is based on a State Water Resources Control Board (SWRCB) field investigation attended by Dr. Stacy Li, National Marine Fisheries Service (NMFS), Mr. Chuck Glasgow (NMFS), and Mr. Tim Broadman and Mr. Dave Rielly (NMFS Law Enforcement) on 17 October 2001 in relation to a complaint of an unpermitted diversion on Stanshaw Creek by Doug and Heidi Cole. The Coles have directly diverted up to 3 cubic feet per second (cfs) from Stanshaw Creek (watershed is approximately 3.2 square miles) the year round (when flows are available) for the purposes of domestic use and hydroelectric generation. The water used for hydroelectric generation is diverted into Irving Creek in an adjacent watershed. Irving Creek is also tributary to the Klamath River. The Coles have applied for appropriative rights for the hydroelectric use, but have pre-1914 rights for domestic use. The amount of the pre-1914 use is approximately 0.5 cfs.

NMFS is interested in this project because the Klamath River watershed supports federally threatened Southern Oregon/Northern California coasts Evolutionarily Significant Unit (ESU) of coho salmon (*Oncorhynchus kisutch*).

Existing Project

Typically each year the Coles must manually construct a structure of cobbles and boulders to divert water from Stanshaw Creek. The unscreened diversion delivers water via an earthen ditch approximately 1-foot deep, 2-foot wide, and 5200 feet long. The penstock is a steel pipe 16-inches in diameter and 455 feet long. A head of 200 feet is used to generate a maximum of 33.9 kilowatts with a Pelton wheel. Water not consumed by domestic use is returned to the Klamath River via



000915

Irving Creek. With the diversion active, approximately a mile of Stanshaw Creek has reduced flows; this reach is well shaded by topographic features as well as a thick canopy coverage of about 60%. About 1/4 mile of Irving Creek has augmented flows from Stanshaw Creek.

Stanshaw Creek enters the Klamath mainstem near River Mile (RM) 76. Irving Creek also enters the Klamath mainstem near RM 75. Stanshaw Creek has a smaller watershed than Irving Creek. While both streams are not gauged, the few measurements of Irving Creek and Stanshaw Creek during the summer suggest a summer base flow in Irving Creek as more than double (7 cfs vs. 3 cfs) that of Stanshaw Creek. Both streams provide cooler water than the mainstem Klamath River during the summer. Because water temperatures during the summer in the mainstem Klamath River are stressful to salmonids, it is likely that rearing juvenile anadromous salmonids use each tributary as a thermal refuge. California Department of Fish and Game collected juvenile coho salmon and steelhead with a backpack electrofisher in the portion of Stanshaw Creek 100 yards downstream of Highway 96 in July 2000. There is a culvert under Highway 96 on Stanshaw Creek that may limit anadromous fish access to upstream reaches.

The culvert under Highway 96 at Stanshaw Creek is listed on resource agencies master list for culverts with passage problems. CalTrans has stated that they will replace the culvert in the future to allow salmonid passage.

At the site we reviewed the project, examined the point of diversion (POD), the flume, the penstock, the reach downstream of the POD, and the reach of Stanshaw Creek between Highway 96 and the Klamath River.

Terms to Remove Protest

NMFS finds that the following conditions are necessary and sufficient to remove our protest:

- a) **Diversion Intake:** Limit diversion flow to a maximum of 3 cfs. The applicant proposes to divert a maximum of 3 cfs, but the existing intake has no provision to control the amount of flow diverted. There are a variety of methods of controlling flow including: head gates with adjustable undershot weir, notched weir, orifice, dimensional flume, and the like (See Bureau of Reclamation 1997).
- b) **Fish screen:** The existing diversion is not adequately screened to prevent entrainment. Any diversion should be adequately screened. We saw an 8" salmonid in the flume during the field investigation. The fish screen should follow NMFS/CDFG fish screen criteria. However, these fish screen criteria were developed with large diversions in mind. There may be adequate screening alternatives for smaller diversions such as this one. Please contact Mr. Richard Wantuck, NMFS (707) 575-6063 for technical advice regarding fish screens in small drainages.
- c) **Return flow:** Return the diverted flow from Stanshaw Creek back to Stanshaw Creek instead of to Irving Creek. Thermal refugia during the summer is an important habitat element in the Klamath River. It is our belief that diverted flow returned to Stanshaw Creek will provide necessary cold water to provide a thermal refuge at the mouth of Stanshaw Creek without compromising the thermal refuge on Irving Creek. During the field investigation, Mr. Cole ,

the applicant, stated that we would be willing to move the hydroelectric generating plant so that the tail race flow would return to Stanshaw Creek. The new return would be located on Stanshaw Creek upstream of Highway 96.

- d) Bypass flows: This is based upon the assumption that 3 cfs is a representative summer base flow. The nature of the point of diversion precludes precise bypass flows due to leaf fall or debris accumulation. However, bypass flows are of major concern only at low flows, i.e., 3 cfs. We believe that there is ample canopy that keeps the stream cool downstream of the POD provided that most of the flow is in Stanshaw Creek during low flow periods. Therefore, we recommend that a minimum bypass flow of 1.5 cfs be maintained at all times downstream of the POD. This bypass flow represents 50% of the summer base flow. This bypass flow recommendation assumes tailwater from the hydroelectric plant will be returned to Stanshaw Creek. Therefore, the thermal refuge downstream of Highway 96 will be maintained. This bypass flow recommendation may be modified when CalTrans provides salmonid passage through the Highway 96 culvert. The applicant must install and maintain permanent staff gages at the point of diversion to allow monitoring and facilitate release of bypass flows. Alternatively, the applicant may perform a comprehensive biological and hydrological study to identify an alternate biologically based bypass flow.
- e) Monitoring: Regardless of the quality of stream at the point of diversion, the proposed project should provide California Department of Fish and Game personnel access to all points of diversion and places of use for the purpose of conducting routine and or random monitoring and compliance inspections.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the State Water Resources Control Board to cooperate in the conservation of listed species. If you have any questions or comments concerning the contents of this letter please contact Dr. Stacy K. Li at (707) 575-6082.

Sincerely,



James R. Bybee
Habitat Manager
Northern California

cc: Doug and Heidi Cole
Irma Lagomarsino, PRD, NMFS, Arcata
Tim Broadman, Law Enforcement, NMFS, Arcata

CONTACT REPORT

WR-6

WHO CONTACTED

METHOD

DATE

Jane Vorpapel

Phone / Site Visit
(530) 225-2124

Tuesday, November 13, 2001

STAFF

Michael Contreras, ESIII
(916) 341-5307 / mcontreras@waterrights.swrcb.ca.gov

SUBJECT

Complaint Lodged Against Doug and Heidi Cole

LOCATION

Stanshaw Creek - Tributary of Klamath River

NOTES

Responding to her message requesting status update.

She said that DFG has been waiting for NMFS to develop a policy. As far as NMFS is concerned, they want NO DIVERSION.

DFG is drafting a document that will include "data based on field measurement and best professional judgement." They will conclude that the flow at the culvert (Stanshaw Creek) should be no less than 2.5 cfs, rather than "continuity" because that is more difficult to measure.

She also suggested that if Cole cannot get 3 cfs (enough to turn his pelton wheel) that he should then close off his diversion, and allow all remaining flow to proceed down Stanshaw Creek.



State Water Resources Control Board

SURNAME / FILES
WR-6



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

SEP 20 2001

To Attached Mailing List

The Division of Water Rights (Division) received a complaint against Doug and Heidi Cole on June 18, 2001, lodged by Don Mooney, legal counsel representing the Klamath Forest Alliance (KFA). On August 20, 2001, an Answer to Complaint was received from Janet Goldsmith, legal counsel for the Coles. Based on a short telephone discussion with Mr. Mooney prior to him leaving on vacation, we do not believe that Ms. Goldsmith's response adequately resolves the complaint filed on behalf of the KFA. Therefore, unless notified to the contrary, the next step in the complaint process is to schedule a field investigation.

We propose to conduct this investigation on **Wednesday, October 17, 2001**. We would like to have all interested parties meet at the Marble Mountain Ranch at 9:00 a.m. on that date. Because the issues raised by KFA relate to the health and well being of anadromous fish, we would appreciate the participation of representatives from the National Marine Fisheries Service and the California Department of Fish and Game. We will be inspecting both Stanshaw Creek below the point of diversion and Irving Creek below the point where diverted water is released to this creek. Because the ditch heads on Forest Service property, we would also appreciate the participation of a representative from the U.S. Forest Service. If these agencies do not participate in this investigation or make other arrangements for their input, we will assume that they have no position or interest in this matter.

If this date is unworkable for any party, please let me know what alternate dates are better. However, Division staff believe that this investigation must be conducted before the onset of winter rains. Therefore, we are not willing to postpone this investigation beyond October 26th.

Please let me know if you intend to participate in the October 17th investigation, or if some other date/time during that week would be preferable. I can be reached by telephone at (916) 341-5307, or by e-mail at mcontreras@waterrights.swrcb.ca.gov.

Sincerely,

Michael Contreras

Attachment

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>."

SURNAME
DWR 540

ml 9/19/01

CR 9-19-01

000919

KRONICK
MOSKOVITZ
& TIEDEMANN
& GIRARD
A PROFESSIONAL CORPORATION

JANET K. GOLDSMITH

August 20, 2001

VIA HAND DELIVERY

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, CA 95812-2000

Attn: Michael Contreras

Re: Water Right Complaint Against Douglas and Heidi Cole;
Stanshaw Creek, Siskiyou County

Dear Mr. Schueller:

This letter responds to the letter dated June 14, 2001 from Donald Mooney on behalf of the Klamath Forest Alliance ("KFA") complaining of diversions by Heidi and Douglas Cole from Stanshaw Creek in Siskiyou County. In essence the letter asserts that the Coles have not provided evidence that the pre-1914 water right filing by Samuel Stenshaw pertained to their land, and that their diversions harm coho salmon and steelhead in Stanshaw Creek and the Klamath River. This letter provides the evidence requested concerning the basis of the Coles' claim of pre-1914 water rights. The KFA allegations that the Coles' diversions constitute a "take" of coho or steelhead salmon are unsupported and incorrect. The Coles' diversion is not harming either the coho or steelhead (or any other) fishery in either Stanshaw Creek or the Klamath River.

A. HISTORY OF USE

Attached as Exhibit A to this letter is Patent 186169¹ from the United States to Samuel Stenshaw dated March 27, 1911. Because the handwritten description in the Stenshaw patent is difficult to read, I have verified the property description using the BLM Master Township Plat and Historical Index.² The description of the land patented to Stenshaw includes forty acres of what is now known as Marble Mountain Ranch, owned by the Coles.³

¹ The patent number appears at the bottom of the page, below the signatures.

² The land is described as a patent granted pursuant to a Homestead Entry: "W¹/₂ SW¹/₄ NW¹/₄, W¹/₂ NW¹/₄ SW¹/₄, SE¹/₄ NW¹/₄ SW¹/₄, SW¹/₄ NE¹/₄ SW¹/₄, and the N¹/₂ NW¹/₄ SE¹/₄ SW¹/₄ of Section 33, and E¹/₂ E¹/₂ NE¹/₄ SE¹/₄ and E¹/₂ SE¹/₄ NE¹/₄ of Section 32, T 13 N, R 6 E, Humboldt Meridian. Because

Harry M. Schueller, Chief
 Division of Water Rights
 August 20, 2001
 Page 2

10987.2-1

According to Edwin Gustave Gudde, California Gold Camps (U.C. Berkeley Press, 1975), the Stanshaw Mine was in operation at the turn of the century and was reported in Mining Bureau reports as late as 1935. A mining pit is located on the Marble Mountain Ranch.

Water was also used for domestic purposes and irrigation. The notice of appropriation states that it was in part "for irrigating purposes" and describes the ditch and flume as running "to my upper field." (See Exhibit D, Notice of Appropriation, Liber 1 of Water Rights, page 397, Siskiyou Official Records)

Violet Anderson, who moved to the area shortly after Stanshaw conveyed a portion of his property to Guy and Blanche McMurtry, recalls that she cooked in an old cookhouse on the property for up to two shifts of workers who boarded there, and that the McMurtrys ran a small dairy. (Exhibit E.) She recalls that electricity was already in use at that time in connection with the dairy. Among other purposes, it was used to sterilize the bottles into which milk was transferred for sale.⁴ Minerva Starritt, one of the early schoolteachers at the Irving Creek schoolhouse recalls that when she arrived in 1935, Guy McMurtry was the Superintendent for the State Highway 96 and "had cabins where the state highway workers lived with their families." (The Siskiyou Pioneer (Siskiyou County Historical Society, Vol. 6, No. 2, 1989). (Exhibit F.))

The McMurtrys owned the property until Lue and Agnes Hayes purchased it in 1955. At the time of the purchase, Mr. Hayes recalls that 30 acres were under irrigation and there was an existing 4 KW pelton wheel and an existing 12" main water line on the property. (Exhibit G.) The pelton wheel was described by William M. Heitler of the U.S.F.S. as "the 85-year old pelton wheel" (Exhibit H). Mr. Hayes identified it as "an old C-3 HP generator."⁵ The power generating facilities have since been upgraded several times by Mr. Hayes and successive owners, including the Coles, but the evidence is that power was being generated from a very early date. The engineer retained by the Coles to upgrade the power facilities described the pelton wheel as dating from perhaps the first decade of the last century. The old pelton wheel remains available for inspection at the Ranch.

Domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. The Hayes' use has been described in the 1963 DWR Bulletin 94-6 "Land and Water Use in Klamath River Hydrographic Unit." (Table 4, at p. 55.) Mr. Hayes believes that the demand estimated at that time may have underestimated his existing uses because it was based on a single flow measurement taken in late fall when he was not irrigating. (See Exhibit G.)

the Historical Index page is 24" x 28" it is difficult to reproduce and is not included as an Exhibit to this letter. It is available for your inspection and verification on request.

The patented land was resurveyed by the Bureau of Land Management in 1985 and designated "Tract 48" on that resurvey. A portion of Sheet 1 of 8 of that resurvey is attached as Exhibit B.

³ A copy of the Coles' deed is attached as Exhibit C.

⁴ Personal communication, 8/19/01.

⁵ Personal communication, 8/16/01.

Harry M. Schueller, Chief
 Division of Water Rights
 August 20, 2001
 Page 3

10987.2-1

The Hayes conveyed the Ranch to the Youngs, whose uses are documented in your files. The Youngs conveyed the Ranch to the Coles in 1994. The Coles' residence is the same house originally occupied by Samuel Stenshaw.

While there has been an evolution of uses for the Stanshaw Creek appropriation since the early days of the Stanshaw Mine, it is clear that year-round uses of water were in practice from early in the last century. Mining, domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. While mining may no longer be pursued, changes in purpose of use of pre-1914 appropriations have been permissible so long as no other user is injured. The very long history of the current uses of water on Marble Mountain Ranch belie any assertion that others have been harmed by the shift in purpose of use of this water.

B. CALCULATION OF WATER DUTY

The estimate of water demand for the documented uses on Marble Mountain Ranch, as set forth in the SWRCB letter of February 4, 1993 from Katherine Mwroka (Exhibit I) appears questionable for several reasons.

First, it is based on use *at the point of use*, and therefore does not take into account conveyance losses in the ditch leading from Stanshaw Creek. This ditch is seven tenths of a mile long⁶ and is constructed of flumes and earthen materials. While the Coles have taken steps to improve conveyance efficiency (see Exhibit H), there remain reasonable losses that should be considered in calculating the amount of diversion necessary to satisfy their pre-1914 appropriative right.

Second, the calculation completely ignores water demand for power production. As explained above, power use began early in the last century and has been continuous throughout the history of the Ranch.

Third, the water duty used by Ms. Mwroka for calculating irrigation demand is questionable. Ms. Mwroka based her estimate of irrigation demand on a water duty of one cfs per eighty acres of irrigated land. This is the most conservative water duty proposed in the SWRCB guidelines concerning reasonable use for irrigation. While it may be appropriate for other areas of Siskiyou County, it is not appropriate for calculating irrigation water demand on Marble Mountain Ranch. The porous nature of the soil on the Ranch and the slopes involved suggest that a higher water duty should be used.

C. LACK OF JUSTIFICATION FOR A CEASE AND DESIST ORDER

The complainant fails utterly to provide any factual evidence that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. The sole allegation of adverse impact is a single paragraph in the middle of page 3 of the KFA letter that alleges that the National Marine Fisheries Service ("NMFS") and California Department of Fish and Game ("DFG") "are concerned." No specifics are given of just how the long-standing diversions of the Ranch are affecting either coho salmon or steelhead. No statements of either the DFG or NMFS are attached to the KFA letter.

⁶ DWR Bulletin 94-6, Table 4, p. 55.

Harry M. Schueller, Chief
Division of Water Rights
August 20, 2001
Page 4

10987.2-1

The only evidence offered by KFA is a letter from the U.S. Forest Service District Ranger, William Heitler reporting such "concerns," again without specifics. The USFS letter related to the question whether the Coles had, or needed, a fee permit for the ditch. Subsequently, based on the age of the ditches, it was determined that no fee permit was required. (See Exhibit H.) In a subsequent memo, Mr. Heitler also comments on the responsiveness of the Coles to DFG's direction concerning fish passage at the century-old rock and rubble diversion dam. (*Ibid.*)

In a March 8, 2000 letter concerning the Coles' water right application for 3 cfs diversion for power production, the following *general* concerns were listed by NMFS concerning coho salmon: migration delay, loss of habitat due to dewatering, stranding of fish due to dewatering of the stream, entrainment in poorly screened diversions, and increased water temperatures. None of the issues was raised based on any site specific investigation or concern.

None of the issues mentioned in the NMFS letter are being significantly exacerbated, if at all, by the Coles' diversions under their existing rights. Stanshaw Creek is not a migration or spawning resource for coho salmon, nor is it available for juvenile rearing, since the culverts at Highway 96 prevent passage upstream into the creek. There are no pools in the 600' reach of Stanshaw Creek below the highway to serve as "preferred" rearing habitat for juveniles (according to the NMFS letter). However, coho habitat has been documented in Irving Creek to which the Coles' diverted water is ultimately returned. The addition of flow to that creek may well benefit the coho resource of concern to the KFA.

Temperature at the mouth of Stanshaw Creek was measured at 65° F in the afternoon of August 17, 2001 by Douglas Cole, within the reported range of suitability for coho juveniles and within the range of "best" suitability for the steelhead trout that inhabit the creek (Klamath Resource Information System).

Water in Stanshaw Creek is bypassed through the rock and rubble diversion dam. The diversion is maintained pursuant to a Five Year Maintenance Agreement between the Coles and the California Department of Fish and Game, dated January 21, 1999. There is continuous flow bypassing the Ranch diversion, and fish passage has been observed in both directions. As reported by Mr. Heitler in his April 6, 2001 e-mail memo, "The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction." (Exhibit H.) The flow in Stanshaw Creek extends to the mouth, even in this dry month of a dry year.

The mere fact that coho are a listed species and steelhead are a candidate species is no evidence that the decades-long diversions for the Ranch are harming the fishery. The above data refute the allegation that the current diversions by the Coles violate the Endangered Species Act. The complainants have produced no evidence of harm to protected species from a continuation of diversions.

Beyond the Endangered Species Act, however, the KFA has raised a claim of public trust violation. In any public trust evaluation, the harm to the public trust resource (if any) must be balanced against the reliance on the diversions. In this instance, there is clear evidence of a century of reliance on the water and a good faith belief that the diversions are justified under the pre-1914 appropriation by Samuel Stanshaw. The Coles' water use is reasonable and beneficial, and the Coles and their predecessors have continually improved the efficiency of use. No other water source is available to the Coles, whose entire livelihood depends on the continued availability of water from Stanshaw Creek. This

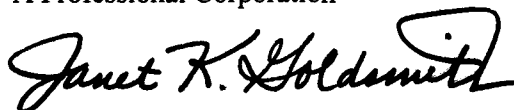
Harry M. Schueller, Chief
Division of Water Rights
August 20, 2001
Page 5

10987.2-1

great reliance, balanced against the lack of any specific allegation or evidence of harm to public trust resources by continuation of diversions pending SWRCB action on the Coles' pending application, should militate against any enforcement action at this time.

Please feel free to contact me if you have further questions.

Sincerely,
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation



Janet K. Goldsmith
Attorneys for Douglas and Heidi Cole,
Marble Mountain Ranch

JKG/mm

Attachments

cc: Douglas Cole
Donald Mooney
Michael Contreras

The United States of America

Homestead Certificate No. _____
Application No. Eureka 01271

To all to whom these presents shall come, Greeting-

Whereas, There has been deposited in the GENERAL LAND OFFICE of the United States a Certificate of the REGISTER OF THE LAND OFFICE at Eureka, California, has been deposited in the General Land Office whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of _____ COMPARED

Samuel Stenslow has been established and duly consummated, in conformity to law, for the East half of the East half of the North-east quarter of the the southeast Quarter and the (East half of the southeast quarter) of the Northeast Quarter of Section Thirty-two and the West half of the Southwest Quarter of the Northwest Quarter, the west half of the Northwest quarter of the Southwest quarter, the southeast quarter of the north-west quarter of the southwest quarter, the southwest quarter of the northeast quarter of the southwest quarter and the West half of the north-west quarter of the southeast quarter north of range 14 east of the 100th meridian according to the OFFICIAL PLAT of the Survey of the said Land, returned to the GENERAL LAND OFFICE

by the SURVEYOR GENERAL:

Now know Ye, That there is, therefore, granted by the United States unto the said claimant the tract of Land above described To have and to hold the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

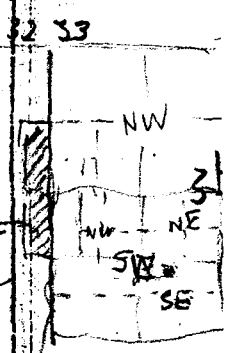
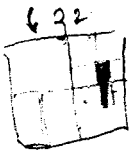
In testimony whereof, I, William H. Taft PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made Patent, and the seal of the GENERAL LAND OFFICE to be hereunto affixed.

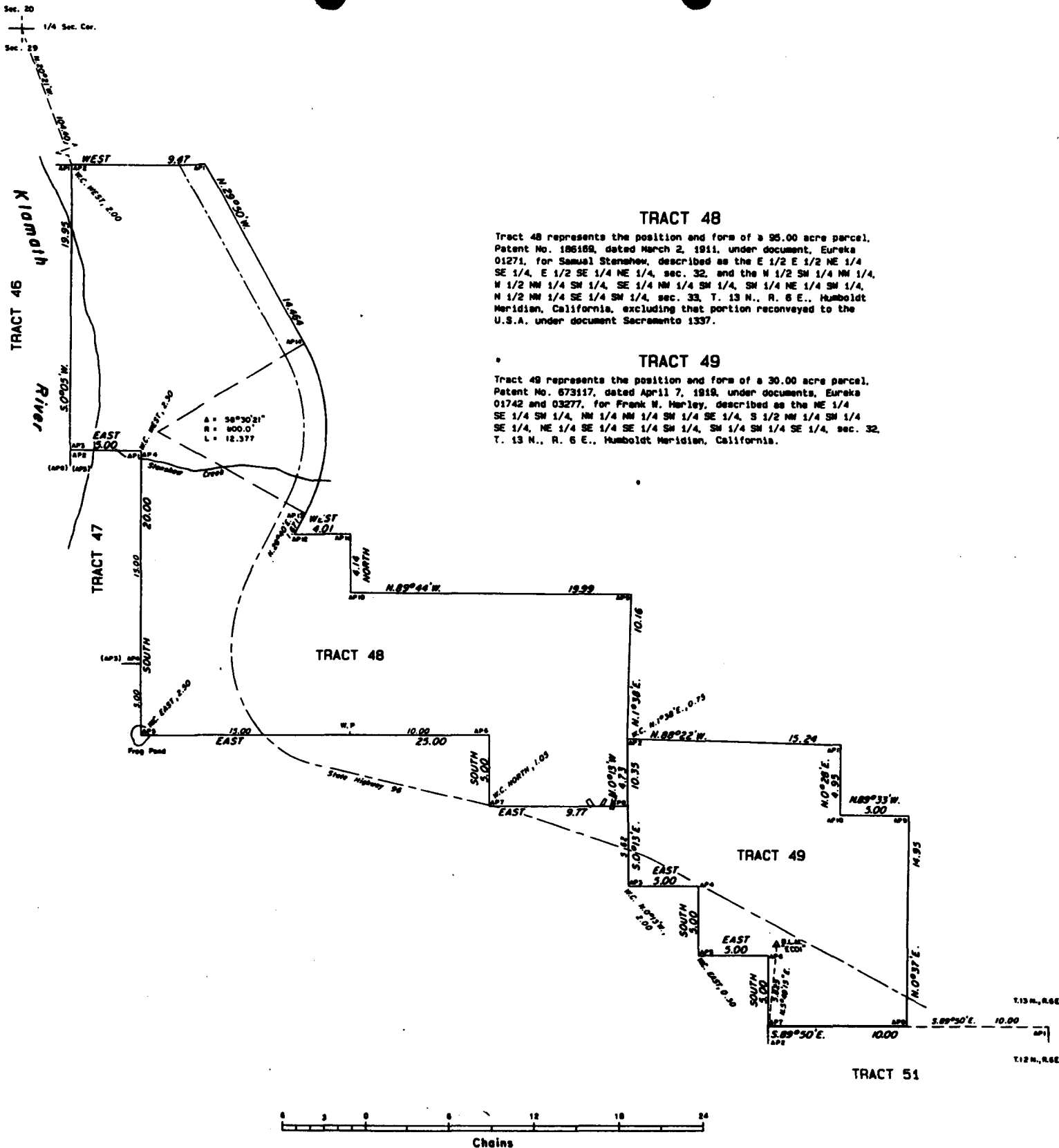
GIVEN under my hand, at the CITY OF WASHINGTON, the Twenty-seventh day of March, in the year of our Lord one thousand nine hundred and Eleven, and of the Independence of the United States the one hundred and thirty-fifth

[SEAL]

BY THE PRESIDENT Wm. H. Taft
By H. H. Sanford Secretary.
Recorder of the General Land Office

Patent Number 156149
Recorded California, Vol. _____ Page _____
Recorded at Request of Samuel Stenslow Office of George County Recorder
Jan 24 1918 at 37 hours past 8 A.M.
By _____ Deputy Recorder





61 260-U

EXHIBIT B

RECORDED AT REQUEST OF
SISKIYOU COUNTY TITLE CO

OFFICIAL RECORDS
SISKIYOU COUNTY, CALIF.

DEC 30 3 00 PM '94

94018121

David J. [Signature]

\$14.00

Recording requested by:
SISKIYOU COUNTY TITLE CO.
AND WHEN RECORDED MAIL THIS DEED AND
UNLESS OTHERWISE SHOWN BELOW, MAIL
TAX STATEMENT TO:

Name: Mr. and Mrs. Doug Cole

Mailing Address: 92520 Hwy. 96

City/State/Zip: Searsville, CA
95568

Order No. 60696-dn

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Grant Deed

THE UNDERSIGNED GRANTOR(S) DECLARE(S)

DOCUMENTARY TRANSFER TAX IS \$ 88.00

computed on full value of property conveyed, or

computed on full value less value of liens or encumbrances remaining at
time of sale.

Unincorporated area City of , AND

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

ROBERT E. YOUNG and MARY J. YOUNG, husband and wife

hereby GRANT(S) to DOUGLAS T. COLE and HEIDI ANN COLE, husband and wife as
Joint Tenants

the following described real property in the
County of Siskiyou State of California:

EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.
TOGETHER WITH ALL WATER RIGHTS APPURTENANT THERETO.

Dated December 15, 19 94

STATE OF CALIFORNIA
COUNTY OF SISKIYOU
On 12/29/94 before me, the undersigned, a
Notary Public in and for said State, personally appeared
Robert E. Young and Mary J. Young

Robert E. Young
Robert E. Young
Mary J. Young
Mary J. Young

personally, known to me (or proved to me on the basis of
satisfactory evidence) to be the person(s) whose name(s)
in/are subscribed to the within instrument and acknowledged
to me that he/she/they executed the same in his/her/their
authorized capacity(ies), and that by his/her/their signature(s)
on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

Signature *Denise D. Nixon*
NOTARY PUBLIC IN AND FOR SAID STATE

.....
DENISE D. NIXON
COMM. #1011830
NOTARY PUBLIC - CALIFORNIA
SISKIYOU COUNTY
My Comm. Exp. Dec. 26, 1997
.....

MAIL TAX STATEMENTS AS DIRECTED ABOVE.

94018121

EXHIBIT "A"

ALL THAT REAL PROPERTY SITUATE IN THE COUNTY OF SISKIYOU, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL I:

The Southeast 1/4 of the Northwest 1/4 of the Southwest 1/4, the Southwest 1/4 of the Northeast 1/4 of the Southwest 1/4, the North 1/2 of the Northwest 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northwest 1/4 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, the South 1/2 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, and the Southwest 1/4 of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Base and Meridian.

EXCEPTING THEREFROM: All that portion of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian described as:

Beginning at the South 1/4 corner of said section; thence East 350 feet to the True Point of Beginning; thence East 330 feet along the South line of said Section to the East boundary of the IRE HAYES property; thence North 330 feet along the East line of said Hayes property; thence West 330 feet; thence South 330 feet to the True Point of Beginning.

FURTHER EXCEPTING those portions of the land in the West 1/2 of the Southwest 1/4 of the Southeast 1/4, and in the Southwest 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian, as conveyed to IRE HAYES et ux, by deed recorded July 1, 1955, in Book 352 at page 253, Official Records of Siskiyou County, lying Southerly of the line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, Humboldt Meridian, and Sections 33 and 34, Township 13 North, Range 6 East, Humboldt Meridian, bears South $80^{\circ} 51' 44''$ East, 1769.19 feet, said point also being Engineer's Station "A" 479177.35 P.O.C., as established from the Department of Public Works 1964 Survey between Sages Bar and Tj Creek Road 01-Sis-96; thence from a tangent which bears North $47^{\circ} 20' 27''$ West, along a curve to the left, having a radius of 1000.00 feet, through an angle of $07^{\circ} 37' 11''$, a distance of 132.99 feet to Engineer's Station "A" 481110.34 E.C., as established from said survey; thence North $35^{\circ} 02' 22''$ East, 100.00 feet to a point hereinafter referred to as Point "B", thence North, $54^{\circ} 57' 39''$ West 180 feet more or less to the East line of the West 1/2 of the Southwest 1/4 of the Southeast 1/4 of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence, continuing North $54^{\circ} 57' 38''$ West, 610 feet to a point for a total distance of 790.42 feet from said Point "B"; thence South $35^{\circ} 02' 22''$ West, 34.00 feet; thence, from a tangent which bears North $54^{\circ} 57' 39''$ West, along a curve to the left, having a radius of 1266.00 feet, through an angle of $14^{\circ} 29' 35''$, a distance of 320.24 feet to a point hereinafter referred to as Point "C"; thence North $69^{\circ} 27' 13''$ West 520 feet, more or less, to the West line of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33; thence continuing North $69^{\circ} 27' 13''$ West, 290 feet, more or less to the South line of the North

(Continued)

000928

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1/2 of the North 1/2 of the Southeast 1/4 of the Southwest 1/4 of Section 33; thence continuing North $69^{\circ} 27' 13''$ West, 47 feet to a point, hereinbelow referred to as Point "D" for a total distance of 857.37 feet from said Point "C"; thence from a tangent which bears North $69^{\circ} 27' 13''$ West along a curve to the left, having a radius of 5066.00 feet a distance of 355 feet, more or less to the West line of the Southeast 1/4 of the Southwest 1/4 of said Section 33; thence continuing along last said curve, a distance of 335 feet to a point, hereinbelow referred to as Point "E", through a total angle of $07^{\circ} 48' 15''$, and a total distance of 690.03 feet from said Point "D"; thence North $41^{\circ} 41' 14''$ West, 178 feet, more or less, to the South line of the Northwest 1/4 of the Southwest 1/4 of said Section 33; thence continuing North $41^{\circ} 41' 14''$ West 130 feet to a point for a total distance of 316.31 feet from said Point "E"; thence North $76^{\circ} 12' 04''$ West, 128 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the Northwest 1/4 of the Southwest 1/4 of said Section 33.

EXCEPTING THEREFROM that portion thereof lying Southerly of the line described as follows:

Commencing at said Engineer's Station "A" 481110.34 E.C., hereinabove described; thence North $54^{\circ} 57' 38''$ West, 159.66 feet; thence South $35^{\circ} 02' 22''$ West, 225.00 feet to a point hereinbelow referred to as Point "F"; thence North $11^{\circ} 17' 26''$ East, 17 feet, more or less, to the South line of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence continuing North $11^{\circ} 17' 25''$ East, 120 feet to a point for a total distance of 136.57 feet from said Point "F"; thence North $54^{\circ} 57' 38''$ West, 575.76 feet; thence from a tangent which bears North $54^{\circ} 57' 38''$ West, along a curve to the left, having a radius of 1100.00 feet, through an angle of $14^{\circ} 29' 35''$, a distance of 278.25 feet; thence North $69^{\circ} 27' 13''$ West, 115 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33.

ALSO EXCEPTING THEREFROM that portion thereof conveyed to EDWIN T. HAWKINS, et ux, by Deed recorded January 19, 1965 in Book 512 at page 457, Official Records of Siskiyou County.

The bearings used in the above description are on the California Co-ordinate System Zone 1, and the distances are surface.

PARCEL II:

That portion of the lands in the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, H.M., conveyed to the State of California by deed recorded December 15, 1965 in Book 524, Official Records, page 98, Siskiyou County Records, lying Northeasterly of a line described as follows:

Commencing at a point on the South line of said Section 33 from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, H.M., and Sections 33 and 34, Township 13 North, Range 6 East, H.M., bears South $88^{\circ} 51' 44''$ East, 1769.19 feet, said point also being Engineer's Station "A" 479177.35 P.O.C., as established from the Department of Public Works 1964 Survey between Sages Bar and Ti Creek, Road 01-Sis-96; thence from a tangent that bears North $47^{\circ} 20' 27''$ West, along a curve to the left with a radius of 1000.00 feet, through an angle of $07^{\circ} 37' 11''$, for a distance of 132.99 feet; thence North $35^{\circ} 02' 22''$ East, 100.00 feet; thence North $54^{\circ} 57' 38''$ West, 182 feet, more or less to the Point of Intersection with the East line of said land, last said

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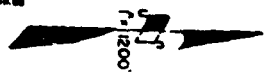
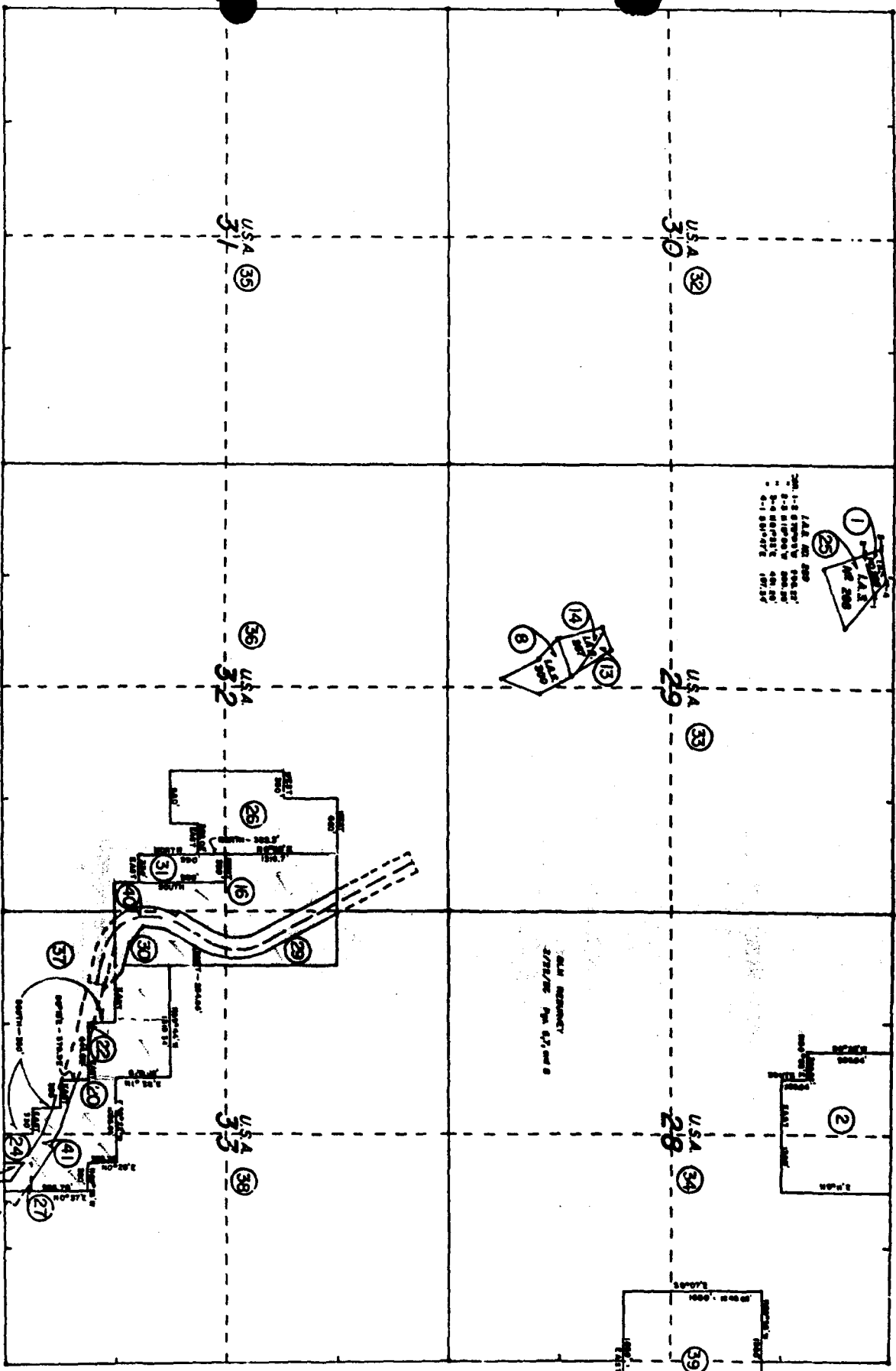
point being the TRUE POINT OF BEGINNING of this parcel thence continuing North
54° 57' 38" West, 117 feet, more or less to the Point of Termination of this
line on the North line of said lands.

The bearings used in the above description are on the California Co-ordin

T 13 N R 6 E H M

Tax Area Code 85-00

26-29



BOOK 33

Assessor's Map
County of Siskiyou, California

THIS PLAT IS FURNISHED FOR INFORMATION. IT IS
CONTAINED FROM DATA WHICH WE BELIEVE TO BE
ACCURATE, BUT NO LIABILITY IS ASSUMED BY THE
COMPANIES AS TO THE CORRECTNESS OF SUCH DATA.

SISKIYOU COUNTY TITLE CO.

E. STENSHAW

WR-6
WATER NOTICE

NOTICE IS HEREBY GIVEN: That I have taken up and hold for mining and irrigating purposes, six hundred inches of the water running in Stenshaw Creek. So called the water so taken being carried first by ditch and flume to and past my dwelling house by ditch and flume running up the Klamath River to my upper field. Said creek being in Dillon's Township, State of California, County of Klamath.

March 25, 1867

E. Stenshaw

RECORDED

Liber 1 Water Right, page 397

JUNE 9, 1880

EXHIBIT D

000932

Seiad Valley Pa
April 25/01

Dear Mr and Mrs Cole:

I read with misgivings
about your trouble with
Pace over your water.

Don't know if theres anything
I know that would help you.

I first moved down there
shortly after Guy and Blanch
McMurry first bought the
place from Sam Stenshaw.
They had built that house
around the old Stenshaws
house. I first lived in an old
store building that was built
over Twing Creek. Later that
was torn down and a school
was built nearby. My children
went to that school when there
were two teachers there.

I cooked for boarders
in an old cookhouse on
your ranch.

EXHIBIT E

000933

The highway was being ~~re~~ rebuilt and there sometimes two shifts. Later after Blanché died and Guy married Mary Lockheart I helped them I run the little dairy. Guy then owned both the lower ranch across ^{Irving} and near the river so we often kept the cows down there. When I first moved down there Dave Drake owned the lower ranch. He had an old sawmill not far from the river on Irving Creek. It was long ago shut down over there. I walked that ditch up to Stenshaw Creek a good many times.

One of Stenshaw's lived in Seiad until just recently. I could probably be able to contact him if that would help.

The residence at the mouth
of Stenshaw Creek belonged
to a fellow (Russian) Bank
Delgas. He operated the
mine for the Singer Sewing
Machine of New York. Also
a group of cabins were built
at the mouth of the creek and
I can't remember ever hearing
of there being any trouble
about waters.

I have arthritis in my
hands and am sorry about
this poor writing.

Yours truly
Dwight Anderson

We and all
my children have been
working against Felix Pace and
all he represents so if we can
help let us know.

ONE ROOM SCHOOLS ISSUE

COPY

1989

The Siskiyou Pioneer

IN FOLKLORE, FACT AND FICTION



and YEARBOOK

The Siskiyou County Historical Society

Volume 6

Number 2

EXHIBIT F

COPY



Photo courtesy of Leona Bryan

JUNCTION SCHOOL - 1928 — SOMES BAR - Levella Conrad, Pauline Conrad, Caroline Davis, Shan Davis, Henry Davis, Frank Grant, Violet Johnnie, Dave Johnnie, J. Rosy Jerry, Lee Merrill, Sidney McNeal, Georgia McNeal, Gengia Ann Langford, Deane Langford, Miss L. Lewis.

IRVING CREEK

Minerva Starritt

The Irving Creek District was established in 1918. The first school was a log building situated over the creek. The outdoor toilet was also over the creek. In the early days it was a custom on the Klamath River to build toilets over a creek. About 1925 the second school house was built of lumber by Frank Grant. A second classroom, dining room, kitchen and bathrooms were added in the fall of 1935. John Spinks helped build the log school as well as the second building and the addition.

At first, school terms on the Klamath were only six or seven months from spring to early fall because many families lived across the river from school. At high water, children could not get across the river. In the late twenties there were regular school terms starting in the fall.

John Spinks and his wife Lucy lived across the river at Roger Creek, two miles down the river from Irving Creek. They had six children, Roy, May, Chester, Bryon, Ernest and Willard. They were well liked and civic minded citizens. They were most anxious that their children get an education.

Other families living within walking distance wanted a school for their children. They included the Pattersons, Farnums, Johnsons, Drakes, Charleys, McCash, Layman, Toms, Albars, Hickox and others. There were four Patterson children, Willie, John, and their two younger sisters May and Rose. They walked five miles to Irving Creek School taking all the short cuts along the narrow crooked road. The Patterson children never missed a day unless they were sick. The older children in the families took care of their younger sisters and brothers on their way to school. Madeline and Grace Charley lived at T Bar five miles from Irving Creek. They too walked.

COPY

There was money from the Office of Indian Affairs for Indian children, so lunches consisting of milk, soup, sandwiches and cookies were delivered to the school. According to Mary Patterson (Lawe) the older boys would order as many as five sandwiches and eat every one or maybe give them to their white friends, who didn't have as good a lunch. Mary also told me about the boys finding lizard eggs along the ditch that ran along the side of the school. They gathered up the eggs and little lizards and threw them on the floor in front of the teachers desk. Pranks like putting water snakes or a frog in the teachers desk were common. Teachers joined in the fun most of the time with laughing and a little screaming. Ernest Spinks tells of one day before Christmas when the teacher let him and all the boys out of school to get a Christmas tree. They all skipped and didn't return. Ernest got a good spanking from his dad.

Enrollment records no longer exist. A partial list of children attending Irving Creek School from 1918 to 1929 follow:

Roy, Mary, Chester, Byron, Ernest and Willard Spinks; John, Willie, Mary and Rose Patterson; Ella, Anne, Henry and Ulysis McCash; Arthur Layman; Lawrence and Gladys Johnson; Madeline and Grace Charley; Laura, Lottie and Henry (Buster) Farnum; Zona and Betty Drake.

In the fall of 1935, I went to teach at the Irving Creek School. I had been teaching the lower grades at Junction School at Somes Bar down the Klamath River from Irving Creek. It was my seventh year of teaching school on the Klamath: two years at Morek below Martins Ferry, two years at Orleans, and two years at Junction. I was no stranger to the district. I knew the people and the children.

The school building was located at the junction of Highway 96 and Irving Creek on the hillside overlooking the creek. It was one large room approximately 20 by 40 feet with anteroom 10 by 20 feet and a porch across the front. There were outside toilets. The children helped with the janitor work.

Mr. Guy McMurtry was Superintendent for the State Highway 96 and had the Highway Yard on his ranch above the school, now the Young ranch. He had cabins where the highway workers lived with their families.

John Waldner owned the ranch below the road where the school was located. He and his wife boarded some of the highway workers and rented cabins to the other workers,



Photo courtesy of Minerva Starritt

IRVING CREEK SCHOOL — These boys all went to Irving School in the twenties. (L-R) Partly shown, Alvis Johnson, Lawrence Johnson, Henry (Buster) Farnau, Willie Patterson, Chester Spinks (standing), John Patterson, Ernest Spinks. In river, Willard Spinks, taken about 1929.

their families and the teacher. Waldner also operated a sawmill up Irving Creek. This ranch was once owned by Frank Harley, Halverson, and the Drakes. It is now the Blue Heron Ranch. The first cabin I rented was an old shed full of mice. I put traps everywhere but at night, mice would wake me running across my bed. A bit eerie. I soon rented another cabin.

When school opened in September, I had fifty-two children and all eight grades. Most of the pupils were from families working on the road, and there were several Indian children. Five Indian children belonged to Chester Pepper. They lived at T Bar but never came to school. I had tried to get them to come to Junction without success. The oldest boy was sixteen and was driving an old car. Arrangements were made with Robert Dennis, the County Superintendent of Schools in Siskiyou County to have this boy transport his brothers and sisters and attend school himself to get his eighth grade diploma, beside helping me around the school. The money from the mileage, clothing, and free lunches helped keep these children in school.

One day in late September, Robert Dennis, County Superintendent of Schools in Siskiyou County, arrived to see how I was progressing. We offered him some graham crackers. To our embarrassment kerosene had seeped onto the shelf where the crackers and supplies were stored in the anteroom. We laughed about the entire episode but Robert decided some changes should be made. He said, "It looks to me as if you need some help. I have a friend, Valeria Beym (Lange), who will graduate from Chico State in January. I will try to convince her to come down the river to Irving Creek School with you and teach the lower grades, but arrangements must be made for another classroom, kitchen, dining room and bathrooms". These arrangements were made with the trustees and with John Waldner, who ran the sawmill.

Meanwhile, I continued with my fifty-two children, with the help of members of the community. The hillside was leveled off for a playground. The State road equipment did their part. Tex Hunt's father was an excellent pianist. He came to school twice a week in the afternoons to help with the music for our entertainments. School programs were most important; there was no TV in those days. The entire community far and wide would come to the school plays and games. We were preparing a gala affair for Christmas. I had combined all grades into a history project of North America beginning with stick puppets for the first three grades of cave men, Indians and old miners. String marionettes of U.S. history with President Washington and the revolutionary war, Lincoln and the Civil War were made by the upper grades. Parents were all involved. Santa and all his helpers and the singers were ready. The night arrives for our program. We had built a stage at the end of the room six inches off the floor and put candle foot lights on the stage. I was wearing a long white polkadot dress. In the middle of the program while I was announcing, I was standing too close to one of the footlights and my dress caught fire. Tex Hunt, one of the parents grabbed me and put the fire out. The show went on.



Contributed by Joe Clyburn

BIG HUMBUG SCHOOL - 1917
- located on Klamath River near Jack and Cecil Well's home. Back row: Robert (Bud) Clyburn, Tony Rose, Jim Clyburn; Front row: Tom Clyburn and teacher's children. Teacher Mrs. Desevado.

APRIL 30,2000

TO WHOM THIS MAY CONCERN:

I, LUE H HAYES AND AGNES M HAYES, PURCHASED THE McMURTRY RANCH LOCATED IN SOMES BAR, CA. SISKIYOU COUNTY IN 1955. THE PURCHASE PRICE INCLUDED 55 ACRES, 4 RESIDENCES, 2 BARNs, ALL OTHER BUILDINGS, EQUIPMENT AND DEEDED WATER RIGHTS TO STANSHAW CREEK. THE WATER RIGHT, WHICH DATED BACK TO 1867, INCLUDED THE RIGHT TO 600 MINORS INCHES OF WATER AND DITCH. THIS IS RECORDED IN THE ORIGINAL DEED IN THE DILLION MINING DISTRICT. KLAMATH COUNTY, CA. THE PROPERTY HAD AN EXISTING 12" MAIN WATERLINE AND 4 KW PELTON WHEEL AND 30 ACRES WERE UNDER IRRIGATION. AFTER OUR PURCHASE IN 1955, WE UPGRADED TO A LARGER 9 KW PELTON WHEEL TO GENERATE MORE NEEDED ELECTRICITY. IN 1957, SENATOR REEBER, WEAVERVILLE, INTRODUCED A BILL TO THE SENATE OF CALIFORNIA, FOR THE PROTECTION OF NORTH STATE WATER. THE STATE, AT THIS TIME MEASURED THE AMOUNT OF WATER BEING USED ON THE RANCH. ON THE DAY OF THIS MEASUREMENT WE WERE NOT IRRIGATING ALFALFA, SO THE AMOUNT OF WATER DIRECTED INTO THE DITCH WAS REDUCED FROM NORMAL FLOW. THE MEASUREMENT WAS TAKEN BY DROPPING A LEAF INTO THE WATER AND MEASURING HOW FAR IT FLOATED DOWN STREAM IN SO MANY MINUTES. AT OTHER TIMES IN THE YEAR WE WOULD CAPTURE ALL OF STANSHAW FOR OUR USE. IN 1965, A 100 KW PELTON WHEEL WAS INSTALLED AND WATER WAS STILL BEING USED FOR IRRIGATION. WATER FROM STANSHAW CREEK WAS IN CONTINUOUS USE BEFORE OUR PURCHASE AND WAS USED CONTINUOUSLY BY US UNTIL THE PROPERTY WAS SOLD IN 1977.

IF WE STILL OWNED THIS PROPERTY, WE WOULD MAINTAIN THAT WE HAD VALID AND COMPLETE FIRST RIGHT TO STANSHAW CREEK, AS STATED IN A VERY OLD AND COMPLETELY LEGAL DEED.

SIGNED:

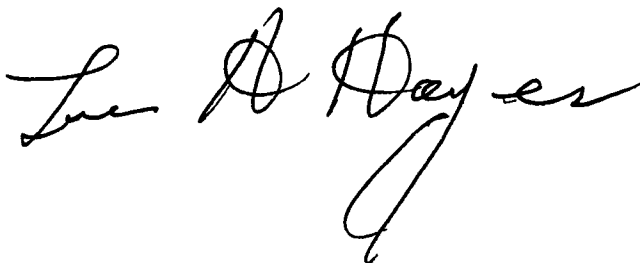
A handwritten signature in cursive script that reads "Lue H Hayes". The signature is written in black ink and is positioned below the "SIGNED:" text.

EXHIBIT G

000940

Subject:

Stanshaw Diversion

Date:

Fri, 6 Apr 2001 15:27:50 -0700

From:

"William M Heitler/R5/USDAFS" <wheitler@fs.fed.us>

To:

access@pcweb.net

Doug,

As you requested.

Bill

**STANSHAW DIVERSION MEETING
MARCH 22,2001**

The purpose of the meeting was to familiarize the landowner, Karuk Tribe of California, and the Forest Service with the diversion and related issues. We meet at the Marble Mountain Ranch at 9:30 AM, March 22,2001. We met to determine if it was possible to increase flow in Stanshaw Creek while meeting the needs of the Marble Mountain Ranch. Attendees were: Doug Cole, owner, Marble Mountain Ranch, Toz Soto, Mid-Klamath River Sub-Basin Coordinator, Ron Reed, Karuk Tribal Fisheries, and Bill Heitler, District Ranger, Orleans Ranger District.

Mr. Cole has done a considerable amount of work to improve the efficiency of his hydropower plant. He recently replaced the 85-year-old pelton wheel and military surplus generator with a state of the art unit, and upgraded about 100 feet of the penstock with new PVC pipe. He estimates that about 25% less water will be used to generate the same amount of power as the old system. Water from Stanshaw Creek flows from the generator, is used for irrigation and eventually ends up in Irving Creek. Blue Heron Ranch uses

the water for hydropower and irrigation.

After looking over the hydro plant, we walked the ditch to Stanshaw Creek. The ditch is in good overall condition and shows signs of regular maintenance. Portions have been reinforced with open topped culvert to reduce exfiltration and minimize the chance of a failure. The diversion structure on Stanshaw Creek is rock rubble reinforced with plastic sheeting. The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction. We did not estimate how much water was by passing the diversion. There is a possibility of additional downstream flow if the ditch can be lined or piped. Currently the Cole's do not have the resources to take on a project such as this. Ron explained the tribal position to Doug. The tribe is concerned about coho survival and feels that adequate flows in Stanshaw Creek are critical to providing refugia. I explained that the Forest Service will not require a fee permit for the ditch and diversion structure since use has been continuous prior to the proclamation of the Klamath National Forest. We do need to document the use in a no fee permit. There is also a question as to whether the ditch is a legal easement included in the deed to the property based on a proclamation signed by President Howard

Taft. Toz, in his position as Mid-Klamath River Sub-Basin Coordinator, feels there is a good chance that grants are available to pay for improving the ditch. He will begin looking for funding sources for this project. Ron offered tribal support for the grant.

I left the meeting about 11:00 AM. Ron, Toz and Doug continued the discussion looking for other ways to direct water back into Stanshaw Creek. Ron and Toz will look into the amount of water that is being diverted by other users on the Stanshaw Creek. There may be an opportunity to gain additional water from these users.

Bill Heitler

(916) 657-1951

FAX: (916) 657-2388

In Reply Refer
to:333:KDM:29450

FEBRUARY 04 1993

Robert E. and Mary Judith Young
c/o Thomas W. Birmingham
770 L Street, Suite 1200
Sacramento, CA 95814

Dear Mr. Birmingham:

APPLICATION 29450 OF ROBERT E. AND MARY JUDITH YOUNG--STANSHAW CREEK IN SISKIYOU COUNTY

On July 22, 1992, Division of Water Rights (Division) staff wrote to inform your clients, Robert and Mary Judith Young, that additional information is required before Division staff will be able to complete the initial review of Application 29450. No response was received. The issues which require a response are listed below.

The first issue which must be addressed is the quantities of water which were requested for both domestic and irrigation purposes. The application requests a right to directly divert 0.22 cubic feet per second (cfs) for domestic purposes. 3 residences, 44 recreational vehicle hookups, 11 housekeeping cabins, 14 mobile homes and one lodge will be served. Based on the quantities considered reasonably necessary pursuant to Title 23, California Code of Regulations Section 697, Division of Water Rights (Division) staff calculates the total beneficial use for these facilities to be 0.02 cfs.

Beneficial use was calculated using 75 gallons per day (gpd) per person for the residences, and an average of 4 persons in each house. The recreational vehicles are estimated to use 30 gpd for 2 people. The housekeeping units would require 55 gpd for four people, and the mobile homes would require a similar amount of water. No information was provided about the lodge. Thus, Division staff estimates that 20 people would use the lodge, and each person would require 55 gpd. If any of these estimates are incorrect, please provide information regarding actual occupancy rates and water duties. Based upon these estimates, Division staff recommends that domestic use under Application 29450 be reduced to 0.02 cfs. The 0.02 cfs was calculated by multiplying the number of each type of facility, such as 3 residences, times the estimated daily usage (75 gpd), times the number of persons (4 people), then multiplying by the conversion factor of 1 cfs per 646,317 gpd.

SURNAME
DWR 540 02.1.1 00

KDM 2-3-93

Kassel 2/3/93

EXHIBIT I

000943

FEBRUARY 04 1993

Robert E. and Mary Judith Young -2-

Irrigation water duty of 1 cfs for each 80 acres of irrigated area is considered reasonable for Siskiyou county. Thus, irrigation of the 7 acres of alfalfa listed in the application should require 0.09 cfs. The application requests 0.12 cfs. Thus, Division staff recommends that Application 29450 be reduced to 0.09 cfs for irrigation purposes. Please respond and state whether your client concurs with these recommendations.

Additional information is also required to complete the environmental supplement to the application. The following information is required:

Question 4 of Environmental Supplement

Indicate whether or not any permitting agency prepared any environmental documents for the project. If so, please complete the answers to the last part of questions number 4.

Question 7b

Please describe the types of existing vegetation (such as grasslands, pine forest, oak-grass foothills, etc.) at the point of diversion, immediately downstream of the point of diversion, and at the place where the water is to be used. Please be sure to include photographs of these areas with the vegetation types showing in the photographs.

Question 8

Indicate what changes in the project site and surrounding area will occur or are likely to occur because of construction and operation of the project.

Question 16

Indicate whether or not your client is willing to make the changes in the project as recommended by the Department of Fish and Game.

A response is requested within the next 30 days. Please note that failure by an applicant to comply with a written request for information within a reasonable time may be cause for the Division to cancel an application pursuant to Government Code Section 65956(c). Division staff is available to answer any questions you might have. I can be contacted at (916) 657-1951.

Sincerely,

ORIGINAL SIGNED BY

Katherine Mrowka
Associate WRC Engineer
Hearings Unit

cc: Robert E. and Mary Judith Young
Young's Ranch
Somes Bar, CA 95568

CAR/me
file 2944

KRONICK
MOSKOVITZ
TIEDEMANN
& GIRARD
A PROFESSIONAL CORPORATION

JANET K. GOLDSMITH

August 20, 2001

VIA HAND DELIVERY

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, CA 95812-2000

Attn: Michael Contreras

Re: Water Right Complaint Against Douglas and Heidi Cole;
Stanshaw Creek, Siskiyou County

Dear Mr. Schueller:

This letter responds to the letter dated June 14, 2001 from Donald Mooney on behalf of the Klamath Forest Alliance ("KFA") complaining of diversions by Heidi and Douglas Cole from Stanshaw Creek in Siskiyou County. In essence the letter asserts that the Coles have not provided evidence that the pre-1914 water right filing by Samuel Stenshaw pertained to their land, and that their diversions harm coho salmon and steelhead in Stanshaw Creek and the Klamath River. This letter provides the evidence requested concerning the basis of the Coles' claim of pre-1914 water rights. The KFA allegations that the Coles' diversions constitute a "take" of coho or steelhead salmon are unsupported and incorrect. The Coles' diversion is not harming either the coho or steelhead (or any other) fishery in either Stanshaw Creek or the Klamath River.

A. HISTORY OF USE

Attached as Exhibit A to this letter is Patent 186169¹ from the United States to Samuel Stenshaw dated March 27, 1911. Because the handwritten description in the Stenshaw patent is difficult to read, I have verified the property description using the BLM Master Township Plat and Historical Index.² The description of the land patented to Stenshaw includes forty acres of what is now known as Marble Mountain Ranch, owned by the Coles.³

¹ The patent number appears at the bottom of the page, below the signatures.

² The land is described as a patent granted pursuant to a Homestead Entry: "W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, and the N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, and E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T 13 N, R 6 E, Humboldt Meridian. Because

Harry M. Schueller, Chief
 Division of Water Rights
 August 20, 2001
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According to Edwin Gustave Gudde, California Gold Camps (U.C. Berkeley Press, 1975), the Stanshaw Mine was in operation at the turn of the century and was reported in Mining Bureau reports as late as 1935. A mining pit is located on the Marble Mountain Ranch.

Water was also used for domestic purposes and irrigation. The notice of appropriation states that it was in part "for irrigating purposes" and describes the ditch and flume as running "to my upper field." (See Exhibit D, Notice of Appropriation, Liber 1 of Water Rights, page 397, Siskiyou Official Records)

Violet Anderson, who moved to the area shortly after Stanshaw conveyed a portion of his property to Guy and Blanche McMurtry, recalls that she cooked in an old cookhouse on the property for up to two shifts of workers who boarded there, and that the McMurtrys ran a small dairy. (Exhibit E.) She recalls that electricity was already in use at that time in connection with the dairy. Among other purposes, it was used to sterilize the bottles into which milk was transferred for sale.⁴ Minerva Starritt, one of the early schoolteachers at the Irving Creek schoolhouse recalls that when she arrived in 1935, Guy McMurtry was the Superintendent for the State Highway 96 and "had cabins where the state highway workers lived with their families." (The Siskiyou Pioneer (Siskiyou County Historical Society, Vol. 6, No. 2, 1989). (Exhibit F.))

The McMurtrys owned the property until Lue and Agnes Hayes purchased it in 1955. At the time of the purchase, Mr. Hayes recalls that 30 acres were under irrigation and there was an existing 4 KW pelton wheel and an existing 12" main water line on the property. (Exhibit G.) The pelton wheel was described by William M. Heitler of the U.S.F.S. as "the 85-year old pelton wheel" (Exhibit H). Mr. Hayes identified it as "an old C-3 HP generator."⁵ The power generating facilities have since been upgraded several times by Mr. Hayes and successive owners, including the Coles, but the evidence is that power was being generated from a very early date. The engineer retained by the Coles to upgrade the power facilities described the pelton wheel as dating from perhaps the first decade of the last century. The old pelton wheel remains available for inspection at the Ranch.

Domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. The Hayes' use has been described in the 1963 DWR Bulletin 94-6 "Land and Water Use in Klamath River Hydrographic Unit." (Table 4, at p. 55.) Mr. Hayes believes that the demand estimated at that time may have underestimated his existing uses because it was based on a single flow measurement taken in late fall when he was not irrigating. (See Exhibit G.)

the Historical Index page is 24" x 28" it is difficult to reproduce and is not included as an Exhibit to this letter. It is available for your inspection and verification on request.

The patented land was resurveyed by the Bureau of Land Management in 1985 and designated "Tract 48" on that resurvey. A portion of Sheet 1 of 8 of that resurvey is attached as Exhibit B.

³ A copy of the Coles' deed is attached as Exhibit C.

⁴ Personal communication, 8/19/01.

⁵ Personal communication, 8/16/01.

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The Hayes conveyed the Ranch to the Youngs, whose uses are documented in your files. The Youngs conveyed the Ranch to the Coles in 1994. The Coles' residence is the same house originally occupied by Samuel Stenshaw.

While there has been an evolution of uses for the Stanshaw Creek appropriation since the early days of the Stanshaw Mine, it is clear that year-round uses of water were in practice from early in the last century. Mining, domestic and power uses were among those early uses, and use of water for these purposes has been continuous, as has irrigation. While mining may no longer be pursued, changes in purpose of use of pre-1914 appropriations have been permissible so long as no other user is injured. The very long history of the current uses of water on Marble Mountain Ranch belie any assertion that others have been harmed by the shift in purpose of use of this water.

B. CALCULATION OF WATER DUTY

The estimate of water demand for the documented uses on Marble Mountain Ranch, as set forth in the SWRCB letter of February 4, 1993 from Katherine Mwroka (Exhibit I) appears questionable for several reasons.

First, it is based on use *at the point of use*, and therefore does not take into account conveyance losses in the ditch leading from Stanshaw Creek. This ditch is seven tenths of a mile long⁶ and is constructed of flumes and earthen materials. While the Coles have taken steps to improve conveyance efficiency (see Exhibit H), there remain reasonable losses that should be considered in calculating the amount of diversion necessary to satisfy their pre-1914 appropriative right.

Second, the calculation completely ignores water demand for power production. As explained above, power use began early in the last century and has been continuous throughout the history of the Ranch.

Third, the water duty used by Ms. Mwroka for calculating irrigation demand is questionable. Ms. Mwroka based her estimate of irrigation demand on a water duty of one cfs per eighty acres of irrigated land. This is the most conservative water duty proposed in the SWRCB guidelines concerning reasonable use for irrigation. While it may be appropriate for other areas of Siskiyou County, it is not appropriate for calculating irrigation water demand on Marble Mountain Ranch. The porous nature of the soil on the Ranch and the slopes involved suggest that a higher water duty should be used.

C. LACK OF JUSTIFICATION FOR A CEASE AND DESIST ORDER

The complainant fails utterly to provide any factual evidence that the Coles' diversion is adversely affecting fishery resources in the Klamath River or Stanshaw Creek. The sole allegation of adverse impact is a single paragraph in the middle of page 3 of the KFA letter that alleges that the National Marine Fisheries Service ("NMFS") and California Department of Fish and Game ("DFG") "are concerned." No specifics are given of just how the long-standing diversions of the Ranch are affecting either coho salmon or steelhead. No statements of either the DFG or NMFS are attached to the KFA letter.

⁶ DWR Bulletin 94-6, Table 4, p. 55.

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 Division of Water Rights
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The only evidence offered by KFA is a letter from the U.S. Forest Service District Ranger, William Heitler reporting such "concerns," again without specifics. The USFS letter related to the question whether the Coles had, or needed, a fee permit for the ditch. Subsequently, based on the age of the ditches, it was determined that no fee permit was required. (See Exhibit H.) In a subsequent memo, Mr. Heitler also comments on the responsiveness of the Coles to DFG's direction concerning fish passage at the century-old rock and rubble diversion dam. (*Ibid.*)

In a March 8, 2000 letter concerning the Coles' water right application for 3 cfs diversion for power production, the following *general* concerns were listed by NMFS concerning coho salmon: migration delay, loss of habitat due to dewatering, stranding of fish due to dewatering of the stream, entrainment in poorly screened diversions, and increased water temperatures. None of the issues was raised based on any site specific investigation or concern.

None of the issues mentioned in the NMFS letter are being significantly exacerbated, if at all, by the Coles' diversions under their existing rights. Stanshaw Creek is not a migration or spawning resource for coho salmon, nor is it available for juvenile rearing, since the culverts at Highway 96 prevent passage upstream into the creek. There are no pools in the 600' reach of Stanshaw Creek below the highway to serve as "preferred" rearing habitat for juveniles (according to the NMFS letter). However, coho habitat has been documented in Irving Creek to which the Coles' diverted water is ultimately returned. The addition of flow to that creek may well benefit the coho resource of concern to the KFA. ✕

Temperature at the mouth of Stanshaw Creek was measured at 65° F in the afternoon of August 17, 2001 by Douglas Cole, within the reported range of suitability for coho juveniles and within the range of "best" suitability for the steelhead trout that inhabit the creek (Klamath Resource Information System).

Water in Stanshaw Creek is bypassed through the rock and rubble diversion dam. The diversion is maintained pursuant to a Five Year Maintenance Agreement between the Coles and the California Department of Fish and Game, dated January 21, 1999. There is continuous flow bypassing the Ranch diversion, and fish passage has been observed in both directions. As reported by Mr. Heitler in his April 6, 2001 e-mail memo, "The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction." (Exhibit H.) The flow in Stanshaw Creek extends to the mouth, even in this dry month of a dry year.

The mere fact that coho are a listed species and steelhead are a candidate species is no evidence that the decades-long diversions for the Ranch are harming the fishery. The above data refute the allegation that the current diversions by the Coles violate the Endangered Species Act. The complainants have produced no evidence of harm to protected species from a continuation of diversions.

Beyond the Endangered Species Act, however, the KFA has raised a claim of public trust violation. In any public trust evaluation, the harm to the public trust resource (if any) must be balanced against the reliance on the diversions. In this instance, there is clear evidence of a century of reliance on the water and a good faith belief that the diversions are justified under the pre-1914 appropriation by Samuel Stanshaw. The Coles' water use is reasonable and beneficial, and the Coles and their predecessors have continually improved the efficiency of use. No other water source is available to the Coles, whose entire livelihood depends on the continued availability of water from Stanshaw Creek. This ✓

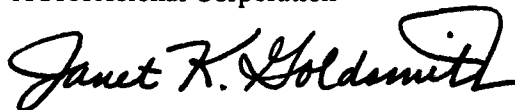
Harry M. Schueller, Chief
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great reliance, balanced against the lack of any specific allegation or evidence of harm to public trust resources by continuation of diversions pending SWRCB action on the Coles' pending application, should militate against any enforcement action at this time.

Please feel free to contact me if you have further questions.

Sincerely,
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation



Janet K. Goldsmith
Attorneys for Douglas and Heidi Cole,
Marble Mountain Ranch

JKG/mm

Attachments

cc: Douglas Cole
Donald Mooney
Michael Contreras

The United States of America

Homestead Certificate No. _____
Application No. Eureka 01271

To all to whom these presents shall come, Greeting:-

Whereas, There has been deposited in the GENERAL LAND OFFICE of the United States a Certificate of the Register of the Land Office at Eureka, California, has been deposited in the General Land Office whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of _____ COMPARED

Samuel Stenslow has been established and duly consummated, in conformity to law, for the East half of the East half of the North-east quarter of the the southeast Quarter and the East half of the southeast quarter of the Northeast Quarter of Section Thirty-two and the West half of the Southwest Quarter of the Northwest quarter of the west half of the Northwest quarter of the Southwest quarter; the southeast quarter of the north-west quarter of the southwest quarter; the southwest quarter of the northeast quarter of the southwest quarter of the north half of the north half of the north-west quarter of the southeast quarter of the southwest quarter of Section Thirty-two north of Range Six east of the Humboldt meridian; California containing ninety-three (93) Acres, more or less according to the OFFICIAL PLAT of the Survey of the said Land, returned to the GENERAL LAND OFFICE

by the SURVEYOR GENERAL:

Now know Ye, That there is, therefore, granted by the United States unto the said claimant

the tract of Land above described To have and to hold the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

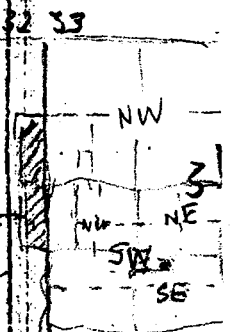
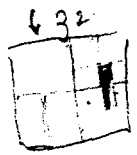
In testimony whereof, I, William H. Taft PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made Patent, and the seal of the GENERAL LAND OFFICE to be hereunto affixed.

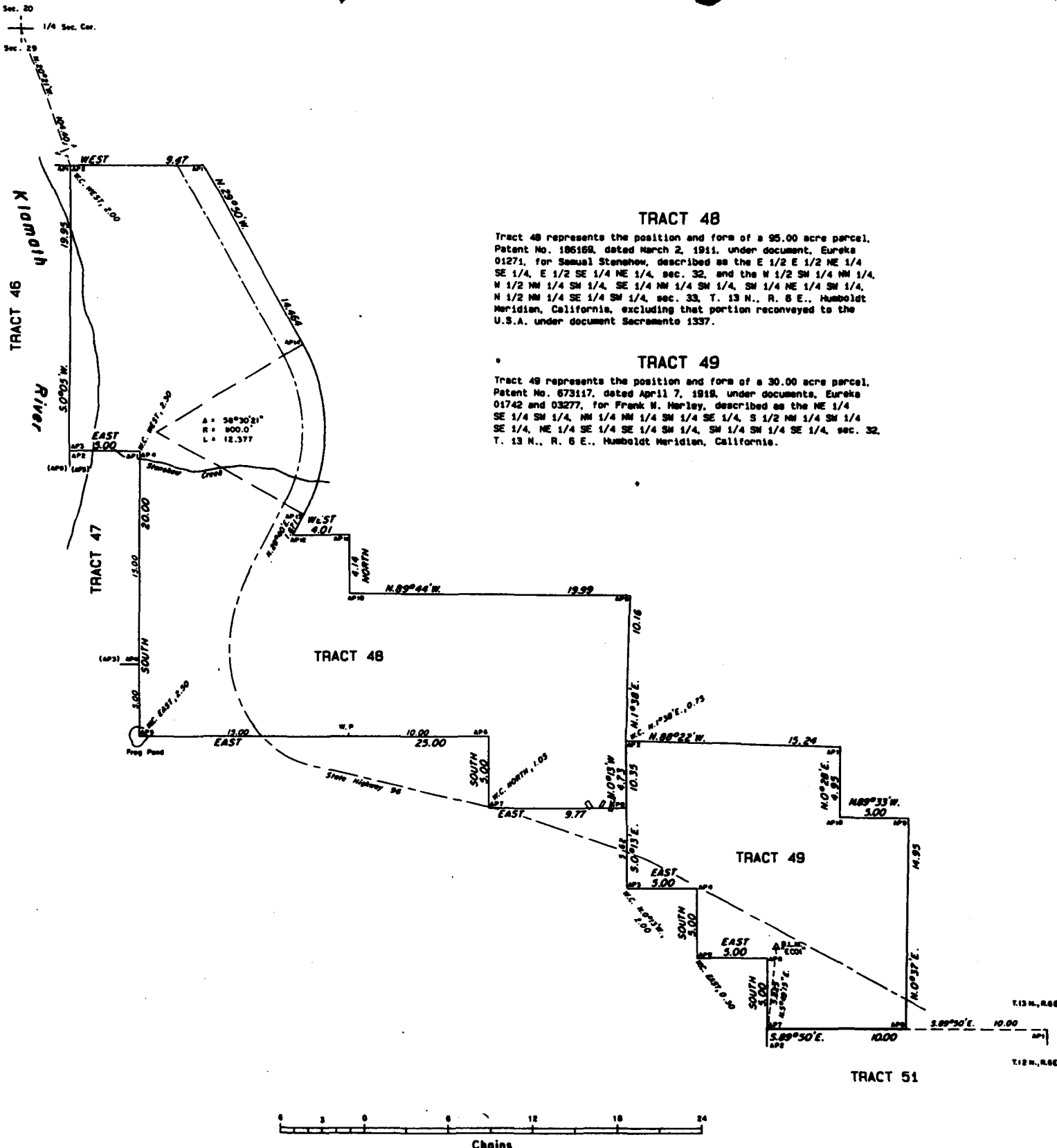
GIVEN under my hand, at the CITY OF WASHINGTON, the Twenty-seventh day of March, in the year of our Lord one thousand nine hundred and Eleven, and of the Independence of the United States the one hundred and thirty-fifth

[SEAL]

By Wm. H. Taft President
By Wm. L. Roy Secretary
H. H. Sanford Recorder of the General Land Office

Patent Number 156169
Recorded California, Vol. _____ Page _____
Recorded at Request of Samuel Stenslow Office No. of January County Recorder
Jan 2 1918 at 37 minutes past 8 A. M.
By _____ Deputy Recorder





TRACT 48

Tract 48 represents the position and form of a 95.00 acre parcel, Patent No. 186169, dated March 2, 1911, under document, Eureka 01271, for Samuel Stenehew, described as the E 1/2 E 1/2 NE 1/4 SE 1/4, E 1/2 SE 1/4 NE 1/4, sec. 32, and the W 1/2 SW 1/4 NW 1/4, W 1/2 NW 1/4 SW 1/4, SE 1/4 NW 1/4 SW 1/4, SW 1/4 NE 1/4 SW 1/4, N 1/2 NW 1/4 SE 1/4 SW 1/4, sec. 33, T. 13 N., R. 6 E., Humboldt Meridian, California, excluding that portion reconveyed to the U.S.A. under document Sacramento 1337.

TRACT 49

Tract 49 represents the position and form of a 30.00 acre parcel, Patent No. 673117, dated April 7, 1918, under documents, Eureka 01742 and 03277, for Frank M. Marley, described as the NE 1/4 SE 1/4 SW 1/4, NW 1/4 NW 1/4 SW 1/4 SE 1/4, S 1/2 NW 1/4 SW 1/4 SE 1/4, NE 1/4 SE 1/4 SW 1/4, SW 1/4 SW 1/4 SE 1/4, sec. 32, T. 13 N., R. 6 E., Humboldt Meridian, California.

REGISTRATION REQUEST
SISKIYOU COUNTY TITLE CO

OFFICIAL RECORDS
SISKIYOU COUNTY, CALIF.

Dec 30 . 3 00 PM '94

94018121

David H. Hodge

\$14.00

Recording requested by:
SISKIYOU COUNTY TITLE CO.
AND WHEN RECORDED MAIL THIS DEED AND
UNLESS OTHERWISE SHOWN BELOW, MAIL
TAX STATEMENT TO:

Name: Mr. and Mrs. Doug Cole

Mailing 92520 Hwy. 96
Address:

City/State/Zip Somes Bar, CA
95568

Order No. 60696-dn

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Grant Deed

THE UNDERSIGNED GRANTOR(S) DECLARE(S)

DOCUMENTARY TRANSFER TAX IS \$ 88.00

computed on full value of property conveyed, or
 computed on full value less value of liens or encumbrances remaining at
time of sale.

Unincorporated area City of _____, AND

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

ROBERT E. YOUNG and MARY J. YOUNG, husband and wife

hereby GRANT(S) to DOUGLAS T. COLE and HEIDI ANN COLE, husband and wife as
Joint Tenants

the following described real property in the
County of Siskiyou State of California:

EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.
TOGETHER WITH ALL WATER RIGHTS APPURTENANT THERETO.

Dated December 15, 1994

STATE OF CALIFORNIA
COUNTY OF Siskiyou
On 12/29/94 before me, the undersigned, a
Notary Public in and for said State, personally appeared
Robert E. Young and Mary J. Young

Robert E. Young
Robert E. Young
Mary J. Young
Mary J. Young

personally, known to me (or proved to me on the basis of
satisfactory evidence) to be the person(s) whose name(s)
is/are subscribed to the within instrument and acknowledged
to me that he/she/they executed the same in his/her/their
authorized capacity(ies), and that by his/her/their signature(s)
on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

Signature *Denise D. Nixon*
NOTARY PUBLIC IN AND FOR SAID STATE

.....
DENISE D. NIXON
COMM. #1011630
NOTARY PUBLIC -- CALIFORNIA
SISKIYOU COUNTY
My Comm. Exp. Dec. 26, 1997
.....

MAIL TAX STATEMENTS AS DIRECTED ABOVE.

94018121

EXHIBIT "A"

ALL THAT REAL PROPERTY SITUATE IN THE COUNTY OF SISKIYOU, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL I:

The Southeast 1/4 of the Northwest 1/4 of the Southwest 1/4, the Southwest 1/4 of the Northeast 1/4 of the Southwest 1/4, the North 1/2 of the Northwest 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northeast 1/4 of the Southeast 1/4 of the Southeast 1/4 of the Southwest 1/4, the Northwest 1/4 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, the South 1/2 of the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4, and the Southwest 1/4 of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Base and Meridian.

EXCEPTING THEREFROM: All that portion of the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian described as:

Beginning at the South 1/4 corner of said section; thence East 330 feet to the True Point of Beginning; thence East 330 feet along the South line of said Section to the East boundary of the LUE HAYES property; thence North 330 feet along the East line of said Hayes property; thence West 330 feet; thence South 330 feet to the True Point of Beginning.

FURTHER EXCEPTING those portions of the land in the West 1/2 of the Southwest 1/4 of the Southeast 1/4, and in the Southwest 1/4 of Section 33, Township 13 North, Range 6 East, Humboldt Meridian, as conveyed to LUE HAYES et ux, by deed recorded July 1, 1955. In Book 352 at page 253, Official Records of Siskiyou County, lying Southerly of the line described as follows:

Commencing at a point on the South line of said Section 33, from which the corner common to Sections 3 and 4, Township 13 North, Range 6 East, Humboldt Meridian, and Sections 33 and 34, Township 13 North, Range 6 East, Humboldt Meridian, bears South 88° 51' 44" East, 1769.19 feet, said point also being Engineer's Station "A" 479177.35 P.O.C., as established from the Department of Public Works 1964 Survey between Scopes Bar and Tl Creek Road 01-Sis-96; thence from a tangent which bears North 47° 20' 27" West, along a curve to the left, having a radius of 1000.00 feet, through an angle of 07° 37' 11", a distance of 132.99 feet to Engineer's Station "A" 481110.34 E.C., as established from said survey; thence North 35° 02' 22" East, 100.00 feet to a point hereinafter referred to as Point "B", thence North, 54° 57' 38" West 100 feet more or less to the East line of the West 1/2 of the Southwest 1/4 of the Southeast 1/4 of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence, continuing North 54° 57' 38" West, 630 feet to a point for a total distance of 790.42 feet from said Point "B"; thence South 35° 02' 22" West, 34.00 feet; thence, from a tangent which bears North 54° 57' 38" West, along a curve to the left, having a radius of 1266.00 feet, through an angle of 14° 29' 35", a distance of 320.24 feet to a point hereinafter referred to as Point "C"; thence North 69° 27' 13" West 520 feet, more or less, to the West line of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33; thence continuing North 69° 27' 13" West, 290 feet, more or less to the South line of the North

(Continued)

94018121

1/2 of the North 1/2 of the Southeast 1/4 of the Southwest 1/4 of Section 33; thence continuing North $69^{\circ} 27' 13''$ West, 47 feet to a point, hereinbelow referred to as Point "D" for a total distance of 857.37 feet from said Point "C"; thence from a tangent which bears North $69^{\circ} 27' 13''$ West along a curve to the left, having a radius of 5066.00 feet a distance of 355 feet, more or less to the West line of the Southeast 1/4 of the Southwest 1/4 of said Section 33; thence continuing along last said curve, a distance of 335 feet to a point, hereinbelow referred to as Point "E", through a total angle of $07^{\circ} 48' 15''$, and a total distance of 690.03 feet from said Point "D"; thence North $41^{\circ} 41' 14''$ West, 178 feet, more or less, to the South line of the Northwest 1/4 of the Southwest 1/4 of said Section 33; thence continuing North $41^{\circ} 41' 14''$ West 138 feet to a point for a total distance of 316.31 feet from said Point "E"; thence North $76^{\circ} 12' 04''$ West, 128 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the Northwest 1/4 of the Southwest 1/4 of said Section 33.

EXCEPTING THEREFROM that portion thereof lying Southerly of the line described as follows:

Commencing at said Engineer's Station "A" 481110.34 E.C., hereinabove described; thence North $54^{\circ} 57' 38''$ West, 159.66 feet; thence South $35^{\circ} 02' 22''$ West, 225.00 feet to a point hereinbelow referred to as Point "F"; thence North $11^{\circ} 17' 26''$ East, 17 feet, more or less, to the South line of said Section 33, being the TRUE POINT OF BEGINNING of this line; thence continuing North $11^{\circ} 17' 26''$ East, 120 feet to a point for a total distance of 136.57 feet from said Point "F"; thence North $54^{\circ} 57' 38''$ West, 575.76 feet; thence from a tangent which bears North $54^{\circ} 57' 38''$ West, along a curve to the left, having a radius of 1100.03 feet, through an angle of $14^{\circ} 29' 35''$, a distance of 278.25 feet; thence North $69^{\circ} 27' 13''$ West, 115 feet, more or less, to the Point of Termination of this line on the West line of the East 1/2 of the East 1/2 of the Southwest 1/4 of said Section 33.

ALSO EXCEPTING THEREFROM that portion thereof conveyed to EDWIN T. MANNING, et ux, by Deed recorded January 19, 1965 in Book 512 at page 457, Official Records of Siskiyou County.

The bearings used in the above description are on the California Co-ordinate System Zone 1, and the distances are surface.

PARCEL II:

That portion of the lands in the Southwest 1/4 of the Southeast 1/4 of Section 33, Township 13 North, Range 6 East, N.M., conveyed to the State of California by deed recorded December 15, 1965 in Book 524, Official Records, page 90, Siskiyou County Records, lying Northeasterly of a line described as follows:

Commencing at a point on the South line of said Section 33 from which the corner common to Sections 3 and 4, Township 12 North, Range 6 East, N.M., and Sections 33 and 34, Township 13 North, Range 6 East, N.M., bears South $88^{\circ} 51' 44''$ East, 1769.19 feet, said point also being Engineer's Station "A" 479177.35 P.O.C., as established from the Department of Public Works 1964 Survey between Sages Bar and Ti Creek, Road 01-Sis-96; thence from a tangent that bears North $47^{\circ} 20' 27''$ West, along a curve to the left with a radius of 1000.00 feet, through an angle of $07^{\circ} 37' 11''$, for a distance of 132.99 feet; thence North $35^{\circ} 02' 22''$ East, 100.00 feet; thence North $54^{\circ} 57' 38''$ West, 182 feet, more or less to the Point of Intersection with the East line of said land, last said

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point being the TRUE POINT OF BEGINNING of this parcel thence continuing North
54° 57' 38" West, 117 feet, more or less to the Point of Termination of this
line on the North line of said lands.

The bearings used in the above description are on the California Co-ordin

1
E. STENSHAW

WR-6
WATER NOTICE

NOTICE IS HEREBY GIVEN: That I have taken up and hold for mining and irrigating purposes, six hundred inches of the water running in Stenshaw Creek. So called the water so taken being carried first by ditch and flume to and past my dwelling house by ditch and flume running up the Klamath River to my upper field. Said creek being in Dillon's Township, State of California, County of Klamath.

March 25, 1867

E. Stenshaw

RECORDED

Liber 1 Water Right, page 397

JUNE 9, 1880

4
EXHIBIT D

000957

where?

Seiad Valley Pa
April 2001

Dear Mr and Mrs Cole:

I read with misgivings
about your trouble with
Pace over your water.

Don't know if theres anything
I know that would help you.

I first moved down there
shortly after Guy and Blanch
McMurry first bought the
place from Sam Stenshaw.
They had built that house
around the old Stenshaw
house. I first lived in an old
store? → store building that was built
over Irving Creek. Later that
was torn down and a school
was built nearby. My children
went to that school when there
were two teachers there.

I cooked for boarders
in an old cookhouse on
your ranch.

The highway was being ~~re~~ rebuilt and there sometimes two shifts later after Blanche died and Guy married Mary Lockheart I helped them I run the little dairy. Guy then owned both the lower ranch across ^{Irving Crk} and near the river so we often kept the cows down there. When I first moved down there Dave Drake owned the lower ranch. He had an old sawmill not far from the river on Irving Creek. It was long ago shut down over there. I walked that ditch up to Stenshaw Creek a good many times.

One of Stenshaw's lived in Seiad until just recently. I could probably be able to contact him if that would help.

The residence at the mouth
of Stenshaw Creek belonged
to a fellow (Russian) Basil
Delgas. He operated the
mine for the Singer Sewing
Machine of New York. Also
a group of cabins were built
at the mouth of the creek and
I can't remember ever hearing
of there being any trouble
about water.

I have arthritis in my
hands and am sorry about
this poor writing.

Yours truly
Violet Anderson

Violet
Anderson

We and all
my children have been
working against Felice Pace and
all he represents so if we can
help let us know.

Felice ?
Pace.

ONE ROOM SCHOOLS ISSUE

COPY

1989

The Siskiyou Pioneer

IN FOLKLORE, FACT AND FICTION



and YEARBOOK

The Siskiyou County Historical Society

Volume 6

Number 2

EXHIBIT F

COPY



Photo courtesy of Leona Bryan

JUNCTION SCHOOL - 1928 — SOMES BAR - Levella Conrad, Pauline Conrad, Caroline Davis, Shan Davis, Henry Davis, Frank Grant, Violet Johnnie, Dave Johnnie, J. Rosy Jerry, Lee Merrill, Sidney McNeal, Georgia McNeal, Gengia Ann Langford, Deane Langford, Miss L. Lewis.

IRVING CREEK

Minerva Starritt

The Irving Creek District was established in 1918. The first school was a log building situated over the creek. The outdoor toilet was also over the creek. In the early days it was a custom on the Klamath River to build toilets over a creek. About 1925 the second school house was built of lumber by Frank Grant. A second classroom, dining room, kitchen and bathrooms were added in the fall of 1935. John Spinks helped build the log school as well as the second building and the addition.

At first, school terms on the Klamath were only six or seven months from spring to early fall because many families lived across the river from school. At high water, children could not get across the river. In the late twenties there were regular school terms starting in the fall.

John Spinks and his wife Lucy lived across the river at Roger Creek, two miles down the river from Irving Creek. They had six children, Roy, May, Chester, Bryon, Ernest and Willard. They were well liked and civic minded citizens. They were most anxious that their children get an education.

Other families living within walking distance wanted a school for their children. They included the Pattersons, Farnums, Johnsons, Drakes, Charleys, McCash, Layman, Toms, Albars, Hickox and others. There were four Patterson children, Willie, John, and their two younger sisters May and Rose. They walked five miles to Irving Creek School taking all the short cuts along the narrow crooked road. The Patterson children never missed a day unless they were sick. The older children in the families took care of their younger sisters and brothers on their way to school. Madeline and Grace Charley lived at T Bar five miles from Irving Creek. They too walked.

COPY

There was money from the Office of Indian Affairs for Indian children, so lunches consisting of milk, soup, sandwiches and cookies were delivered to the school. According to Mary Patterson (Lawe) the older boys would order as many as five sandwiches and eat every one or maybe give them to their white friends, who didn't have as good a lunch. Mary also told me about the boys finding lizard eggs along the ditch that ran along the side of the school. They gathered up the eggs and little lizards and threw them on the floor in front of the teachers desk. Pranks like putting water snakes or a frog in the teachers desk were common. Teachers joined in the fun most of the time with laughing and a little screaming. Ernest Spinks tells of one day before Christmas when the teacher let him and all the boys out of school to get a Christmas tree. They all skipped and didn't return. Ernest got a good spanking from his dad.

Enrollment records no longer exist. A partial list of children attending Irving Creek School from 1918 to 1929 follow:

Roy, Mary, Chester, Byron, Ernest and Willard Spinks; John, Willie, Mary and Rose Patterson; Ella, Anne, Henry and Ulysis McCash; Arthur Layman; Lawrence and Gladys Johnson; Madeline and Grace Charley; Laura, Lottie and Henry (Buster) Farnum; Zona and Betty Drake.

In the fall of 1935, I went to teach at the Irving Creek School. I had been teaching the lower grades at Junction School at Somes Bar down the Klamath River from Irving Creek. It was my seventh year of teaching school on the Klamath: two years at Morek below Martins Ferry, two years at Orleans, and two years at Junction. I was no stranger to the district. I knew the people and the children.

The school building was located at the junction of Highway 96 and Irving Creek on the hillside overlooking the creek. It was one large room approximately 20 by 40 feet with anteroom 10 by 20 feet and a porch across the front. There were outside toilets. The children helped with the janitor work.

Mr. Guy McMurtry was Superintendent for the State Highway 96 and had the Highway Yard on his ranch above the school, now the Young ranch. He had cabins where the highway workers lived with their families.

John Waldner owned the ranch below the road where the school was located. He and his wife boarded some of the highway workers and rented cabins to the other workers,



Photo courtesy of Minerva Starritt

IRVING CREEK SCHOOL — These boys all went to Irving School in the twenties. (L-R) Partly shown, Alvis Johnson, Lawrence Johnson, Henry (Buster) Farnau, Willie Patterson, Chester Spinks (standing), John Patterson, Ernest Spinks. In river, Willard Spinks, taken about 1929.

their families and the teacher. Waldner also operated a sawmill up Irving Creek. This ranch was once owned by Frank Harley, Halverson, and the Drakes. It is now the Blue Heron Ranch. The first cabin I rented was an old shed full of mice. I put traps everywhere but at night, mice would wake me running across my bed. A bit eerie. I soon rented another cabin.

When school opened in September, I had fifty-two children and all eight grades. Most of the pupils were from families working on the road, and there were several Indian children. Five Indian children belonged to Chester Pepper. They lived at T Bar but never came to school. I had tried to get them to come to Junction without success. The oldest boy was sixteen and was driving an old car. Arrangements were made with Robert Dennis, the County Superintendent of Schools in Siskiyou County to have this boy transport his brothers and sisters and attend school himself to get his eighth grade diploma, beside helping me around the school. The money from the mileage, clothing, and free lunches helped keep these children in school.

One day in late September, Robert Dennis, County Superintendent of Schools in Siskiyou County, arrived to see how I was progressing. We offered him some graham crackers. To our embarrassment kerosene had seeped onto the shelf where the crackers and supplies were stored in the anteroom. We laughed about the entire episode but Robert decided some changes should be made. He said, "It looks to me as if you need some help. I have a friend, Valeria Beym (Lange), who will graduate from Chico State in January. I will try to convince her to come down the river to Irving Creek School with you and teach the lower grades, but arrangements must be made for another classroom, kitchen, dining room and bathrooms". These arrangements were made with the trustees and with John Waldner, who ran the sawmill.

Meanwhile, I continued with my fifty-two children, with the help of members of the community. The hillside was leveled off for a playground. The State road equipment did their part. Tex Hunt's father was an excellent pianist. He came to school twice a week in the afternoons to help with the music for our entertainments. School programs were most important; there was no TV in those days. The entire community far and wide would come to the school plays and games. We were preparing a gala affair for Christmas. I had combined all grades into a history project of North America beginning with stick puppets for the first three grades of cave men, Indians and old miners. String marionettes of U.S. history with President Washington and the revolutionary war, Lincoln and the Civil War were made by the upper grades. Parents were all involved. Santa and all his helpers and the singers were ready. The night arrives for our program. We had built a stage at the end of the room six inches off the floor and put candle foot lights on the stage. I was wearing a long white polkadot dress. In the middle of the program while I was announcing, I was standing too close to one of the footlights and my dress caught fire. Tex Hunt, one of the parents grabbed me and put the fire out. The show went on.



Contributed by Joe Clyburn

BIG HUMBUG SCHOOL - 1917
 - located on Klamath River near Jack and Cecil Well's home. Back row: Robert (Bud) Clyburn, Tony Rose, Jim Clyburn; Front row: Tom Clyburn and teacher's children. Teacher Mrs. Desevado.

APRIL 30,2000

TO WHOM THIS MAY CONCERN:

I, LUE H HAYES AND AGNES M HAYES, PURCHASED THE McMURTRY RANCH LOCATED IN SOMES BAR, CA. SISKIYOU COUNTY IN 1955. THE PURCHASE PRICE INCLUDED 55 ACRES, 4 RESIDENCES, 2 BARNs, ALL OTHER BUILDINGS, EQUIPMENT AND DEEDED WATER RIGHTS TO STANSHAW CREEK. THE WATER RIGHT, WHICH DATED BACK TO 1867, INCLUDED THE RIGHT TO 600 MINORS INCHES OF WATER AND DITCH. THIS IS RECORDED IN THE ORIGINAL DEED IN THE DILLION MINING DISTRICT. KLAMATH COUNTY, CA. THE PROPERTY HAD AN EXISTING 12" MAIN WATERLINE AND 4 KW PELTON WHEEL AND 30 ACRES WERE UNDER IRRIGATION. AFTER OUR PURCHASE IN 1955, WE UPGRADED TO A LARGER 9 KW PELTON WHEEL TO GENERATE MORE NEEDED ELECTRICITY. IN 1957, SENATOR REEBER, WEAVERVILLE, INTRODUCED A BILL TO THE SENATE OF CALIFORNIA, FOR THE PROTECTION OF NORTH STATE WATER. THE STATE, AT THIS TIME MEASURED THE AMOUNT OF WATER BEING USED ON THE RANCH. ON THE DAY OF THIS MEASUREMENT WE WERE NOT IRRIGATING ALFALFA, SO THE AMOUNT OF WATER DIRECTED INTO THE DITCH WAS REDUCED FROM NORMAL FLOW. THE MEASUREMENT WAS TAKEN BY DROPPING A LEAF INTO THE WATER AND MEASURING HOW FAR IT FLOATED DOWN STREAM IN SO MANY MINUTES. AT OTHER TIMES IN THE YEAR WE WOULD CAPTURE ALL OF STANSHAW FOR OUR USE. IN 1965, A 100 KW PELTON WHEEL WAS INSTALLED AND WATER WAS STILL BEING USED FOR IRRIGATION. WATER FROM STANSHAW CREEK WAS IN CONTINUOUS USE BEFORE OUR PURCHASE AND WAS USED CONTINUOUSLY BY US UNTIL THE PROPERTY WAS SOLD IN 1977.

IF WE STILL OWNED THIS PROPERTY, WE WOULD MAINTAIN THAT WE HAD VALID AND COMPLETE FIRST RIGHT TO STANSHAW CREEK, AS STATED IN A VERY OLD AND COMPLETELY LEGAL DEED.

SIGNED:

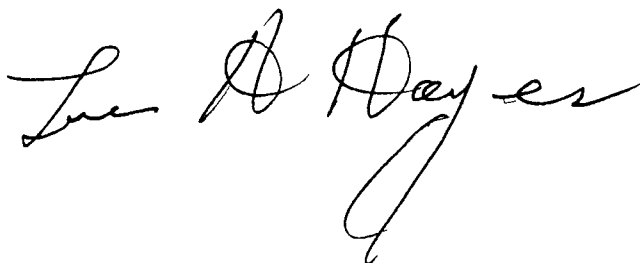
A handwritten signature in cursive script that reads "Lue H Hayes". The signature is written in black ink and is positioned in the lower right quadrant of the page.

EXHIBIT G

000965

Subject:
Stanshaw Diversion
Date:
Fri, 6 Apr 2001 15:27:50 -0700
From:
"William M Heitler/R5/USDAFS" <wheitler@fs.fed.us>
To:
access@pcweb.net

Doug,

As you requested.

Bill

STANSHAW DIVERSION MEETING
MARCH 22,2001

The purpose of the meeting was to familiarize the landowner, Karuk Tribe of California, and the Forest Service with the diversion and related issues. We meet at the Marble Mountain Ranch at 9:30 AM, March 22,2001. We met to determine if it was possible to increase flow in Stanshaw Creek while meeting the needs of the Marble Mountain Ranch. Attendees were: Doug Cole, owner, Marble Mountain Ranch, Toz Soto, Mid-Klamath River Sub-Basin Coordinator, Ron Reed, Karuk Tribal Fisheries, and Bill Heitler, District Ranger, Orleans Ranger District.

Mr. Cole has done a considerable amount of work to improve the efficiency of his hydropower plant. He recently replaced the 85-year-old pelton wheel and military surplus generator with a state of the art unit, and upgraded about 100 feet of the penstock with new PVC pipe. He estimates that about 25% less water will be used to generate the same amount of power as the old system. Water from Stanshaw Creek flows from the generator, is used for irrigation and eventually ends up in Irving Creek. Blue Heron Ranch uses

the water for hydropower and irrigation.

After looking over the hydro plant, we walked the ditch to Stanshaw Creek. The ditch is in good overall condition and shows signs of regular maintenance. Portions have been reinforced with open topped culvert to reduce exfiltration and minimize the chance of a failure. The diversion structure on Stanshaw Creek is rock rubble reinforced with plastic sheeting. The diversion structure has been modified to provide additional flow downstream in accordance with California Fish and Game direction. We did not estimate how much water was by passing the diversion. There is a possibility of additional downstream flow if the ditch can be lined or piped. Currently the Cole's do not have the resources to take on a project such as this. Ron explained the tribal position to Doug. The tribe is concerned about coho survival and feels that adequate flows in Stanshaw Creek are critical to providing refugia. I explained that the Forest Service will not require a fee permit for the ditch and diversion structure since use has been continuous prior to the proclamation of the Klamath National Forest. We do need to document the use in a no fee permit. There is also a question as to whether the ditch is a legal easement included in the deed to the property based on a proclamation signed by President Howard

Taft. Toz, in his position as Mid-Klamath River Sub-Basin Coordinator, feels there is a good chance that grants are available to pay for improving the ditch. He will begin looking for funding sources for this project. Ron offered tribal support for the grant.

I left the meeting about 11:00 AM. Ron, Toz and Doug continued the discussion looking for other ways to direct water back into Stanshaw Creek. Ron and Toz will look into the amount of water that is being diverted by other users on the Stanshaw Creek. There may be an opportunity to gain additional water from these users.

Bill Heitler

(916) 657-1951

FAX: (916) 657-2388

In Reply Refer
to:333:KDM:29450

FEBRUARY 04 1993

Robert E. and Mary Judith Young
c/o Thomas W. Birmingham
770 L Street, Suite 1200
Sacramento, CA 95814

Dear Mr. Birmingham:

APPLICATION 29450 OF ROBERT E. AND MARY JUDITH YOUNG--STANSHAW CREEK IN SISKIYOU COUNTY

On July 22, 1992, Division of Water Rights (Division) staff wrote to inform your clients, Robert and Mary Judith Young, that additional information is required before Division staff will be able to complete the initial review of Application 29450. No response was received. The issues which require a response are listed below.

The first issue which must be addressed is the quantities of water which were requested for both domestic and irrigation purposes. The application requests a right to directly divert 0.22 cubic feet per second (cfs) for domestic purposes. 3 residences, 44 recreational vehicle hookups, 11 housekeeping cabins, 14 mobile homes and one lodge will be served. Based on the quantities considered reasonably necessary pursuant to Title 23, California Code of Regulations Section 697, Division of Water Rights (Division) staff calculates the total beneficial use for these facilities to be 0.02 cfs.

Beneficial use was calculated using 75 gallons per day (gpd) per person for the residences, and an average of 4 persons in each house. The recreational vehicles are estimated to use 30 gpd for 2 people. The housekeeping units would require 55 gpd for four people, and the mobile homes would require a similar amount of water. No information was provided about the lodge. Thus, Division staff estimates that 20 people would use the lodge, and each person would require 55 gpd. If any of these estimates are incorrect, please provide information regarding actual occupancy rates and water duties. Based upon these estimates, Division staff recommends that domestic use under Application 29450 be reduced to 0.02 cfs. The 0.02 cfs was calculated by multiplying the number of each type of facility, such as 3 residences, times the estimated daily usage (75 gpd), times the number of persons (4 people), then multiplying by the conversion factor of 1 cfs per 646,317 gpd.

SURNAME
DWR 540 REV. 1/88

KDM 2-3-93

Kassel 2/3/93

EXHIBIT I

000968

FEBRUARY 04 1993

Robert E. and Mary Judith Young -2-

Irrigation water duty of 1 cfs for each 80 acres of irrigated area is considered reasonable for Siskiyou county. Thus, irrigation of the 7 acres of alfalfa listed in the application should require 0.09 cfs. The application requests 0.12 cfs. Thus, Division staff recommends that Application 29450 be reduced to 0.09 cfs for irrigation purposes. Please respond and state whether your client concurs with these recommendations.

Additional information is also required to complete the environmental supplement to the application. The following information is required:

Question 4 of Environmental Supplement

Indicate whether or not any permitting agency prepared any environmental documents for the project. If so, please complete the answers to the last part of questions number 4.

Question 7b

Please describe the types of existing vegetation (such as grasslands, pine forest, oak-grass foothills, etc.) at the point of diversion, immediately downstream of the point of diversion, and at the place where the water is to be used. Please be sure to include photographs of these areas with the vegetation types showing in the photographs.

Question 8

Indicate what changes in the project site and surrounding area will occur or are likely to occur because of construction and operation of the project.

Question 16

Indicate whether or not your client is willing to make the changes in the project as recommended by the Department of Fish and Game.

A response is requested within the next 30 days. Please note that failure by an applicant to comply with a written request for information within a reasonable time may be cause for the Division to cancel an application pursuant to Government Code Section 65956(c). Division staff is available to answer any questions you might have. I can be contacted at (916) 657-1951.

Sincerely,

ORIGINAL SIGNED BY

Katherine Mrowka
Associate WRC Engineer
Hearings Unit

cc: Robert E. and Mary Judith Young
Young's Ranch
Somes Bar, CA 95568

CONTACT REPORT

WHO CONTACTED

METHOD

DATE

Jan Goldsmith
400 Capital Mall
27th Floor
Sacramento, CA 95814

Phone / Site Visit
(916) 321-4500

7/13/01

STAFF

Michael Contreras, ESIII
(916) 341-5307 / mcontreras@waterrights.swrcb.ca.gov

SUBJECT

Complaint Lodged Against Doug and Heidi Cole

LOCATION

Stanshaw Creek - Tributary of Klamath River

NOTES

Late this morning I received a voice mail message from Jan Goldsmith, introducing herself as attorney for Doug & Heidi Cole. She asked that I provide her with a copy of the complaint (letter from Don Mooney). When I returned her call I was told that she was out, but that she would call me this afternoon.

I plan to either mail or fax a copy of the 5/4/99 memo prepared by Chris Murray and the letter from Don Mooney, whichever she prefers (given the quality of the 1857 miners claim that is attached). Her subsequent voice mail requested that I mail them as soon as possible. In addition, she said that we needed to talk about an "extension."

Jan & I finally spoke. She asked that I mail her the letter authored by Don Mooney and that their response be extended two weeks beyond next Tuesday (7/31/01).

Handwritten notes:
The letter from Don Mooney was mailed to Jan Goldsmith on 7/13/01. The letter from Chris Murray was mailed to Jan Goldsmith on 7/13/01. The letter from Don Mooney was mailed to Jan Goldsmith on 7/13/01.

CONTACT REPORT

WHO CONTACTED	METHOD	DATE
Donald B. Mooney	Phone / Site Visit (530) 758-2377	7/13/01
STAFF	Michael Contreras, ESIII (916) 341-5307 / mcontreras@waterrights.swrcb.ca.gov	
SUBJECT	Complaint Lodged Against Doug and Heidi Cole	
LOCATION	Stanshaw Creek - Tributary of Klamath River	

NOTES

At 10:00 this morning I telephoned Don Mooney to follow up on the discussion he had with Chuck Rich last week (7/3/01). Because there was no answer, I left a message complete with my purpose and telephone number. My stated purpose is to provide a status update, including:

- Their application for consumptive use has been cancelled (A029450),
- The application for hydro electric generation is currently being processed, and
- We are currently awaiting the Cole's response to our notification of complaint letter and hope to schedule a site visit to resolve this matter in early August.

In addition, I want to fax a copy of the 5/4/99 memo prepared by Chris Murray to Don for further illumination on our actions.

After Don's reply (10:30), I faxed the memo.

Overall development - 7/13/01

• Update on status of consumptive use application to fill out a report.

• Don's response to our notification of complaint letter and hope to schedule a site visit to resolve this matter in early August.

CONTACT REPORT

WHO CONTACTED

METHOD

DATE

Chris Murray

Phone / Site Visit
(707) 547-1926

7/12/01

STAFF

Michael Contreras, ESIII
(916) 341-5307 / mcontreras@waterrights.swrcb.ca.gov

SUBJECT

Complaint Lodged Against Doug and Heidi Cole

LOCATION

Stanshaw Creek - Tributary of Klamath River

NOTES

In preparation for a telephone discussion with Don Mooney, attorney for the Klamath Forest Alliance, I have reviewed documents prepared by Christopher O. Murray, a former DWR employee. Today, I e-mailed Chris in hopes that he could provide me with some background information to this case.

Chris responded by calling me this morning. I found that he has a vivid recollection of the Coles' water issues, and the documentation that reflects the evolution. We discussed several memos that chronicle the determinations.

He suggested that the application would have likely been processed easily if the Coles had not been belligerent. He characterized the situation and personalities at play as now vastly different, and that the Dept. of F&G might now have ample cause for concern about the fishery, and that neighbors have finally decided to retaliate. In addition, Chris recalled that Mr. Gary Squires, father to Heidi, was much more accessible and reasonable, perhaps attributed to the fact that he had taught biology at the community college.

e-mail attached.



State Water Resources Control Board

SURNAME / FILES



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Gray Davis
Governor

JUL 02 2001

Mr. Doug and Ms. Heidi Cole
92250 Highway 96
Somes Bar, California 95568

Dear Doug and Heidi:

WATER RIGHTS COMPLAINT SUBMITTED BY THE KLAMATH FOREST ALLIANCE ALLEGING UNREASONABLE DIVERSION

The State Water Resources Control Board's (SWRCB) Division of Water Rights has received a complaint on behalf of the Klamath Forest Alliance (KFA) regarding your diversion of water from Stanshaw Creek, a tributary to the Klamath River. In a letter from their attorney, your water rights are questioned and it is alleged that your diversion is unreasonable in that it compromises the downstream fishery.

Enclosed for your review is a copy of the June 14, 2001 letter, an "Answer to Complaint" form, and an information pamphlet. Please use the form to respond to the allegations within 15 days from the date of this letter. Upon receipt of your responses, all items submitted by each party will be evaluated to determine whether further action is required by the SWRCB.

If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,

ORIGINAL SIGNED BY

Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our web-site at <http://www.swrcb.ca.gov>."

SURNAME
DWR 540

uc 6/29/01

000973

Doug and Heidi Cole

2

cc: Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman
Attention Margaret Tauzer
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Mr. Jim De Pree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klingle Road NW
Washington, D.C. 20008

Robert E. and Mary J. Young
c/o Thomas W. Birmingham
770 L Street, Suite 1200
Sacramento, CA 95814

Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

bcc: Robert E. Miller (REM)

Mcontreras\lfischer
D:\mc\cole 6/29/01



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) 341-5307
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Gray Davis
Governor

JUL 02 2001

Mr. Doug and Ms. Heidi Cole
92250 Highway 96
Somes Bar, California 95568

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If you have any questions regarding this matter, please contact me at (916) 341-5307.

Sincerely,

Michael Contreras
Complaint Unit

Enclosures

cc: See next page.

[Faint, illegible text, likely bleed-through from the reverse side of the page]

California Environmental Protection Agency

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000975

Doug and Heidi Cole

2

JUL 02 2001

cc: Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

William M. Heitler, District Ranger
U.S. Department of Agriculture
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

National Marine Fisheries Service
Santa Rosa Field Office
Attention Tim Broadman
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777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Mr. Jim DePree
Siskiyou County Planning Department
P.O. Box 1085
Courthouse Annex
Yreka, CA 96097

Mr. Konrad Fisher
3210 Klinge Road NW
Washington, D.C. 20008

Robert E. and Mary J. Young
c/o Thomas W. Birmingham
770 L Street, Suite 1200
Sacramento, CA 95814

Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

From: "Ditchwebmaster" <ditches@cwo.com>
To: "Robert E. Miller" <REMiller@waterrights.swrcb.ca.gov>
Date: Thu, Jun 28, 2001 6:42 PM
Subject: RE: Stenshaw

Rob -

Below are the excerpts from: Gudde, Erwin Gustav. "California gold camps : a geographical and historical dictionary of camps, towns, and localities where gold was found and mined, wayside stations and trading centers." Berkeley : University of California Press, c1975. x, 467 p. : ill. ; 27 cm. Please cite the source if you use the text in a publication:

Stenshaw [Siskiyou]. On Klamath River, above Somes Bar. Placer mining was carried on until the end of the century (Register, 1898). Shown on USGS Sawyers Bar 1945 quadrangle. Stenshaw Placer is listed in Mining Bureau reports until 1935. The name is also spelled Stanshaw.

I suggest that you check out this register at the State Library, Gov't Publications section:

Register of mines and minerals : county of Siskiyou, California /, issued by the State Mining Bureau. [San Francisco, Calif.] : The Bureau, 1900 (Sacramento: A.J. Johnston, Superintendent State Printing) [49] p., [1] folded leaf of plates : 1 folded map ; 23 x 30 cm.

CSL State Lib - Govt Pubs

N400 .R3asis

Shelved at Information Desk. Map has been removed, encapsulated and is located in Reference Room; Another copy of report in Register of mines and minerals, N400.R3 v.1.

Various information was included in these Registers, depending on the type of mine:

- 1) lode mine - whether there was a stamp mill (or other mechanical works, and how it was powered (e.g. "water")
- 2) drift mine - the source of water to run the stamp mill
- 3) hydraulic mine - the quantity, source, and other data on the water supply.

You might also contact the librarian at the Division of Mines and Geology Library ((916) 327-1850), and ask for help investigating the mine's history. There are many circa-1900s DMG reports there that have lists and descriptions of the various mines, by County.

Thank you,

Craig Crouch
5307 Hawkhaven Court
Rocklin, CA 95765

cecrouch@cwo.com
(916) 632-1407



State Water Resources Control Board

WR-6



Gray Davis
Governor

Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5300
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>.

JUN 22 2001

Mr. Konrad Fisher
3210 Klinge Road NW
Washington D.C. 20008

Dear Mr. Fisher:

APPLICATION 29449 OF DOUG COLE ET. AL. TO DIVERT 3.0 CUBIC FEET PER SECOND (CFS) OF WATER FROM STANSHAW CREEK TRIBUTARY TO KLAMATH RIVER IN SISKIYOU COUNTY FOR GENERATION OF 33.9 KILOWATTS OF ELECTRICITY

Per our phone conversation on 21 June, 2001, I have enclosed text, tables, and a map from the May, 1965 bulletin authored by the Department of Water Resources (DWR) entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6) that is pertinent to the above mentioned application. As you will see in Table 4 on page 58 of the copied report, the type of apparent water right is incorrectly listed as riparian. Page 31 states, "Those [diversions] which have been neither adjudicated nor based on appropriations [water right applications or pre-1914 appropriations], but for which the area of use is apparently riparian to the streams or which the owner claims to be riparian are listed as 'riparian.'" Either DWR incorrectly came to this conclusion or the owner incorrectly stated that it was a riparian right. It is interesting here to note that neither the owner at the time, L.H. Hayes, nor the previous owner, McMertree, listed this right as a pre-1914 appropriation even though the indicated date of first use on the table is "About 1800."

As you will also see in the enclosures, 362 acre-feet (af) was *measured* at the nozzle in 1958; this would be the amount of water that was put to beneficial use. This calculates to a daily average beneficial use of:

$$362 \text{ af/yr} \div 365 \text{ days/yr} = 0.99 \text{ af/day}$$
$$0.99 \text{ af/day} \div 1.98 \text{ af/day/cfs} = 0.50 \text{ cfs}$$

Average instantaneous flow per month could also be calculated using data from Table 5. Small domestic use is not calculated in this figure, although that would be negligible at less than 10 af/yr. I also assume that seepage losses are not figured into this since this is measured at the nozzle rather than the point of diversion, but I would not expect seepage losses to nearly approach 2.5 cfs.

Mr. Konrad Fisher

2

JUN 22 2001

Please also note that: 1) 1958 was an "unusually wet year," with Klamath River flows nearly double that of the average annual flow, and 2) 6 kilowatts of electricity were generated by the diversion in question. Hence, an average rate of 0.5 cfs through the nozzle was probably all that was needed to generate 6 kilowatts, and this lower rate was not the result of low flows available for diversion from Stanshaw Creek.

If I can be of further assistance, please call me at (916) 341-5392.

Sincerely,

ORIGINAL SIGNED BY:

Robert E. Miller
Environmental Specialist II
Environmental Review Unit 2

Enclosures

bc. MC

RMILLER:llv 06/22/2001
u:\envirodrv\rem\29449 letter to fisher



State Water Resources Control Board

SURNAME/FILES



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5307
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Gray Davis
Governor

SEP 20 2001

To Attached Mailing List

The Division of Water Rights (Division) received a complaint against Doug and Heidi Cole on June 18, 2001, lodged by Don Mooney, legal counsel representing the Klamath Forest Alliance (KFA). On August 20, 2001, an Answer to Complaint was received from Janet Goldsmith, legal counsel for the Coles. Based on a short telephone discussion with Mr. Mooney prior to him leaving on vacation, we do not believe that Ms. Goldsmith's response adequately resolves the complaint filed on behalf of the KFA. Therefore, unless notified to the contrary, the next step in the complaint process is to schedule a field investigation.

We propose to conduct this investigation on **Wednesday, October 17, 2001**. We would like to have all interested parties meet at the Marble Mountain Ranch at 9:00 a.m. on that date. Because the issues raised by KFA relate to the health and well being of anadromous fish, we would appreciate the participation of representatives from the National Marine Fisheries Service and the California Department of Fish and Game. We will be inspecting both Stanshaw Creek below the point of diversion and Irving Creek below the point where diverted water is released to this creek. Because the ditch heads on Forest Service property, we would also appreciate the participation of a representative from the U.S. Forest Service. If these agencies do not participate in this investigation or make other arrangements for their input, we will assume that they have no position or interest in this matter.

If this date is unworkable for any party, please let me know what alternate dates are better. However, Division staff believe that this investigation must be conducted before the onset of winter rains. Therefore, we are not willing to postpone this investigation beyond October 26th.

Please let me know if you intend to participate in the October 17th investigation, or if some other date/time during that week would be preferable. I can be reached by telephone at (916)-341-5307, or by e-mail at mcontreras@waterrights.swrcb.ca.gov.

Sincerely,

Michael Contreras

Attachment

California Environmental Protection Agency

"The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>." 000981

SURNAME

mc 9/19/01

CAR 19-01

LAW OFFICES OF DONALD B. MOONEY

DONALD B. MOONEY
Admitted in California and Oregon

129 C Street, Suite 2
Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

DRB, HMS
WB
DEB/CR

June 14, 2001

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

*Re: Unlawful Diversion of Water by Doug and Heidi Cole from
Stanshaw Creek*

Dear Mr. Schueller:

This letter is written on the behalf of the Klamath Forest Alliance ("KFA") regarding the unlawful diversion of water from Stanshaw Creek, a tributary to the Klamath River. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. To that end, KFA requests that without any further delay the State Water Resources Control Board's Division of Water Rights ("SWRCB") issue an order that directs Doug and Heidi Cole to cease and desist their unlawful diversion of water from Stanshaw Creek, as such diversion adversely impacts public trust resources, including but not limited to coho salmon, a federally listed species.

Although the Coles divert up to 3.0 cfs from Stanshaw Creek, the Coles do not possess an appropriative water right to divert this quantity of water. (See letter dated September 15, 1998, from Harry M. Schueller to Doug Cole, Regarding: Unauthorized Diversion - Stanshaw Creek in Siskiyou County ("Schueller Letter"). For your convenience a copy of your letter is attached as Exhibit A to this letter.) To the extent that the Coles divert water based upon a claim to a pre-1914 appropriative water right, California water law limits any such water right to the amount of water put to continuous, reasonable and beneficial use regardless of the original water right. (See Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) According to the SWRCB's Division of Water Rights, any claim the Coles may have to a pre-1914 appropriative water is limited to the Coles' historic domestic and irrigation use. The SWRCB has quantified such use to be 0.11 cfs. (See Schueller Letter p. 1 & 2) This quantity is based on the yet unsubstantiated assumption that the Coles are successors in interest to Sam Stanshaw's water rights as established in a March 25, 1867 letter by Mr. Stanshaw. (See copy of the March 25, 1867, Stanshaw Water Rights Notice attached as Exhibit B to this letter.)

The Coles, however, have failed to provide any evidence to the SWRCB that the Stanshaw Water Right Notice applies to their land. Unless the Coles can substantiate the assumption that Stanshaw Water Rights Notice applies to their property, any diversion of water by the Coles from Stanshaw Creek violates

June 14, 2001

Page 2

California Water Code, section 1200 *et seq.* It should be noted that former water diversion ditches and pipes, large rock piles and abandoned mining equipment indicate that large scale mining and water consumption from Stanshaw Creek took place on the land now owned by the Fisher Family, not the Coles. Furthermore, Stanshaw Creek itself flows through the former and not the latter. If the Coles can prove that they are successors to Stanshaw's water rights, then any diversion of water in excess of a resulting pre-1914 appropriative water right of approximately 0.11 cfs violates Water Code, section 1200 *et seq.* In either event, the Coles do not possess an appropriative water right to support their current water diversion practices and such practices are contrary to law.

As the Coles do not possess a valid water right for their current diversion of water, the Coles filed an application to appropriate water seeking to divert 3 cfs from Stanshaw Creek via a flume which is 12-inches deep, 24-inches wide, and 5,200 feet long then through a penstock of 16-inch diameter, 455 foot long steel pipe from Stanshaw Creek, a tributary to the Klamath River, in Siskiyou County (Application to Appropriate Water No. 29449). According to the Cole's application, the penstock utilizes 200 feet of fall to generate a maximum of 33.9 kilowatts at 80 percent efficiency at a hydroelectric plant above Irving Creek. The water is then released into Irving Creek and then into the Klamath River. Despite the fact that the Coles have not obtained a water rights permit from the SWRCB for the diversion of water, the Coles continue to divert up to 3 cfs from Stanshaw Creek.¹

In the Fall of 2000, the California Department of Fish and Game ("DFG") obtained an injunction against the Coles for violating sections 1603 and 5937 of the Fish and Game Code. The injunction required that the Coles remove portions of the dam that they had constructed in Stanshaw Creek. The Coles used this illegal obstruction to pool water in order to assist their diversion from Stanshaw Creek. It must be noted, however, that the injunction obtained by DFG applies only to the illegal obstruction in Stanshaw Creek and does not address the unlawful diversion of water. It is KFA's understanding that even though the Coles or DFG may have modified the diversion structure as required by the injunction, the Coles continue to divert water in excess of any pre-1914 appropriative water right.

In your September 15, 1998, letter to the Coles, you stated that within 45 days of your letter, the Coles must provide information to the Division of Water Rights substantiating their claims to a pre-1914 appropriative water right for their

¹ On November 15, 1999, the SWRCB granted the Coles' request for the registration of a small domestic use pursuant to Water Code section 1228 *et seq.* (Certificate No. R 480, Application 30945R). The Coles' small domestic use registration limits the Coles' diversion to 10 acre-feet per annum ("afa") and does not allow hydroelectric generation as a purpose of use. The Coles' current water diversion practices far exceed the 10-afa limitation. For instance, at a diversion rate of 2.5 cfs, the Coles exceed the 10-afa limitation in just 4 days. Additionally, the Small Domestic Use Registration requires that the Coles obtain all necessary federal, state and local approvals which the Coles have failed to do.

Mr. Harry M. Schueler
June 14, 2001
Page 3

current water diversion. If the Coles failed to provide the requested information, the matter would be referred to the Division of Water Rights' Complaint Unit to consider appropriate enforcement action. It is our understanding that although two and one-half years have passed since your letter to the Coles, the Coles have not provided the requested information. Despite the Coles' failure to comply with your request, this matter has not been referred to the Complaints Unit and the Coles continue to unlawfully divert water from Stanshaw Creek.

In many instances the unlawful diversion of water may not have a significant impact to public trust resources and other legal users of water while an application to appropriate is reviewed and considered by the SWRCB. In such instances, it is our understanding that the SWRCB's informal practice is to allow such diversions to continue until the application to appropriate has been denied or approved. In the present situation, however, the Coles' unlawful diversion has significant impacts to public trust resources and may result in a violation of section 9 of the federal Endangered Species Act, 16 U.S.C. § 1538.²

Stanshaw Creek and the Klamath River contain coho salmon (*Oncorhynchus kisutch*) which are in the Southern Oregon/Northern California Coasts ESU and are listed as threatened under the federal ESA. See 50 C.F.R. § 102(a)(4). In a letter dated October 5, 2000, from William M. Heitler, District Ranger to Doug and Heidi Cole, Mr. Heitler stated that the National Marine Fisheries Service ("NMFS") and DFG are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting coho salmon. (A copy of Mr. Heitler's October 5, 2000 letter is attached to this letter as Exhibit C.) Stanshaw Creek also contains steelhead (*Oncorhynchus mykiss*) which are in the Klamath Mountains Province and are listed as candidate species under the ESA and a species of concern to DFG.

As the Coles' unauthorized diversion of water poses a significant risk to public trust resources in and along Stanshaw Creek and the Klamath River, including but not limited to the impacts to coho salmon, a federally listed species, KFA respectfully requests that the SWRCB follow through on its September 15, 1998, letter and immediately refer this matter to the Complaint Unit. KFA also

² The courts have ruled that when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition. (Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997), cert. denied, 119 S.Ct.81, and cert. denied, 119 S.Ct. 437 (1998).) The same rationale that caused the court in Strahan to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the SWRCB's decision to allow the Coles to continue diverting water from Stanshaw Creek; even though the SWRCB has concluded that Coles do not possess an appropriate water right. In addition, recent case law confirms that the failure of government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act. (Loggerhead Turtle v. Volusia County, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999).)

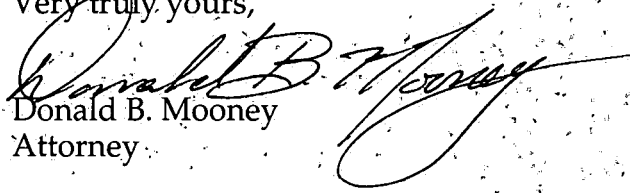
Mr. Harry M. Schueler
June 14, 2001
Page 4

WR-6

requests that the SWRCB direct the Coles to cease and desist from any further diversion of water from Stanshaw Creek in excess of an established pre-1914 water right until the SWRCB has the opportunity to review and consider the Coles' Application to Appropriate Water and the associated protests as well as any biological assessment prepared by the United States Forest Service and a biological opinion prepared by NMFS.

Please do not hesitate to contact me if you have any questions regarding this matter. I can be reached at (530) 758-2377.

Very truly yours,


Donald B. Mooney
Attorney

cc: Felice Pace
Robert Miller
Charles Rich
Larry Allen

000985



State Water Resources Control Board

John P. Caffrey, Chairman



Peter Wilson
Governor

Division of Water Rights
901 P Street • Sacramento, California 95814 • (916) 657-4765 FAX (916) 657-1423
Mailing Address: P.O. Box 2080 • Sacramento, California • 95812-2080
Internet Address: <http://www.stwrbc.ca.gov>

J. Vorhies

SEPTEMBER 15 1998

RECEIVED
JUN 26 2000

In Reply Refer
to: 332:CM:29449, 29450

Doug Cole, Heidi Cole,
Norman D. Cole, Caroline Cole
c/o Mr. Doug Cole
92520 Highway 96
Somers Bar, CA 95568

Nat'l Marine Fish
Aic218. C

OPTIONAL FORM NO. 7-00

FAX TRANSMITTAL

of pages = 3

To: <i>Kenneth Fisher</i>	From: <i>M. FAUZEI</i>
Dist./Priority: <i>1</i>	Phone #: <i>825 5174</i>
Fax #: <i>530 244 0933</i>	Fax #: <i>825 4840</i>

Dear Mr. Cole:

UNAUTHORIZED DIVERSION--STANSHAW CREEK IN SISKIYOU COUNTY

I understand that you have been involved in an ongoing discussion with the Division of Water Rights (Division) regarding your diversion and use of water from Stanshaw Creek in Siskiyou county. It is my understanding that you have on file with the Division, two pending applications to appropriate water, numbered 29449 and 29450. These applications were filed by the previous owner of your property in Somers Bar, California to authorize his diversions from Stanshaw Creek for use upon the parcel which you now own. You claim pre-1914 appropriative rights as a basis for your ongoing and, apparently increasing diversions for domestic use and hydroelectric power production and you have expressed a desire to withdraw your pending applications.

To date, the Division has been unwilling to cancel your pending applications because you do not appear to have a valid pre-1914 claim for the water you are currently diverting. The Division has supplied you and your attorney with evidence to show that the upper limit of your claim of pre-1914 appropriative rights is 0.49 cubic feet per second (cfs), continuous flow and may appropriately be only 0.11 cfs. This assertion is based upon information contained within the May, 1965 bulletin by the Department of Water Resources entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6). This publication lists the property, which you now own and states that the total amount of water diverted for irrigation, domestic, stockwatering, and power production totaled 362 acre-feet, annually. This total usage equates to a continuous flow rate of approximately 1/2 cfs. This information was verified by Mr. Marvin Goss, Forest Service Hydrologist, who lived on your property while it was under prior ownership. Mr. Goss evaluated the flow capacity of the ditch as well as measuring the actual amount of water put to use generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel.

Please understand that the nature of any appropriative right is such that it is limited to the amount of water put to continuous, reasonable and beneficial use regardless of the original "face value" of the appropriation. Your predecessor in interest, Mr. Young, submitted a copy of a water appropriation notice by Samuel Stanshaw dating well into pre-1914 times, claiming

Same to Pasion 9.21.98

RECEIVED
2/1998
Dept. of F&G Region 1

Mr. Doug Cole

-2-

SEPTEMBER 15 1998

600 minor's inches (15 cfs) of water from Stanshaw Creek for mining purposes. You claim to be successor in interest to Mr. Stanshaw's water rights. Although you have submitted no information to suggest that those rights ever pertained to your parcel of land, the Division is willing to accept, given that you are the current operator of an obviously old ditch on Stanshaw Creek, that you are the successor in interest to Mr. Stanshaw's water rights. However, you are not entitled to the entire 15 cfs appropriation described in Mr. Stanshaw's original notice, due to the documented failure of the previous landowners to apply that amount of water to beneficial use; additionally, your ditch is not capable of carrying that much water and expansion of the ditch does not allow you to reclaim water previously lost by nonuse. All appropriative water rights are limited as to both amount and season to the amounts actually used, which has been documented, in your case, as a maximum of 0.49 cfs for power generation and domestic purposes.

On September 23, 1997 an engineer from this office visited your site and observed that you were diverting water from Stanshaw Creek to supply your hydroelectric power plant. No measurements were taken at that time, but it was the opinion of the engineer that your diversions were well in excess of 0.49 cfs. Based upon the observations made during this visit, Division staff has attempted to help you understand the limitations of your claimed right and the need for the two pending applications. This subject has been discussed in considerable detail with your attorney. You continue to maintain that your current diversions are authorized by your "pre-1914 rights". As you have been advised by my staff, your "pre-1914 rights" are probably limited to your domestic and irrigation needs, which amount to approximately 0.11 cfs. On June 3, 1998 an engineer from this Division measured the flow rate in your ditch (located upon public lands) and determined that you were diverting 2.4 cfs from Stanshaw Creek to operate your hydroelectric power plant.

The Division has received a report from the Department of Fish and Game that you have recently constructed a reservoir upon your property. It is difficult to envision how such a reservoir, constructed in 1998, could be authorized by a pre-1914 appropriative right. Although a pre-1914 right may be changed as to purpose of use, place of use, or point of diversion without the approval of this Division, such a change cannot serve to increase the amount of the right. The construction of a new reservoir is generally considered to be an increase in a water right and usually requires the filing of a new application to appropriate water.

At this time, the Division is willing to cancel application 29450, filed for 0.11 cfs for domestic and irrigation use, as soon as you complete and submit the enclosed Request for Cancellation form and the Statement of Water Diversion and Use form. It would appear that the diversion of this water is authorized under your pre-1914 claim of right. There is no information in our files to indicate that any diversion in excess of 0.11 cfs is authorized under your pre-1914 claim. Consequently, I recommend that you work with my staff to process application 29449. In the event you do not wish to process application 29449, please submit evidence to substantiate your alleged pre-1914 claim of right including a discussion of the recently constructed reservoir (capacity, amount and season of use, basis of right). Such evidence should clearly show the extent water was continuously used from the time of the appropriation to the present. Our files indicate that the hydroelectric plant was installed in the 1940's, so you may wish to substantiate the use of this water between 1914 and 1950. Any claim in excess of 0.49 cfs should be accompanied by substantial evidence to refute the Department of Water Resources' Bulletin 94-6 as well as the testimony of Mr. Goss.

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Mr. Doug Cole

-3-

SEPTEMBER 15 1998

If the Division fails to receive the following within 45 days of the date of this letter, this matter will be referred to our Complaints Unit to consider appropriate enforcement action which may include the imposition of Administrative Civil Liabilities (fines) of up to \$500 per day for continued unauthorized use of water:

1. Description and location of your reservoir, use thereof, and basis of right to store water. If a basis cannot be documented, submit the enclosed application forms, properly completed along with the required fees.
2. Statement indicating whether you wish to continue processing application 29449; if not, substantial evidence which shows that your diversion of water has been continuously maintained in time and amount since December 19, 1914;
3. Completed Request for Cancellation form relating to application 29450 as well as a completed Statement of Water Diversion and Use for your domestic and irrigation use of water. *Please note that, in accordance with Section 5105 of the Water Code, the Division is authorized to investigate and determine the facts relating to your diversion, at your expense, if you do not submit a properly completed Statement of Water Diversion and Use within 60 days.*

If you have any further questions, Chris Murray, the engineer assigned to this case, can be reached at (916) 657-2167.

Sincerely,

ORIGINAL SIGNED BY:

Harry M. Schueller, Chief
Division of Water Rights

Enclosures

CERTIFIED

cc: Nancy Smith, Esq.
1041 East Green Street, Suite 203
Pasadena, CA 91106-2417

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

TOTAL P. 03



United States
Department of
Agriculture

Forest
Service

Six Rivers
National
Forest

WR-6
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410
(530) 627-3291 Text (TTY)
(530) 627-3291 Voice

File Code: 2700

Date: October 5, 2000

Doug and Heidi Cole
Marble Mountain Ranch
Somes Bar, CA 95568

RECEIVED

OCT 06 2000

Nat'l Marine Fisheries Svc
Arcata, CA

Dear Doug and Heidi,

It has come to my attention that you have been diverting water from Stanshaw Creek to use at the Marble Mountain Ranch. We have no record of a Special Use Permit for either the diversion structure or the ditch that transports water from Stanshaw Creek to your property. A recent site inspection of the ditch leads me to believe that it has been in use for a considerable period of time. If the ditch has been in continuous use since before 1910, date the Klamath National Forest was proclaimed, you may be eligible for a free special use permit.

The National Marine Fisheries Service and California Department of Fish and Game are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting a threatened and endangered species, specifically the coho salmon.

Since it appears that your diversion structure and ditch are not authorized, they must be removed within 30 days. If you have permits or other legal documents that provide for this use, the Forest Service needs copies so we can determine if this an appropriate use of National Forest land, authorize the use and provide for a diversion structure that will allow flows adequate for the protection of the salmon.

If you have questions feel free to contact me at the Orleans District Office.

Sincerely,

/s/ William M. Heitler

WILLIAM M. HEITLER
District Ranger



CHK

WR-6

LAW OFFICES OF DONALD B. MOONEY

DONALD B. MOONEY
Admitted in California and Oregon

129 C Street, Suite 2
Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

June 14, 2001

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

**Re: *Unlawful Diversion of Water by Doug and Heidi Cole from
Stanshaw Creek***

Dear Mr. Schueller:

This letter is written on the behalf of the Klamath Forest Alliance ("KFA") regarding the unlawful diversion of water from Stanshaw Creek, a tributary to the Klamath River. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. To that end, KFA requests that without any further delay the State Water Resources Control Board's Division of Water Rights ("SWRCB") issue an order that directs Doug and Heidi Cole to cease and desist their unlawful diversion of water from Stanshaw Creek, as such diversion adversely impacts public trust resources, including but not limited to coho salmon, a federally listed species.

Although the Coles divert up to 3.0 cfs from Stanshaw Creek, the Coles do not possess an appropriative water right to divert this quantity of water. (See letter dated September 15, 1998, from Harry M. Schueller to Doug Cole, Regarding: Unauthorized Diversion - Stanshaw Creek in Siskiyou County ("Schueller Letter") For your convenience a copy of your letter is attached as Exhibit A to this letter.) To the extent that the Coles divert water based upon a claim to a pre-1914 appropriative water right, California water law limits any such water right to the amount of water put to continuous, reasonable and beneficial use regardless of the original water right. (See Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) According to the SWRCB's Division of Water Rights, any claim the Coles may have to a pre-1914 appropriative water is limited to the Coles' historic domestic and irrigation use. The SWRCB has quantified such use to be 0.11 cfs. (See Schueller Letter p. 1 & 2) This quantity is based on the yet unsubstantiated assumption that the Coles are successors in interest to Sam Stanshaw's water rights as established in a March 25, 1867 letter by Mr. Stanshaw. (See copy of the March 25, 1867, Stanshaw Water Rights Notice attached as Exhibit B to this letter.)

The Coles, however, have failed to provide any evidence to the SWRCB that the Stanshaw Water Right Notice applies to their land. Unless the Coles can substantiate the assumption that Stanshaw Water Rights Notice applies to their property, any diversion of water by the Coles from Stanshaw Creek violates

June 14, 2001

Page 2

California Water Code, section 1200 *et seq.* It should be noted that former water diversion ditches and pipes, large rock piles and abandoned mining equipment indicate that large scale mining and water consumption from Stanshaw Creek, took place on the land now owned by the Fisher Family, not the Coles. Furthermore, Stanshaw Creek itself flows through the former and not the latter. If the Coles can prove that they are successors to Stanshaw's water rights, then any diversion of water in excess of a resulting pre-1914 appropriative water right of approximately 0.11 cfs violates Water Code, section 1200 *et seq.* In either event, the Coles do not possess an appropriative water right to support their current water diversion practices and such practices are contrary to law.

As the Coles do not possess a valid water right for their current diversion of water, the Coles filed an application to appropriate water seeking to divert 3 cfs from Stanshaw Creek via a flume which is 12-inches deep, 24-inches wide, and 5,200 feet long then through a penstock of 16-inch diameter, 455 foot long steel pipe from Stanshaw Creek, a tributary to the Klamath River, in Siskiyou County (Application to Appropriate Water No. 29449). According to the Cole's application, the penstock utilizes 200 feet of fall to generate a maximum of 33.9 kilowatts at 80 percent efficiency at a hydroelectric plant above Irving Creek. The water is then released into Irving Creek and then into the Klamath River. Despite the fact that the Coles have not obtained a water rights permit from the SWRCB for the diversion of water, the Coles continue to divert up to 3 cfs from Stanshaw Creek.¹

In the Fall of 2000, the California Department of Fish and Game ("DFG") obtained an injunction against the Coles for violating sections 1603 and 5937 of the Fish and Game Code. The injunction required that the Coles remove portions of the dam that they had constructed in Stanshaw Creek. The Coles used this illegal obstruction to pool water in order to assist their diversion from Stanshaw Creek. It must be noted, however, that the injunction obtained by DFG applies only to the illegal obstruction in Stanshaw Creek and does not address the unlawful diversion of water. It is KFA's understanding that even though the Coles or DFG may have modified the diversion structure as required by the injunction, the Coles continue to divert water in excess of any pre-1914 appropriative water right.

In your September 15, 1998, letter to the Coles, you stated that within 45 days of your letter, the Coles must provide information to the Division of Water Rights substantiating their claims to a pre-1914 appropriative water right for their

¹ On November 15, 1999, the SWRCB granted the Coles' request for the registration of a small domestic use pursuant to Water Code section 1228 *et seq.* (Certificate No. R 480, Application 30945R). The Coles' small domestic use registration limits the Coles' diversion to 10 acre-feet per annum ("afa") and does not allow hydroelectric generation as a purpose of use. The Coles' current water diversion practices far exceed the 10-afa limitation. For instance, at a diversion rate of 2.5 cfs, the Coles' exceed the 10-afa limitation in just 4 days. Additionally, the Small Domestic Use Registration requires that the Coles' obtain all necessary federal, state and local approvals which the Coles have failed to do.

current water diversion. If the Coles failed to provide the requested information, the matter would be referred to the Division of Water Rights' Complaint Unit to consider appropriate enforcement action. It is our understanding that although two and one-half years have passed since your letter to the Coles, the Coles have not provided the requested information. Despite the Coles' failure to comply with your request, this matter has not been referred to the Complaints Unit and the Coles continue to unlawfully divert water from Stanshaw Creek.

In many instances the unlawful diversion of water may not have a significant impact to public trust resources and other legal users of water while an application to appropriate is reviewed and considered by the SWRCB. In such instances, it is our understanding that the SWRCB's informal practice is to allow such diversions to continue until the application to appropriate has been denied or approved. In the present situation, however, the Coles' unlawful diversion has significant impacts to public trust resources and may result in a violation of section 9 of the federal Endangered Species Act, 16 U.S.C. § 1538.²

Stanshaw Creek and the Klamath River contain coho salmon (*Oncorhynchus kisutch*) which are in the Southern Oregon/Northern California Coasts ESU and are listed as threatened under the federal ESA. See 50 C.F.R. § 102(a)(4). In a letter dated October 5, 2000, from William M. Heitler, District Ranger to Doug and Heidi Cole, Mr. Heitler stated that the National Marine Fisheries Service ("NMFS") and DFG are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting coho salmon. (A copy of Mr. Heitler's October 5, 2000 letter is attached to this letter as Exhibit C.) Stanshaw Creek also contains steelhead (*Oncorhynchus mykiss*) which are in the Klamath Mountains Province and are listed as candidate species under the ESA and a species of concern to DFG.

As the Coles' unauthorized diversion of water poses a significant risk to public trust resources in and along Stanshaw Creek and the Klamath River, including but not limited to the impacts to coho salmon, a federally listed species, KFA respectfully requests that the SWRCB follow through on its September 15, 1998, letter and immediately refer this matter to the Complaint Unit. KFA also

² The courts have ruled that when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition. (Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997), cert. denied, 119 S.Ct.81, and cert. denied, 119 S.Ct. 437 (1998).) The same rationale that caused the court in Strahan to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the SWRCB's decision to allow the Coles to continue diverting water from Stanshaw Creek; even though the SWRCB has concluded that Coles do not possess an appropriative water right. In addition, recent case law confirms that the failure of government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act. (Loggerhead Turtle v. Volusia County, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999).)

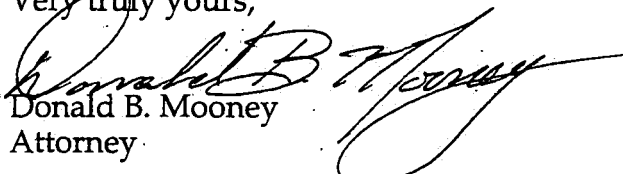
Mr. Harry M. Schue
June 14, 2001
Page 4

WR-6

requests that the SWRCB direct the Coles to cease and desist from any further diversion of water from Stanshaw Creek in excess of an established pre-1914 water right until the SWRCB has the opportunity to review and consider the Coles' Application to Appropriate Water and the associated protests as well as any biological assessment prepared by the United States Forest Service and a biological opinion prepared by NMFS.

Please do not hesitate to contact me if you have any questions regarding this matter. I can be reached at (530) 758-2377.

Very truly yours,


Donald B. Mooney
Attorney

cc: Felice Pace
Robert Miller
Charles Rich
Larry Allen

000997

JUN 26 2000 09:38

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PAGE 01
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P.01

State Water Resources Control Board

John P. Coffey, Chairman

L. Reaney

John Wilson
Governor

Division of Water Rights
951 P Street • Sacramento, California 95814 • (916) 657-6766 FAX (916) 657-1425
Mailing Address: P.O. Box 2000 • Sacramento, California 95812-2000
Internet Address: <http://www.dwr.ca.gov>

J Vorpaugel

SEPTEMBER 15 1998

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JUN 26 2000

In Reply Refer
to: 372-CM-29449, 29450

Doug Cole, Heidi Cole,
Norman D. Cole, Caroline Cole
c/o Mr. Doug Cole
92520 Highway 96
Somers Bar, CA 95568

Nat'l Marine Fish
ACTS 18, C

OPTIONAL FORM NO. 7-88

FAX TRANSMITTAL # of pages = 3

To: <i>Konrad Fisher</i>	From: <i>M. FAUZEI</i>
Date/Time: <i>1</i>	Phone #: <i>825 5174</i>
Fax #: <i>530 244 0933</i>	Fax #: <i>825 4840</i>

USE 7040-01-317-1000 (FORM 107) GENERAL SERVICES ADMINISTRATION

Dear Mr. Cole:

UNAUTHORIZED DIVERSION-STANSHAW CREEK IN SISKIYOU COUNTY

I understand that you have been involved in an ongoing discussion with the Division of Water Rights (Division) regarding your diversion and use of water from Stanshaw Creek in Siskiyou county. It is my understanding that you have on file with the Division, two pending applications to appropriate water, numbered 29449 and 29450. These applications were filed by the previous owner of your property in Somers Bar, California to authorize his diversions from Stanshaw Creek for use upon the parcel which you now own. You claim pre-1914 appropriative rights as a basis for your ongoing and, apparently increasing diversions for domestic use and hydroelectric power production and you have expressed a desire to withdraw your pending applications.

To date, the Division has been unwilling to cancel your pending applications because you do not appear to have a valid pre-1914 claim for the water you are currently diverting. The Division has supplied you and your attorney with evidence to show that the upper limit of your claim of pre-1914 appropriative rights is 0.49 cubic feet per second (cfs), continuous flow and may appropriately be only 0.11 cfs. This assertion is based upon information contained within the May, 1965 bulletin by the Department of Water Resources entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6). This publication lists the property, which you now own and states that the total amount of water diverted for irrigation, domestic, stockwatering, and power production totaled 362 acre-feet, annually. This total usage equates to a continuous flow rate of approximately 1/2 cfs. This information was verified by Mr. Marvin Goss, Forest Service Hydrologist, who lived on your property while it was under prior ownership. Mr. Goss evaluated the flow capacity of the ditch as well as measuring the actual amount of water put to use generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel.

Please understand that the nature of any appropriative right is such that it is limited to the amount of water put to continuous, reasonable and beneficial use regardless of the original "face value" of the appropriation. Your predecessor in interest, Mr. Young, submitted a copy of a water appropriation notice by Samuel Stanshaw dating well into pre-1914 times, claiming

Same to Presley 9.21.98

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Mr. Dong Cole

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SEPTEMBER 15 1998

600 mixer's inches (15 cfs) of water from Shashaw Creek for mixing purposes. You claim to be successful in interest to Mr. Shashaw's water rights. Although you have submitted no information to suggest that those rights ever pertained to your parcel of land, the Division is willing to accept. Given that you are the current operator of an obviously old ditch on Shashaw Creek, that you are the successor in interest to Mr. Shashaw's water rights. However, you are not entitled to the entire 15 cfs appropriation described in Mr. Shashaw's original notice, due to the documented failure of the previous improvements to supply that amount of water to beneficial use; additionally, your ditch is not capable of carrying that much water and expansion of the ditch does not allow you to receive water previously lost by seepage. All appropriate water rights are limited as to both amount and season to the amounts actually used, which has been documented, in your case, as a maximum of 0.49 cfs for power generation and domestic purposes.

On September 23, 1997 an engineer from this office visited your site and observed that you were diverting water from Shashaw Creek to supply your hydroelectric power plant. No measurements were taken at that time, but it was the opinion of the engineer that your diversions were well in excess of 0.49 cfs. Based upon the observations made during this visit, Division staff has attempted to help you understand the limitations of your claimed right and the need for the two pending applications. This subject has been discussed in considerable detail with your attorney. You continue to maintain that your current diversions are authorized by your "pre-1914 rights". As you have been advised by my staff, your "pre-1914 rights" are probably limited to your domestic and irrigation needs, which amount to approximately 0.11 cfs. On June 3, 1998 an engineer from this Division measured the flow rate in your ditch (located upon public lands) and determined that you were diverting 2.4 cfs from Shashaw Creek to operate your hydroelectric power plant.

The Division has received a report from the Department of Fish and Game that you have recently constructed a reservoir upon your property. It is difficult to envision how such a reservoir, constructed in 1998, could be authorized by a pre-1914 appropriative right. Although a pre-1914 right may be changed as to purpose of use, place of use, or point of diversion without the approval of this Division, such a change cannot serve to increase the amount of the right. The construction of a new reservoir is generally considered to be an increase in a water right and usually requires the filing of a new application to appropriate water.

At this time, the Division is willing to cancel application 29450, filed for 0.11 cfs for domestic and irrigation use, as soon as you complete and submit the enclosed Request for Cancellation form and the Statement of Water Diversion and Use form. It would appear that the diversion of this water is authorized under your pre-1914 claim of right. There is no information in our files to indicate that any diversion in excess of 0.11 cfs is authorized under your pre-1914 claim. Consequently, I recommend that you work with my staff to process application 29449. In the event you do not wish to process application 29449, please submit evidence to substantiate your alleged pre-1914 claim of right including a discussion of the recently constructed reservoir (capacity, amount and season of use, basis of right). Such evidence should clearly show the extent water was continuously used from the time of the appropriation to the present. Our files indicate that the hydroelectric plant was installed in the 1940's, and you may wish to substantiate the use of this water between 1914 and 1950. Any claim in excess of 0.49 cfs should be accompanied by substantial evidence to refute the Department of Water Resources' Bulletin 94-6 as well as the testimony of Mr. Gora.

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Mr. Doug Cole

-3-

SEPTEMBER 15 1998

If the Division fails to receive the following within 45 days of the date of this letter, this matter will be referred to our Complaints Unit to consider appropriate enforcement action which may include the imposition of Administrative Civil Liabilities (fines) of up to \$500 per day for continued unauthorized use of water.

1. Description and location of your reservoir, use thereof, and basis of right to store water. If a basis cannot be documented, submit the enclosed application forms, properly completed along with the required fees.
2. Statement indicating whether you wish to continue processing application 29449; if not, substantial evidence which shows that your diversion of water has been continuously maintained in time and amount since December 19, 1914;
3. Completed Request for Cancellation form relating to application 29450 as well as a completed Statement of Water Diversion and Use for your domestic and irrigation use of water. *Please note that, in accordance with Section 5105 of the Water Code, the Division is authorized to investigate and determine the facts relating to your diversion, at your expense, if you do not submit a properly completed Statement of Water Diversion and Use within 60 days.*

If you have any further questions, Chris Murray, the engineer assigned to this case, can be reached at (916) 657-2167.

Sincerely,

ORIGINAL SIGNED BY:

Harry M. Schueler, Chief
Division of Water Rights

Enclosures

CERTIFIED

cc: Nancy Smith, Esq.
1041 East Green Street, Suite 203
Pasadena, CA 91106-2417

Department of Fish and Game
Environmental Services
c/o Mr. Ron Freedy
601 Locust Street
Redding, CA 96001

TOTAL P.03

E. Sturtevant Water Notice

Notices: I hereby give notice that I have taken up and hold for mining purposes, six hundred inches of the water running in Sturtevant Creek, so called, the water so taken being carried first by ditch and flume, ^{lower part of mine workings} ~~lower part of mine workings~~ ^{to my upper field} ~~to my upper field~~ the Klarnath River, to my upper field, said creek being in Dillor's Township, State of California, County of Kern. E. Sturtevant March 25th A.D. 1867

Filed and Recorded March 25th A.D. 1867 in Book of Mining Claims folio 232. B. St. Julien, Recorder.

Filed for Record at request of E. D. Hill June 1st 1880 at 15 mins past 8 o'clock A.M. Joseph Rice, Recorder

Recorded June 9th 1880 at 50 mins past 8 o'clock A.M. Joseph Rice, Recorder



United States
Department of
Agriculture

Forest
Service

Six Rivers
National
Forest

WR-6

Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410
(530) 627-3291 Text (TTY)
(530) 627-3291 Voice

File Code: 2700

Date: October 5, 2000

Doug and Heidi Cole
Marble Mountain Ranch
Somes Bar, CA 95568

RECEIVED

OCT 06 2000

Nat'l Marine Fisheries Svc
Arcata, CA

Dear Doug and Heidi,

It has come to my attention that you have been diverting water from Stanshaw Creek to use at the Marble Mountain Ranch. We have no record of a Special Use Permit for either the diversion structure or the ditch that transports water from Stanshaw Creek to your property. A recent site inspection of the ditch leads me to believe that it has been in use for a considerable period of time. If the ditch has been in continuous use since before 1910, date the Klamath National Forest was proclaimed, you may be eligible for a free special use permit.

The National Marine Fisheries Service and California Department of Fish and Game are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting a threatened and endangered species, specifically the coho salmon.

Since it appears that your diversion structure and ditch are not authorized, they must be removed within 30 days. If you have permits or other legal documents that provide for this use, the Forest Service needs copies so we can determine if this an appropriate use of National Forest land, authorize the use and provide for a diversion structure that will allow flows adequate for the protection of the salmon.

If you have questions feel free to contact me at the Orleans District Office.

Sincerely,

/s/ William M. Heitler

WILLIAM M. HEITLER
District Ranger



LAW OFFICES OF DONALD B. MOONEY

DRB/CR

DONALD B. MOONEY
Admitted in California and Oregon

129 C Street, Suite 2
Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

June 14, 2001

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Unlawful Diversion of Water by Doug and Heidi Cole from
Stanshaw Creek*

Dear Mr. Schueller:

This letter is written on the behalf of the Klamath Forest Alliance ("KFA") regarding the unlawful diversion of water from Stanshaw Creek, a tributary to the Klamath River. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. To that end, KFA requests that without any further delay the State Water Resources Control Board's Division of Water Rights ("SWRCB") issue an order that directs Doug and Heidi Cole to cease and desist their unlawful diversion of water from Stanshaw Creek, as such diversion adversely impacts public trust resources, including but not limited to coho salmon, a federally listed species.

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The Coles, however, have failed to provide any evidence to the SWRCB that the Stanshaw Water Right Notice applies to their land. Unless the Coles can substantiate the assumption that Stanshaw Water Rights Notice applies to their property, any diversion of water by the Coles from Stanshaw Creek violates

Mr. Harry M. Schueller
June 14, 2001
Page 2

California Water Code, section 1200 *et seq.* It should be noted that former water diversion ditches and pipes, large rock piles and abandoned mining equipment indicate that large scale mining and water consumption from Stanshaw Creek, took place on the land now owned by the Fisher Family, not the Coles. Furthermore, Stanshaw Creek itself flows through the former and not the latter. If the Coles can prove that they are successors to Stanshaw's water rights, then any diversion of water in excess of a resulting pre-1914 appropriative water right of approximately 0.11 cfs violates Water Code, section 1200 *et seq.* In either event, the Coles do not possess an appropriative water right to support their current water diversion practices and such practices are contrary to law.

As the Coles do not possess a valid water right for their current diversion of water, the Coles filed an application to appropriate water seeking to divert 3 cfs from Stanshaw Creek via a flume which is 12-inches deep, 24-inches wide, and 5,200 feet long then through a penstock of 16-inch diameter, 455 foot long steel pipe from Stanshaw Creek, a tributary to the Klamath River, in Siskiyou County (Application to Appropriate Water No. 29449). According to the Cole's application, the penstock utilizes 200 feet of fall to generate a maximum of 33.9 kilowatts at 80 percent efficiency at a hydroelectric plant above Irving Creek. The water is then released into Irving Creek and then into the Klamath River. Despite the fact that the Coles have not obtained a water rights permit from the SWRCB for the diversion of water, the Coles continue to divert up to 3 cfs from Stanshaw Creek.¹

In the Fall of 2000, the California Department of Fish and Game ("DFG") obtained an injunction against the Coles for violating sections 1603 and 5937 of the Fish and Game Code. The injunction required that the Coles remove portions of the dam that they had constructed in Stanshaw Creek. The Coles used this illegal obstruction to pool water in order to assist their diversion from Stanshaw Creek. It must be noted, however, that the injunction obtained by DFG applies only to the illegal obstruction in Stanshaw Creek and does not address the unlawful diversion of water. It is KFA's understanding that even though the Coles or DFG may have modified the diversion structure as required by the injunction, the Coles continue to divert water in excess of any pre-1914 appropriative water right.

In your September 15, 1998, letter to the Coles, you stated that within 45 days of your letter, the Coles must provide information to the Division of Water Rights substantiating their claims to a pre-1914 appropriative water right for their

¹ On November 15, 1999, the SWRCB granted the Coles' request for the registration of a small domestic use pursuant to Water Code section 1228 *et seq.* (Certificate No. R 480, Application 30945R). The Coles' small domestic use registration limits the Coles' diversion to 10 acre-feet per annum ("afa") and does not allow hydroelectric generation as a purpose of use. The Coles' current water diversion practices far exceed the 10-afa limitation. For instance, at a diversion rate of 2.5 cfs, the Coles' exceed the 10-afa limitation in just 4 days. Additionally, the Small Domestic Use Registration requires that the Coles' obtain all necessary federal, state and local approvals which the Coles have failed to do.

June 14, 2001

Page 3

current water diversion. If the Coles failed to provide the requested information, the matter would be referred to the Division of Water Rights Complaint Unit to consider appropriate enforcement action. It is our understanding that although two and one-half years have passed since your letter to the Coles, the Coles have not provided the requested information. Despite the Coles' failure to comply with your request, this matter has not been referred to the Complaints Unit and the Coles continue to unlawfully divert water from Stanshaw Creek.

In many instances the unlawful diversion of water may not have a significant impact to public trust resources and other legal users of water while an application to appropriate is reviewed and considered by the SWRCB. In such instances, it is our understanding that the SWRCB's informal practice is to allow such diversions to continue until the application to appropriate has been denied or approved. In the present situation, however, the Coles' unlawful diversion has significant impacts to public trust resources and may result in a violation of section 9 of the federal Endangered Species Act, 16 U.S.C. § 1538.²

Stanshaw Creek and the Klamath River contain coho salmon (*Oncorhynchus kisutch*) which are in the Southern Oregon/Northern California Coasts ESU and are listed as threatened under the federal ESA. See 50 C.F.R. § 102(a)(4). In a letter dated October 5, 2000, from William M. Heitler, District Ranger to Doug and Heidi Cole, Mr. Heitler stated that the National Marine Fisheries Service ("NMFS") and DFG are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting coho salmon. (A copy of Mr. Heitler's October 5, 2000 letter is attached to this letter as Exhibit C.) Stanshaw Creek also contains steelhead (*Oncorhynchus mykiss*) which are in the Klamath Mountains Province and are listed as candidate species under the ESA and a species of concern to DFG.

As the Coles' unauthorized diversion of water poses a significant risk to public trust resources in and along Stanshaw Creek and the Klamath River, including but not limited to the impacts to coho salmon, a federally listed species, KFA respectfully requests that the SWRCB follow through on its September 15, 1998, letter and immediately refer this matter to the Complaint Unit. KFA also

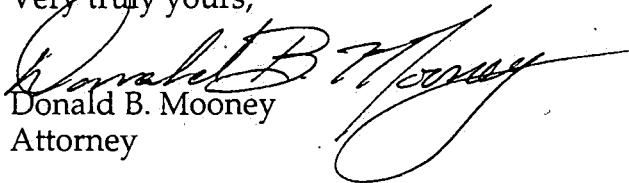
² The courts have ruled that when a state affirmatively allows fishing activities to occur through licensing or other measures, and those activities are likely to result in entanglement of protected species, the responsible agency is in violation of the section 9 take prohibition. (Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997), cert. denied, 119 S.Ct. 81, and cert. denied, 119 S.Ct. 437 (1998).) The same rationale that caused the court in Strahan to find that Massachusetts violated the Endangered Species Act by licensing gillnet and lobster pot fishing likely to result in the entanglement of right whales applies to the SWRCB's decision to allow the Coles to continue diverting water from Stanshaw Creek, even though the SWRCB has concluded that Coles do not possess an appropriate water right. In addition, recent case law confirms that the failure of state government entities to prohibit or restrict activities that are likely to take listed species can be a violation of section 9 of the Endangered Species Act. (Loggerhead Turtle v. Volusia County, 148 F.3d 1231, 1249 (11th Cir. 1998), cert. denied, 119 S.Ct. 1488 (1999).)

Mr. Harry M. Schueller
June 14, 2001
Page 4

requests that the SWRCB direct the Coles to cease and desist from any further diversion of water from Stanshaw Creek in excess of an established pre-1914 water right until the SWRCB has the opportunity to review and consider the Coles' Application to Appropriate Water and the associated protests as well as any biological assessment prepared by the United States Forest Service and a biological opinion prepared by NMFS.

Please do not hesitate to contact me if you have any questions regarding this matter. I can be reached at (530) 758-2377.

Very truly yours,


Donald B. Mooney
Attorney

cc: Felice Pace
Robert Miller
Charles Rich
Larry Allen

LAW OFFICES OF DONALD B. MOONEY

DONALD B. MOONEY
Admitted in California and Oregon

129 C Street, Suite 2
Davis, California 95616
Telephone (530) 758-2377
Facsimile (530) 758-7169
dbmooney@dcn.davis.ca.us

RAS/REM
WR-6
6/21/01
~~EAS~~ 29449
FILE

June 14, 2001

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: *Unlawful Diversion of Water by Doug and Heidi Cole from Stanshaw Creek*

Dear Mr. Schueller:

This letter is written on the behalf of the Klamath Forest Alliance ("KFA") regarding the unlawful diversion of water from Stanshaw Creek, a tributary to the Klamath River. KFA seeks to protect the public trust and environmental resources of Stanshaw Creek and the Klamath River. To that end, KFA requests that without any further delay the State Water Resources Control Board's Division of Water Rights ("SWRCB") issue an order that directs Doug and Heidi Cole to cease and desist their unlawful diversion of water from Stanshaw Creek, as such diversion adversely impacts public trust resources, including but not limited to coho salmon, a federally listed species.

Although the Coles divert up to 3.0 cfs from Stanshaw Creek, the Coles do not possess an appropriative water right to divert this quantity of water. (See letter dated September 15, 1998, from Harry M. Schueller to Doug Cole, Regarding: Unauthorized Diversion - Stanshaw Creek in Siskiyou County ("Schueller Letter") For your convenience a copy of your letter is attached as Exhibit A to this letter.) To the extent that the Coles divert water based upon a claim to a pre-1914 appropriative water right, California water law limits any such water right to the amount of water put to continuous, reasonable and beneficial use regardless of the original water right. (See Water Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122, 127.) According to the SWRCB's Division of Water Rights, any claim the Coles may have to a pre-1914 appropriative water is limited to the Coles' historic domestic and irrigation use. The SWRCB has quantified such use to be 0.11 cfs. (See Schueller Letter p. 1 & 2) This quantity is based on the yet unsubstantiated assumption that the Coles are successors in interest to Sam Stanshaw's water rights as established in a March 25, 1867 letter by Mr. Stanshaw. (See copy of the March 25, 1867, Stanshaw Water Rights Notice attached as Exhibit B to this letter.)

The Coles, however, have failed to provide any evidence to the SWRCB that the Stanshaw Water Right Notice applies to their land. Unless the Coles can substantiate the assumption that Stanshaw Water Rights Notice applies to their property, any diversion of water by the Coles from Stanshaw Creek violates

Mr. Harry M. Schueler
June 14, 2001
Page 2

California Water Code, section 1200 *et seq.* It should be noted that former water diversion ditches and pipes, large rock piles and abandoned mining equipment indicate that large scale mining and water consumption from Stanshaw Creek, took place on the land now owned by the Fisher Family, not the Coles. Furthermore, Stanshaw Creek itself flows through the former and not the latter. If the Coles can prove that they are successors to Stanshaw's water rights, then any diversion of water in excess of a resulting pre-1914 appropriative water right of approximately 0.11 cfs violates Water Code, section 1200 *et seq.* In either event, the Coles do not possess an appropriative water right to support their current water diversion practices and such practices are contrary to law.

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Mr. Harry M. Schueler
June 14, 2001
Page 3

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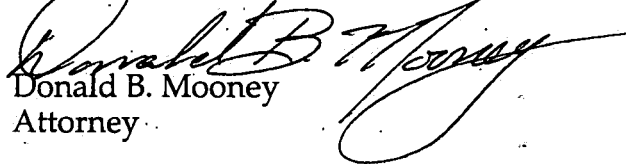
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Mr. Harry M. Schueller
June 14, 2001
Page 4

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Please do not hesitate to contact me if you have any questions regarding this matter. I can be reached at (530) 758-2377.

Very truly yours,


Donald B. Mooney
Attorney

cc: Felice Pace
Robert Miller
Charles Rich
Larry Allen

09/12/2000 13:50 2440923

JUN-26-2000 09:38 DFG R1 REDDING

PAGE 01
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P.01

State Water Resources Control Board

John P. Caffrey, Chairman

Division of Water Rights
901 P Street - Sacramento, California 95814 (916) 657-6760 FAX (916) 657-1423
Mailing Address: P.O. Box 3080 - Sacramento, California 95812-3000
Internet Address: http://www.swrbc.ca.gov

John Wilson
Governor

J. Vorhagen

SEPTEMBER 15 1998

RECEIVED
JUN 26 2000
Natl Marine Fish
AICBIS, C

In Reply Refer
to: 332-CM-29449, 29450

Doug Cole, Heidi Cole,
Norman D. Cole, Caroline Cole
c/o Mr. Doug Cole
92520 Highway 96
Somers Bar, CA 95568

OPTIONAL FORM NO. (7-85)

FAX TRANSMITTAL # of pages = 3

To: <i>Jim Fisher</i>	From: <i>M. TAUZE</i>
Date/Time: <i>1</i>	Phone #: <i>825 5174</i>
Fax #: <i>530 244 0923</i>	Fax #: <i>825 4840</i>

REP 7042-01-317-1000

Dear Mr. Cole:

UNAUTHORIZED DIVERSION-STANSHAW CREEK IN SISKIYOU COUNTY

I understand that you have been involved in an ongoing discussion with the Division of Water Rights (Division) regarding your diversion and use of water from Stanshaw Creek in Siskiyou county. It is my understanding that you have on file with the Division, two pending applications to appropriate water, numbered 29449 and 29450. These applications were filed by the previous owner of your property in Somers Bar, California to authorize his diversions from Stanshaw Creek for use upon the parcel which you now own. You claim pre-1914 appropriative rights as a basis for your ongoing and, apparently increasing diversions for domestic use and hydroelectric power production and you have expressed a desire to withdraw your pending applications.

To date, the Division has been unwilling to cancel your pending applications because you do not appear to have a valid pre-1914 claim for the water you are currently diverting. The Division has supplied you and your attorney with evidence to show that the upper limit of your claim of pre-1914 appropriative rights is 0.49 cubic feet per second (cfs), continuous flow and may appropriately be only 0.11 cfs. This assertion is based upon information contained within the May, 1965 bulletin by the Department of Water Resources entitled "Land and Water Use in the Klamath River Hydrographic Unit" (Bulletin No. 94-6). This publication lists the property, which you now own and states that the total amount of water diverted for irrigation, domestic, stockwatering, and power production totaled 362 acre-feet, annually. This total usage equates to a continuous flow rate of approximately 1/2 cfs. This information was verified by Mr. Marvin Goss, Forest Service Hydrologist, who lived on your property while it was under prior ownership. Mr. Goss evaluated the flow capacity of the ditch as well as measuring the actual amount of water put to use generating power, and found that water had been used at a rate of 0.49 cfs for many years. Mr. Goss determined the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel.

Please understand that the nature of any appropriative right is such that it is limited to the amount of water put to continuous, reasonable and beneficial use regardless of the original "face value" of the appropriation. Your predecessor in interest, Mr. Young, submitted a copy of a water appropriation notice by Samuel Stanshaw dating well into pre-1914 times, claiming

RECEIVED
2/1998
West of FEG Region/

Same to Regina 9.21.98

Mr. Doug Cole

-2-

SEPTEMBER 15 1998

001015

600 minor's inches (15 cfs) of water from Stanshaw Creek for mining purposes. You claim to be successful in interest to Mr. Stanshaw's water rights. Although you have submitted no information to suggest that those rights ever pertained to your parcel of land, the Division is willing to accept, given that you are the current operator of an obviously old ditch on Stanshaw Creek, that you are the successor in interest to Mr. Stanshaw's water right. However, you are not entitled to the entire 15 cfs appropriation described in Mr. Stanshaw's original notice, due to the documented failure of the previous landowners to apply that amount of water to beneficial use; additionally, your ditch is not capable of carrying that much water and expansion of the ditch does not allow you to reduce water previously lost by seepage. All appropriative water rights are limited as to both amount and season to the amounts actually used, which has been documented, in your case, as a maximum of 0.49 cfs for power generation and domestic purposes.

On September 23, 1997 an engineer from this office visited your site and observed that you were diverting water from Stanshaw Creek to supply your hydroelectric power plant. No measurements were taken at that time, but it was the opinion of the engineer that your diversions were well in excess of 0.49 cfs. Based upon the observations made during this visit, Division staff has attempted to help you understand the limitations of your claimed right and the need for the two pending applications. This subject has been discussed in considerable detail with your attorney. You continue to maintain that your current diversions are authorized by your "pre-1914 rights". As you have been advised by my staff, your "pre-1914 rights" are probably limited to your domestic and irrigation needs, which amount to approximately 0.11 cfs. On June 3, 1995 an engineer from this Division measured the flow rate in your ditch (located upon public lands) and determined that you were diverting 2.4 cfs from Stanshaw Creek to operate your hydroelectric power plant.

The Division has received a report from the Department of Fish and Game that you have recently constructed a reservoir upon your property. It is difficult to envision how such a reservoir, constructed in 1998, could be authorized by a pre-1914 appropriative right. Although a pre-1914 right may be changed as to purpose of use, place of use, or point of diversion without the approval of this Division, such a change cannot serve to increase the amount of the right. The construction of a new reservoir is generally considered to be an increase in a water right and usually requires the filing of a new application to appropriate water.

At this time, the Division is willing to cancel application 29450, filed for 0.11 cfs for domestic and irrigation use, as soon as you complete and submit the enclosed Request for Cancellation form and the Statement of Water Diversion and Use form. It would appear that the diversion of this water is authorized under your pre-1914 claim of right. There is no information in our files to indicate that any diversion in excess of 0.11 cfs is authorized under your pre-1914 claim. Consequently, I recommend that you work with my staff to process application 29449. In the event you do not wish to process application 29449, please submit evidence to substantiate your alleged pre-1914 claim of right including a discussion of the recently constructed reservoir (capacity, amount and season of use, basis of right). Such evidence should clearly show the extent water was continuously used from the time of the appropriation to the present. Our files indicate that the hydroelectric plant was installed in the 1940's, so you may wish to substantiate the use of this water between 1914 and 1950. Any claim in excess of 0.49 cfs should be accompanied by substantial evidence to refute the Department of Water Resources' Bulletin 94-6 as well as the testimony of Mr. Cole.

Mr. Doug Cole

-3-

SEPTEMBER 15 1998

If the Division fails to receive the following within 45 days of the date of this letter, this matter will be referred to our Complaints Unit to consider appropriate enforcement action which may include the imposition of Administrative Civil Liabilities (fines) of up to \$500 per day for continued unauthorized use of water.

1. Description and location of your reservoir, use thereof, and basis of right to store water. If a basis cannot be documented, submit the enclosed application forms, properly completed along with the required fees.
2. Statement indicating whether you wish to continue processing application 29449; if not, substantial evidence which shows that your diversion of water has been continuously maintained in time and amount since December 19, 1914;
3. Completed Request for Cancellation form relating to application 29450 as well as a completed Statement of Water Diversion and Use for your domestic and irrigation use of water. Please note that, in accordance with Section 5105 of the Water Code, the Division is authorized to investigate and determine the facts relating to your diversion, at your expense, if you do not submit a properly completed Statement of Water Diversion and Use within 60 days.

If you have any further questions, Chris Murray, the engineer assigned to this case, can be reached at (916) 657-2167.

Sincerely,

ORIGINAL SIGNED BY:

Harry M. Schueller, Chief
Division of Water Rights

Enclosures

CERTIFIED

cc: Nancy Smith, Esq.
1041 East Green Street, Suite 203
Pasadena, CA 91106-2417

Department of Fish and Game
Environmental Services
c/o Mr. Ron Prestly
601 Locust Street
Redding, CA 96001

TOTAL P. 03

E. Sturtevant

Water Notice

Notice: As hereby given that I have taken up and hold for mining ^{and prospecting} several hundred inches of the water running in Sturtevant Creek, so called, the water so taken being carried first by ditch and flume ^{to my paper mill, and then by pipe} to my paper mill, said creek being in Dilloni's Township, State of California, County of Kern.

March 25th A. D. 1867

E. Sturtevant

Filed and Recorded March 25th A. D. 1867.
 in Book of Mining Claims folio 232.
 B. H. Jenks, Recorder.

Filed for Record at request of E. D. Hill June 1st 1880 at 15 min past 8 o'clock A. M.
 Joseph Rice, Recorder

Recorded June 9th 1880 at 50 min past 8 o'clock A. M.
 Joseph Rice, Recorder



United States
Department of
Agriculture

Forest
Service

Six Rivers
National
Forest

Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410
(530) 627-3291 Text (TTY)
(530) 627-3291 Voice

WR-6

File Code: 2700

Date: October 5, 2000

Doug and Heidi Cole
Marble Mountain Ranch
Somes Bar, CA 95568

RECEIVED

OCT 06 2000

Nat'l Marine Fisheries Svc
Arcata, CA

Dear Doug and Heidi,

It has come to my attention that you have been diverting water from Stanshaw Creek to use at the Marble Mountain Ranch. We have no record of a Special Use Permit for either the diversion structure or the ditch that transports water from Stanshaw Creek to your property. A recent site inspection of the ditch leads me to believe that it has been in use for a considerable period of time. If the ditch has been in continuous use since before 1910, date the Klamath National Forest was proclaimed, you may be eligible for a free special use permit.

The National Marine Fisheries Service and California Department of Fish and Game are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting a threatened and endangered species, specifically the coho salmon.

Since it appears that your diversion structure and ditch are not authorized, they must be removed within 30 days. If you have permits or other legal documents that provide for this use, the Forest Service needs copies so we can determine if this an appropriate use of National Forest land, authorize the use and provide for a diversion structure that will allow flows adequate for the protection of the salmon.

If you have questions feel free to contact me at the Orleans District Office.

Sincerely,

/s/ William M. Heitler

WILLIAM M. HEITLER
District Ranger



From: "Chris Murray" <comurray@scwa.ca.gov>
To: "Michael Contreras" <MContreras@waterrights.swrcb.ca.gov>
Date: 7/12/01 12:17PM
Subject: Re: Doug & Heidi Cole

The penstock is long and runs through some very dense brush so determining the length by eye is not possible. Remember the site visit I was going to perform? The major goal of the visit was to determine the capacity of the penstock and measure the slope and length of the penstock. So I can't give a definitive answer to your question except that when I spoke to Gary Squires about it, he believed the length was 200 feet. He stated that they were considering replacing it. So, I am fairly certain they had measured it at one time.

As far as "acknowledging" their pre-14 claim, I am certain that I never wrote them confirming the right. I can't recall whether the thinking at the time was ever put in written form, but I do recall the basic idea behind buying off on the pre-14...

After a painful and arduous battle with the Coles and their legal staff, I determined that there is no information to support the notion that they have a pre-14 right for all the water they are running through their penstock. In fact, it appeared to me that there was a period of non-use from the turn of the century until the 1940's when the pelton wheel was installed. Additionally, a Forest Service hydrologist had measured the capacity of the ditch some time in the 70's and found it to be 1.49 cfs. This number was very similar to the number given by DWR in their hydrographic report from the 1960's. Consequently, I came to believe that a larger pelton wheel had been installed sometime in the 1970's or 80's. The measurements of the ditch indicate that it has been expanded in size since Marvin Goss measured it.

My thought was that, although they had never really showed continuous use of the water for domestic purposes, the place is one of the original homesteads and I felt that it would be reasonable to forgo challenging their pre-14 claim for domestic and irrigation needs (particularly in light of the fact that they have filed a Small Domestic Use Registration). This would allow them to cancel the consumptive use application and put their project in the best light possible.

It should be reiterated, however, that they never proved up on the pre-14 claim. I simply reasoned that it would be prudent in this case to forgo challenging the claim (assuming they file a statement of water diversion and use) because the amount of water was small and the domestic use was very likely continuous since pre-14 times.

Good luck!

Chris

----- Original Message -----

From: "Michael Contreras" <MContreras@waterrights.swrcb.ca.gov>
To: <comurray@scwa.ca.gov>
Sent: Thursday, July 12, 2001 11:44 AM
Subject: Re: Doug & Heidi Cole

> Thanks. Chuck and I have been discussing some physical solutions that may be helpful. The application cites a fall of 200 feet but Chuck seems to recall more like 70. Any thoughts?

>
> Do you remember any specific reference that would indicate "acknowledgment" of their pre-1914 rights?

>
> It was nice to talk with you, and I look forward to hearing from you soon.

>
> >>> "Chris Murray" <comurray@scwa.ca.gov> 07/12/01 09:41AM >>>
> Michael,

>
> Here's that web page I promised you. Say hello to Doug for me. If you have
> any other questions don't hesitate to ask.

>
> <http://www.marblemountainranch.com/index.html>

>
> Chris

>
>
> ----- Original Message -----

> From: "Michael Contreras" <MContreras@waterrights.swrcb.ca.gov>
> To: <comurray@scwa.ca.gov>
> Sent: Thursday, July 12, 2001 9:05 AM
> Subject: Doug & Heidi Cole

>
>
> > Greetings:

> >
> > I am new to the Complaints Unit, working with Chuck Rich. He suggested
> that I contact you to see if you could help to shed some light on the
> circumstances that led to acknowledging the Cole's pre-1914 claim. The
> current complainant is the Klamath Forest Alliance who assert that public
> trust resources are compromised as the result of the hydro power
> diversion.

> You authored a memo to file (5/4/99) in which you described the site
> visit,
> recommended processing of the application for 3 cfs, and indicated that F&
> G

> had been satisfied and that an agreement was in process. To your
> recollection, was that agreement ever finalized?

> >
> > Any relevant information will be appreciated.

> >
> > Michael Contreras
> > Division of Water Rights
> > (916) 341-5307

> >
> >
>
>
>

From: access <access@pcweb.net>
To: "Robert E. Miller" <REMiller@waterrights.swrcb.ca.gov>
Date: Tue, Apr 3, 2001 11:04 PM
Subject: Re: marble mountain ranch water

Hi Robert, I walked outside my front door and my attention was drawn to the water wheel that I removed a couple months ago. It apparently was cast prior to 1912 according to the engineer helping me on the replacement project. It caught my attention as another testament to the pre 1914 hydrogeneration on the ranch... and thus motivated me this morning to call and follow up on this last e-mail about documenting the early hydrogeneration and a misdirected application for it's use permit. Any thoughts? I want to put this project behind me.

Also, the Siskiyou Daily News printed a story on us, placed as the lead article, page one....One comment they quoted from Felice Pace (Klamath Forest Alliance) was that the mere application by us for water permits implied our lack of a water right.....evidence to me of a real and demonstrable damage incurred merely by the application proces. He also states that he thinks we have built a concrete and brick dam in the river and that we have increased the amount of water we take, to the exclusion of our downstream neighbor (Fisher). This is the first time I have actually seen anybody admit that there is a selfish motive by my neighbor to gain water that is masked by a "benevolent" environmental position. I will send you a copy of this article. The Pioneer press also has apparently printed a front page article, to be released to us tomorrow.

Doug

"Robert E. Miller" wrote:

> Doug,

> Thank for the update and for the invitation. Unfortunately I will not be able to make it up there this time. However, I am going to visit a project on the Mad River sometime this spring so maybe I will stop by on that trip. Keep me posted on what comes out of this Thursday's meeting. Have you thought about sending a letter to the protestants of your project (NMFS, DFG, USFS, California Sportfishing Protection Alliance, Konrad) in an attempt to get them to dismiss their protests? What you have done so far may not be enough for them, but it is a start, and it will give them something in writing showing that you are indeed making, or planning on making, improvements to your project. If you do send them letters (or anybody else on any subject regarding your water project), I also recommend that you send carbon copies here to the SWRCB as well. Include your application number (A029449) in the subject line so that it gets routed to our files.

>

> Thanks and best of luck,

> Rob

>

> >>> access <access@pcweb.net> 06/05/83 03:57PM >>>

> An additional update: In case you are not aware, Bill Heitler has recorded the events of our meeting last week and documented all of the improvements I have made since our last meeting in efforts to maximize efficient use of water that we capture. To date, here are some of those improvements:

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> I have expended every available resource in time and money, and am remortgaging the ranch to

continue improvements....This water system is my stewardship and I take it seriously. What has the protestant done to mitigate perceived problems other than intimidate, harass and bully?

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> I am meeting with the chairman and vice chairman of the Karuk tribe, several media reps, local elected officials, and any other interested parties this Thursday at 9:00 A.M. to tour the site and last year's improvements. This is not an invitation to protestants to come and sabotage an informational meeting, and if your agency would like a presence, please come.

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>> I got your message on Friday (3/23) and I apologize for not responding until now (although this still may not be the detailed response you are looking for). I am going to find out what is going on with the case that DFG has, or had, against you and now this latest suit that Konrad has going against you, NMFS, and the USFS. I will then discuss this with Ross, Yoko, and possibly others here, and we will get back to you in more detail in writing soon. Be aware that there may be some problems processing your application since this project is now involved in two court cases. I can understand the difficulties and stresses you are having with this project and I will get an answer to your questions as soon as I can.

>>

>> Rob Miller

>> (916)341-5392

>>

>> ps- The project improvement plans and mitigation that you have look good and I will also discuss those with NMFS, USFS and DFG.

>>

>> >>> access <access@pcweb.net> 06/07/83 12:07PM >>>

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> > Thanks, Doug Cole
> > 530-469-3322
> > access@pcweb.net

3/28/01

~~EAS~~
29449
FILE

From: Robert E. Miller
To: "access@pcweb.net".mime.Internet
Date: 3/28/01 9:37AM
Subject: Re: marble mountain ranch water

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- > 530-469-3322
- > access@pcweb.net

State Water Resources Control Board

CONTACT REPORT DIVISION OF WATER RIGHTS

SUBJECT: Application 29449, Cole

DATE: 10/19/2000

TIME: 11:15

DIVISION PERSONNEL: Robert E. Miller, EAS

INDIVIDUAL (S) / AGENCY CONTACTED: Bill Heitler, USFS District Ranger
Six Rivers NF, Orleans RD

TELEPHONE NUMBER: (530)627-3291

CONVERSATION DESCRIPTION:

Mr. Heitler returned my call from yesterday. BH informed me that he sent a letter to Mr. Cole stating that the USFS has no record of a Special Use Permit for Cole's diversion and ditch. Mr. Cole must provide evidence that the ditch has been in continuous use since 1910, the year the Forest Service was created. If he fails to do so, the diversion structure and ditch must be removed within 30 days of the date of the letter. BH also mentioned that there may be a letter from President Taft specifically mentioning and authorizing this project as it was circa 1910. If there is such a letter, BH is still leaving the burden of proof on Cole. I asked for a copy of the letter which he will send ASAP.

BH also mentioned that the NMFS and DFG seemed to be leaning on him to provide a Use Permit b/c NMFS and DFG are reluctant to act on this project.

NOTE: In a Contact Report dated 10/18/2000, Mr. Heitler's name was incorrectly spelled and Mr. Heitler was incorrectly listed as the Ukonom District Ranger.

ACTION ITEMS: Call back after Cole's 30-day deadline to determine if any documents were provided and to find out the USFS's updated position on this project.

SURNAME				
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National Oceanic and Atmospheric Administration
National Marine Fisheries Service
SOUTHWEST REGION



Arcata Field Office
1655 Heindon Rd.
Arcata, CA 95521
fax: (707) 825-4840

FAX TRANSMISSION

2 PAGES INCLUDING THIS ONE

DATE 10/10/01

TO: NAME Mike Contreras
ROUTING CODE 916-341-5400
TELEPHONE # _____

FROM NAME Margaret Tauzer
ROUTING CODE 707 825 4840
TELEPHONE # 707 668 1632

MESSAGE





United States
Department of
Agriculture

Forest
Service

Six Rivers
National
Forest

Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410
(530) 627-3291 Text (TTY)
(530) 627-3291 Voice

File Code: 2700

Date: October 5, 2000

Doug and Heidi Cole
Marble Mountain Ranch
Somes Bar, CA 95568

RECEIVED

OCT 06 2000

Nat'l Marine Fisheries Svc
Arcata, CA

Dear Doug and Heidi,

It has come to my attention that you have been diverting water from Stanshaw Creek to use at the Marble Mountain Ranch. We have no record of a Special Use Permit for either the diversion structure or the ditch that transports water from Stanshaw Creek to your property. A recent site inspection of the ditch leads me to believe that it has been in use for a considerable period of time. If the ditch has been in continuous use since before 1910, date the Klamath National Forest was proclaimed, you may be eligible for a free special use permit.

The National Marine Fisheries Service and California Department of Fish and Game are concerned that the amount of water being diverted from Stanshaw Creek is adversely affecting a threatened and endangered species, specifically the coho salmon.

Since it appears that your diversion structure and ditch are not authorized, they must be removed within 30 days. If you have permits or other legal documents that provide for this use, the Forest Service needs copies so we can determine if this an appropriate use of National Forest land, authorize the use and provide for a diversion structure that will allow flows adequate for the protection of the salmon.

If you have questions feel free to contact me at the Orleans District Office.

Sincerely,

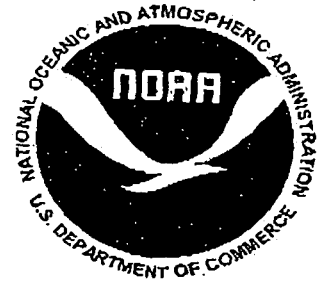
/s/ William M. Heitler

WILLIAM M. HEITLER
District Ranger





National Oceanic and Atmospheric Administration
National Marine Fisheries Service
SOUTHWEST REGION



Arcata Field Office
1655 Heindon Road
Arcata, CA 95521
Fax (707) 825-4840

FAX TRANSMISSION

3 PAGES INCLUDING THIS ONE

DATE 10/01/01

TO: <u>Michael Contreras</u>	FAX NUMBER: <u>916 341 5400</u>
TO: _____	FAX NUMBER: _____
TO: _____	FAX NUMBER: _____
TO: _____	FAX NUMBER: _____
FROM: <u>Margaret Tauter</u>	PHONE NUMBER: <u>(707) 825-5174</u>

MESSAGE: _____





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region Arcata Office
1655 Heindon Rd.
Arcata, California 95521
Tel (707) 825-5160; FAX (707) 825-4840

Unknown Date

S. E. "Lou" Woltering
Forest Service
Six Rivers National Forest
1330 Bayshore Way
Eureka, CA 95501

Dear Mr. Woltering:

The purpose of this letter is to recommend that the Klamath National Forest initiate Section 7 consultation under the Endangered Species Act regarding its authorization of a water diversion from the Klamath National Forest to Mr. Doug Cole and Mrs. Heidi Cole, for use on their private property.

On August 3, 2000, members of my staff and Mr. Bill Heitler, District Ranger of the Orleans Ranger District and Jon Grunbaum, fisheries biologist for Six Rivers National Forest, discussed the Cole's water diversion from Stanshaw Creek. This is a pre-1915 diversion that provides water for domestic use, including hydroelectric generation. The Cole's applied for a water appropriation permit in January, 2000 from the State Water Resources Control Board (SWRCB) for their Stanshaw Creek diversion. In March, 2000 the National Marine Fisheries Service (NMFS) sent a "letter of protest" to the SWRCB regarding the "Notice of Application to Appropriate Water", due to our concern regarding the impact of reduced water flows on threatened Southern Oregon/Norther California Coasts Coho Salmon (*Oncorhynchus kisutch*) (62 FR 24588, May 6, 1997) and their associated designated critical habitat (64 FR 24049, May 5, 1999) in Stanshaw Creek and the Klamath River.

Section 7 (a) (2) of the Endangered Species Act requires a federal agency, in consultation with the NMFS, to insure that any action it authorizes, funds, or carries out, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. Each agency shall review their actions to determine whether any actions may affect listed species or critical habitat. If during informal consultation the action agency determines, with the written concurrence of NMFS, that their actions are "not likely to adversely affect" listed species or critical habitat, formal consultation is not required (50 CFR §402.14). Formal consultation is required for any actions that are likely to adversely affect listed species or critical habitat. Adverse effects include any action or inter-related and interdependent affect of an action that causes "take" of a listed species (including harm or mortality).



To initiate formal Section 7 consultation, the following information must be submitted to the National Marine Fisheries Service, Regional Office in Long Beach, California:

1. A description of the proposed action;
2. A description of the area that may be affected by the action;
3. A description of any listed species or critical habitat that may be affected by the action;
4. A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
5. Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared;
6. Any other relevant available information on the actions, the listed species, or critical habitat.

Because of the potential adverse affects of the Cole's water diversion from National Forest lands, we recommend that the Six Rivers National Forest initiate formal Section 7 consultation with NMFS.

If you have any questions concerning the above comments, please contact Mr. Charles Glasgow at (707) 825-5170.

Sincerely,

Irma Lagomarsino
Arcata Field Office Supervisor

cc: Mr. Bill Heitler
Orleans Ranger District
P.O. Drawer 410
Orleans, CA 95556-0410

FILE
29449

ENVIRONMENTAL FIELD REPORT

Prepared by Robert E. Miller
SWRCB, Division of Water Rights (DWR)
Environmental Assessment Section (EAS)

REM 8-15-00

Application No.: 29449

Applicant: Doug, Heidi, Norman D., and Caroline Cole

Location: Siskiyou Co. at Marble Mountain Ranch, 7.5 miles north of the Siskiyou-Humboldt County border along State Highway 96 (Somes Bar USGS 7.5 Minute Quadrangle).

DWR Staff involved: Ross Swenerton, Robert E. Miller, and Yoko Mooring

Applicant / Agent present: Doug Cole (applicant), Owner of Marble Mountain Ranch

Others present:

National Marine Fisheries Service (NMFS): Margaret Tauzer, Chuck Glasgow, and Tim Broadman. – protest accepted.

California Department of Fish & Game (DFG): Jane Vorpagel and Dennis Maria. – protest accepted.

Karuk Tribe of California: Ron Reed and Todd Soto. – local party with an interest in salmonid issues.

Non agency: Konrad Fisher (protestant, environmental grounds), Dennis Hood (KDH Biological Resource Consultation, on behalf of the Fishers), Michael David Fellows (caretaker of Fisher Ranch), and Neil Tocher (downstream user of water diverted from Stanshaw Creek).

Date: 07/26/2000

PROJECT DESCRIPTION: Applicant seeks a right to directly divert 3 cubic feet per second (cfs) from Stanshaw Creek, tributary to Klamath River, thence Pacific Ocean, in Siskiyou County. Water is conveyed through 5,200 feet of earthen ditch and 455 feet of 16-inch diameter steel pipe (penstock). The penstock uses 200 feet of fall to turn a Pelton wheel turbine. The hydroelectric generator produces a maximum of 33.9 kilowatts of electricity at 80% turbine efficiency. After use (see note), the water is conveyed via ditch into Irving Creek, thence Klamath River. (Note: Some water is taken from the ditch before and after the hydroplant for use by the Cole's for domestic use and pasture irrigation, respectively. Irrigation and domestic use is not applied for by this application and may be covered by pre-1914 rights and a Small Domestic Use Permit. Neil Tocher takes water from the ditch before it enters Irving Creek for domestic use, pasture irrigation, power generation, and to maintain a recreational reservoir. Mr. Tocher's project will briefly be described in another report. Mr. Tocher does not have a valid riparian claim, nor has he applied for Appropriative or Small Domestic Use Permit.) The diversion ditch has been in place since the mid to late 1800's and the turbine and generator were installed circa 1940. Mr. Tocher's project is in place, but the exact date of each facet of his project is unknown at this time.

ENVIRONMENTAL SETTING:

Land use. The Place of Use (POU) is a hydroelectric generator (pelton wheel) producing 33.9 kilowatts of electricity (**photos 1, 3, 4**). This power is used on the premises of Marble Mountain Ranch, supplying power to 11 cabins, 2 rental homes, a lodge, the Cole residence, and recreational vehicle hookups. A diesel powered Caterpillar Electric Generator (75 kW) supplies backup and supplemental power, but its high operational cost (\$2,500-\$3,000/month) make it inhibitive to operate on a full-time capacity (**photo 2**).

Vegetation. The ranch is surrounded by North Coast Coniferous Forest. The riparian area surrounding both Stanshaw and Irving Creeks is lush and in good condition, supplying approximately 90% stream shading and large woody debris (LWD) to the channel (**photo 5, 6**). LWD is ideal for creating pools and offering cover for rearing salmonids.

Wildlife and fisheries. Stanshaw Creek contains steelhead (*Oncorhynchus mykiss*) and coho salmon (*O. kisutch*). The steelhead in this area are in the Klamath Mountains Province Evolutionary Significant Unit (ESU) and are candidate species under the federal Endangered Species Act (ESA); they are a species of concern to the DFG. Coho (Southern Oregon/Northern California Coasts ESU) are federally threatened. During this trip, both species were positively identified below the Highway 96 culvert by electrofishing by Dennis Maria and Jane Vorpapel (1 coho at age 0+; 8 juvenile steelhead) and viewed through dive masks by Ron Reed and Todd Soto (**photos 7-11**). I personally observed 3 coho (0+) and >3 juvenile steelhead while standing near the washout pool below the culvert. It is presumed that anadromous fishes are unable to negotiate through the culvert to get above Highway 96. Plans are underway by the Forest Service (USFS), DFG and the Department of Transportation (CalTrans) to correct this passage problem.

On July 7, 2000, Mr. Reed and Mr. Soto electrofished Stanshaw Creek from the mouth up to Hwy. 96. They sampled every pool that was at least 1 to 1.5 feet deep: 18 pools were sampled and coho were found in 16 of them. A total of 33 coho (age 0+) were observed.

Further upstream, just below the Point of Diversion (POD), Mr. Soto netted an age-0 *O. mykiss* (**photo 13**). It is presumed that this was a resident rainbow trout as steelhead cannot negotiate above the Hwy. 96 culvert. A Pacific giant salamander (*Dicamptodon tenebrosus*) was observed in the diversion channel at the POD (**photo 12**). Another *O. mykiss* (age 1+) was found dead near the diversion ditch about 200 yards before it enters the penstock leading to the generator (**photo 14**). It was probably killed by a predator (it was not stranded, water temp. is not an issue [12.2 °C], and it appeared in good condition).

Hydrology and water quality. The Stanshaw and Irving drainages receive approximately 55 inches of precipitation per year (WRIMS GIS and Rantz Isohyetal). Most, if not all, of this is in the form of rainfall. Margaret Tauzer (NMFS) estimated Stanshaw flow by obtaining Ti Creek stream flow data (USGS gauge) and multiplying it by the ratio of watershed area of Stanshaw Creek (at the confluence with the Klamath River) divided by the watershed area of Ti Creek (at the gage). Ti Creek is approximately 3 miles north of Stanshaw Creek. For the period of record (10/1/1960 – 9/30/1964), Ms. Tauzer calculated the average unimpaired stream flow as 8.12 cfs at the mouth with a minimum and maximum of 1.02 cfs and 100.1 cfs, respectively (**figure 1**). During the period of record, estimated unimpaired streamflow in Stanshaw Creek dips below 3 cfs, the amount applied for by this application, in late July and most of August, September, and October. Using the rational method and assuming an average rainfall of 55 inches, Ms. Tauzer calculated an average flow at the mouth of 7.33 cfs.

As mentioned earlier, there is a fish passage issue in Stanshaw Creek at the Hwy 96 crossing. The culverts are long (>50 yards) and on a steep slope (~5%) with a smooth concrete substrate that offers no resting areas for salmonids migrating upstream (see photos 7, 8).

The POD is approximately three-quarters of a mile above highway 96 (photos 15, 16). The diversion structure is maintained annually by replacing rocks in the stream channel. At the time of this trip, the "diversion rocks" were a migration barrier to fish moving both upstream and downstream as the only water entering Stanshaw was seeping under these "diversion rocks". The flow entering the diversion ditch appeared to be at least twice that of the flow remaining in Stanshaw. The applicant does have a 1600 Permit from DFG, but it is stated that the diversion should be constructed so as to allow for the passage of fish. The POD and a large portion of the ditch are on USFS property.

Moving down the diversion ditch, a relief line is situated to convey surplus water out of the ditch during high flows (photos 17, 18, 19). Only a minimal amount of water was passing through this line during this visit. Water passing through the relief line flows back in to Stanshaw Creek.

Down-diversion of the relief line, a half-culvert is buried in the ditch (photo 20). The applicant says he needs to keep the half-culvert full (the amount present during our review) to operate his hydropower generator effectively; less than that, and he is short on power, more than that, and most is passed through the relief line described above. This is a good place to measure / monitor flow in the ditch. The flow was estimated just upstream of this half-culvert by timing a float over a known distance and measuring the ditch cross section at this reach (photo 21). Flow was about 1 foot per second and cross sectional area was about 2 feet (flow \approx 2 cfs). The applicant claims, and it was evident, that a lot of water seeps out of the ditch between here and the POD.

Water is also gravel-filtered out of the ditch (photo 22) into a pipe that leads to water purification tanks to supply domestic uses (photo 23). This water is not applied for in this application (Small Domestic or Pre-14?).

The ditch continues (photo 24) until it enters the trash rack (photo 25), thence the holding tank to produce head, thence down the penstock to the hydroplant (see photos 1,3,4). Water is then redirected into another ditch which flows into Irving Creek. Mr. Tocher takes water out of the ditch before it enters Irving Creek (photo 26, 27).

Water temperature was measured in Stanshaw Creek below Hwy 96 (12.2 °C, 54 °F), Stanshaw Creek at the POD (12.0 °C, 53.6 °F), the diversion ditch before it enters the trash rack (12.2 °C, 54 °F), the diversion ditch just before entering Irving Creek (12.5 °C, 54.5 °F), and Irving Creek upstream of the diversion discharge (12.0 °C, 53.6 °F).

DISCUSSION:

After the field review, the participants discussed the project, its potential impacts to anadromous salmonids, further studies that are warranted or planned, project alternatives / mitigation strategies, and the next step in the permitting process. Below is a brief synopsis of our discussion.

All participants were in agreement, except Mr. Cole, that the project, in its current form, has potentially negative effects to anadromous salmonids. All of these effects are due to decreased flows in Stanshaw: less habitat may be available, potential increases in temperature, and potential passage problems exist at the mouth. Mr. Cole kept stressing that Stanshaw is not good habitat, and that improvements are being made to Irving Creek by supplementing the flow. NMFS, DFG, Dennis Reed, and Konrad Fisher maintained that habitat needs to be improved in Stanshaw Creek (i.e. benefits to Irving fishery/habitat does not outweigh nor equal detrimental effects to Stanshaw fishery/habitat). All protestants present want more water to be left in or redirected to Stanshaw

Hood?

Hood?

Creek after the hydroplant. Dennis Reed asked if the USFS, NMFS, and/or DFG could do a habitat suitability study to quantify any beneficial effects Stanshaw may receive if it were to receive more water. He and Mr. Fisher plan to ask for funding from the DFG California Coastal Restoration Plan (CCRP) to do such a study. They had plans to ask for funding from the CCRP to study and improve the Highway 96 culverts, but that may be delayed. NMFS, DFG, Dennis Reed, and Konrad Fisher emphasized that the culverts at Hwy 96 will be fixed to allow for fish passage in the near future.

POTENTIAL PROJECT IMPROVEMENTS DISCUSSED

1. Improve the diversion structure at the POD on Stanshaw Creek.

This may be accomplished by placing a more permanent structure in the stream channel such as a screened pipe/siphon or a small check dam with a slot that allows for bypass and fish passage. This may be difficult since the channel frequently receives high streamflow and debris and the channel is very dynamic.

2. Improve the delivery system to hydroplant.

If this is accomplished, less water would need to be diverted out of Stanshaw Creek. Lining the ditch or installing a pipeline were possible methods mentioned.

3. Improve the efficiency of the hydroplant.

This is another method that would require less water to be diverted. We discussed increasing the drop of the penstock, installing a smoother penstock, and installing a newer, more efficient generator.

4. Redirect water back to Stanshaw after it has passed through the Pelton wheel.

Water would be discharged back in to Stanshaw via pipeline just upstream of Hwy. 96. Some water would have to be left in the current ditch that leads to Irving Creek so that Mr. Cole can irrigate (Pre-14 claim of 0.5 cfs). This would still leave the reach between Hwy 96 and the POD at the current flow regime, which may be a problem if passage improvements are made and anadromous fishes get above Hwy 96.

5. Alternative energy sources.

Solar, diesel generator, propane, and running power lines from the town of Somes Bar (7 miles south) are all potential alternative energy sources.

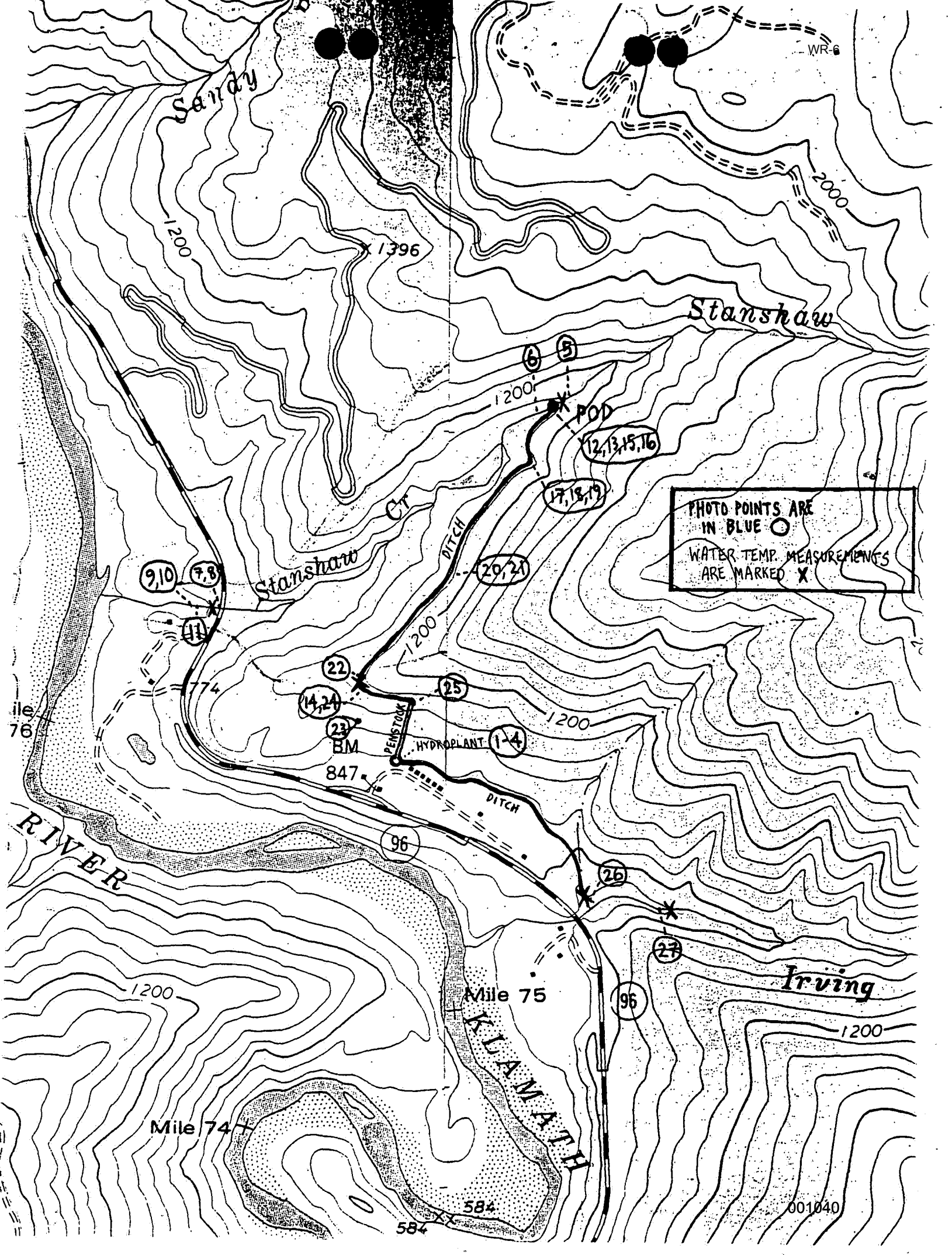
Mr. Cole stressed that all of these options are costly and that he could not afford them. The alternative that most appealed to him was #4, although he would still need to get some funding for that alternative. Other parties thought #4 may be a viable solution, but a consensus needs to be reached as to how much water needs to be redirected. The study proposed by Mr. Reed or studies done by NMFS, DFG, and/or USFS may answer this question. Also, Mr. Reed, Mr. Fisher, Mr. Cole, and Mr. Maria were going to determine if funding was available from the CCRP to develop any of these possible improvements. Mr. Swenerton asked NMFS and DFG to develop alternatives to submit to the SWRCB that may improve the fishery and that are feasible for Mr. Cole so that their protests can be dismissed.

OTHER ISSUES

Mr. Jon Grunbaum, a fisheries biologist for the USFS, was invited to attend but was unable to make it. The POD and most of the ditch are on USFS property. It is unknown at this time whether a USFS Use Permit is needed by the applicant or if the project has been "grandfathered". If

a Use Permit is required, the NMFS may have a nexus for getting more involved in the project because a federal agency (USFS) is supporting a project that may have a negative effect on a federally listed species (coho salmon). The USFS would be required to produce a Biological Assessment and then NMFS would issue a Biological Opinion. Chuck Glasgow (NMFS) is going to discuss this with Mr. Grunbaum or other USFS representatives.

ATTACHMENTS: PHOTOS, MAP, FIGURE



WR-6

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Stanshaw

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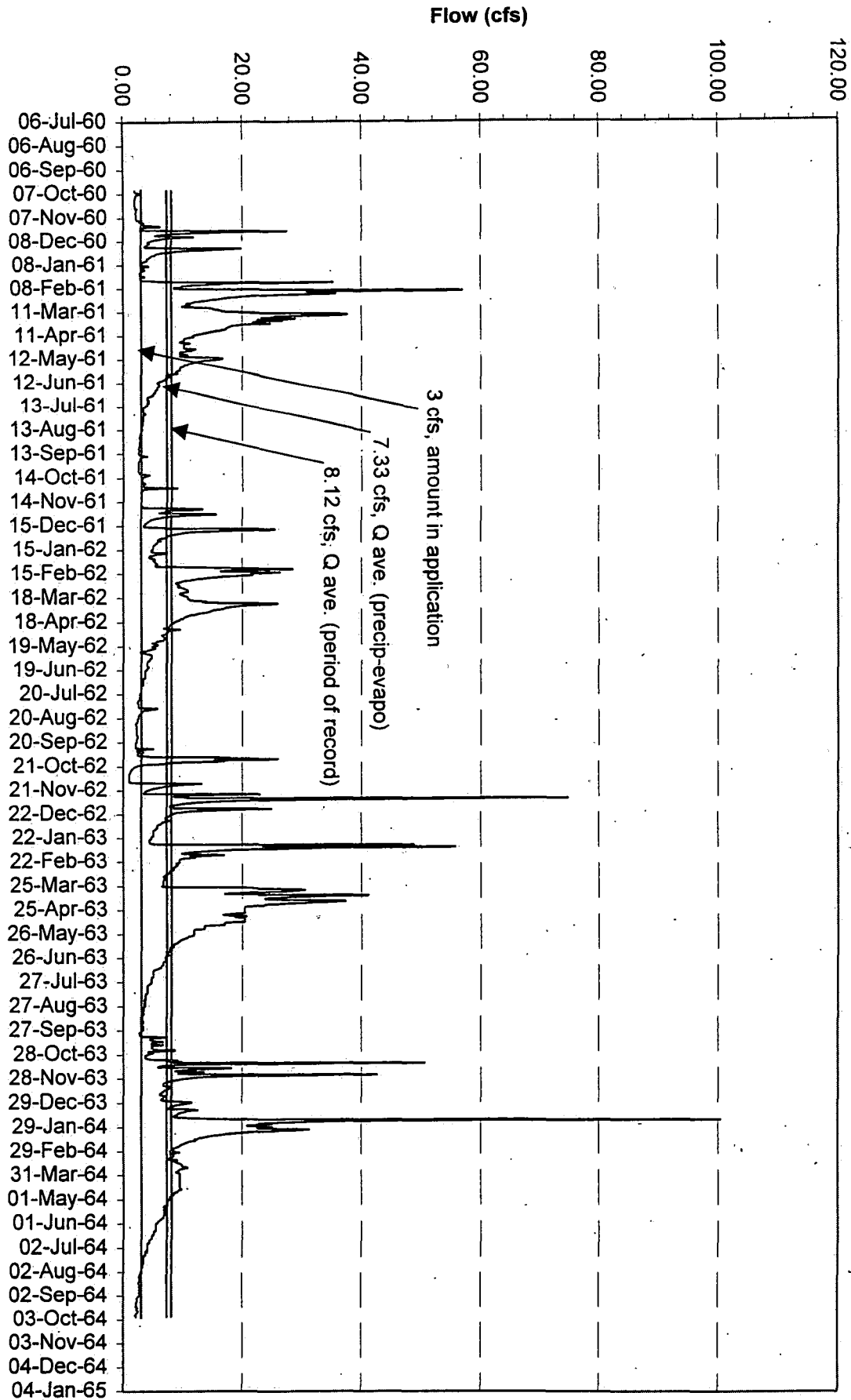


Figure 1. Stanshaw Creek Estimate of Daily Flows based on Ti Creek Gage

State Water
Resources
Control Board

901 P Street
Sacramento, CA
95814
(916) 657-
FAX (916) 657-1485

TO: Files 29449 and X002837

Gray Davis
Governor
WR-6

FROM: Christopher O. Murray
WRC Engineer
Application and Petition Unit #2
DIVISION OF WATER RIGHTS

DATE: 5-4-99

SUBJECT: SITE VISIT TO COLE'S PLACE

Chuck Rich and I visited the project site to determine the best course of action for the Division relative to the current filings. The applicants previously submitted a Small Domestic Registration for a small pond which was recently constructed on their property. The Coles also have two previous filings which the Division has yet to act upon, one for domestic and irrigation direct diversion and one for hydro power direct diversion.

The applicants claim pre-14 rights for the water diverted but cannot show that the right has been in continuous use in the amounts currently diverted through the Pelton wheel. Consequently, the Applicants have requested that the irrigation and domestic use filing be withdrawn (A029450). There was some question as to whether the Applicants own another reservoir which showed up on an aerial photo submitted by the Department of fish and Game. This other reservoir is larger in size than the one the Coles filed for in their recent SDR X002837. There was some speculation that if the Coles do own that reservoir, then the direct diversion under 29450 could be converted to storage to cover the reservoir.

After arriving on site, we were informed that the larger reservoir is not part of the Cole's property. Consequently, it would appear that there is no need for 29450 and it can be cancelled. The SDR should be accepted as filed.

We surveyed the reservoir on the Cole property and found that it is a maximum of three acre-feet in size. It was not full at the time of the survey and did not appear to be capable of filling completely due to seepage losses. Construction on the reservoir is ongoing and the filing was for 10 acre-feet. Consequently, I would recommend that the right be processed for ten acre-feet.

A flow measurement of the canal indicated a flow rate of 2.75 cfs diverted from Stanshaw Creek. This amount of water was more than could be forced through the penstock as some was spilling out

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onto the ground at the inlet to the penstock. The penstock appears to remain full at approximately 2.4 cfs. The applicant applied for three cfs, I would recommend processing the application for that amount as there are plans to repair the penstock at a later time.

According to Mr. Squires, the Department of Fish and Game has been out on site and did not see a need for fish screening on the diversion ditch. This is probably due to the low velocities (approximately 1 foot/sec) and the fact that the ditch does provide some habitat for juvenile salmonids. Mr. Squires stated that they were entering into an agreement with DFG and that he would send me a copy of the agreement once it was finalized.

Chris Murray
State Water Resources Board
Division Of Water Rights
P.O. Box 2000
Sacramento, Calif. 95812-2000

November 5, 1998

UM
29449
29450

Dear Mr. Murray:

I have been ask by my daughter and son-in-law, Heidi and Doug Cole, to assist in the resolution of the water rights issue pertaining to their Marble Mountain Ranch in western Siskyou County. They are currently struggling with preparations for an IRS audit and both are working practically around the clock to provide for the basic needs of their young family. Two nights ago, Doug provided me with a stack of letters which have come to him from your Division office and from his attorney, Nancy Smith, over the past year or so. In digesting this material, I have begun to be a little educated about water rights, about the apparently extensive communication which has gone on between you and Nancy, and about an upcoming deadline of November 30, 1998 for getting this matter resolved.

I believe you and I met on one of your visits to the Ranch and, although I feel quite comfortable speaking with you directly, I decided to write to you so that I might more thoroughly present my questions and concerns regarding the water rights issue as well as provide information and observations which I feel should be considered in the final resolution of the matter. It is my hope that after you have had an opportunity to look over what I have written here we can meet again somewhere to further discuss and finalize details. I trust that you are anxious to get an early settlement to this issue and so I am prepared to work with you in any way necessary to expedite matters.

In a letter from Nancy Smith to Doug, dated October 7, 1997, Ms. Smith stated, "If you [Doug] proceed by way of permit, the State is prepared to give you a permit for 3 cfs." Assuming this option is still open to him, I am certain that Doug would now agree to accept this flow rate as long as he has assurance that his future right to divert water from Stanshaw Creek (irrespective of flow rate), as set forth in the pre-1914 grant signed by President Taft, will not be compromised.

Yesterday, I measured the flow rate in an eighteen-foot section of half-culvert which is a part of the canal carrying water to the Ranch. The inside diameter of this culvert is 29 inches. A small piece of cork was dropped into the center of the stream and it took 15 seconds for it to traverse the 18 feet of culvert. This latter velocity measurement was confirmed by repeated trials. From these measurements, I calculated the flow rate to be 2.75 cfs. Since this flow rate is just slightly in excess of what is necessary for the operation of our hydroelectric plant, I am perplexed over the variety of much lower, past estimates quoted in the various reports and letters available to me. I believe there is sufficient evidence to show that the carrying capacity of the canal has not been altered since its construction in the 1800's. A flow rate of at least 2.75 would have been necessary to support an intensive hydraulic mining operation and, later, to support the documented multiplicity of uses for water delivered to the Ranch, including the irrigation of pasturage supporting 100 head of cattle (as attested to by a former owner, Lue Hayes). I find it preposterous that the State would expect us to come up with numerical data to validate water flow rates during a period of time when such rates were not actually measured and, indeed, when there existed no water rights laws to cause concern to anyone.

Perhaps you would agree that matters, including those pertaining to water rights, were and are written and passed without sufficient attention to or provision for special circumstances. I believe there is a very special circumstance, directly relating to the current issue of water rights for the Ranch, but which seems not to have entered into any of the documents I have read. The special circumstance I allude to is that neither electric power nor potable water has been made available to the Ranch by any public utilities company and therefore we are totally dependent upon an adequate flow of water in the Stanshaw canal for our basic living requirements. Should any agency impose a reduction of our current water flow, which flow by all accounts of former owners and residents has not changed significantly for well over one hundred years, our resident families would be uprooted, our sole source of income wiped out, and a tremendous (if not total) loss of financial resources essential to our future sustenance be incurred. Such action on the part of a government agency would, in my estimation, not only fail to meet the test of reasonableness, but would seem to violate our constitutional rights relating to our pursuit of life and happiness.

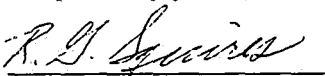
It is clear to me that inherent in the establishment of State water rights laws is a concern for providing adequate water for possible future users downstream. In our circumstance, there is just one downstream user. His property is situated at the mouth of Stanshaw Creek and there is virtually no likelihood of a change in the use of his property which would require a change in the current rate of water supply to our ranch.

In a recent letter signed by Harry Schueller and dated September 15, 1998, there is reference to a "recently-constructed reservoir" on the ranch. What was actually done was an enlargement of a long-time existing pond. Enlargement of the pond came about as a result of an arrangement which Doug made with Cal-Trans to dump material from a massive slide which occurred about four miles upriver from the ranch this past winter. The dumping of this material on the ranch resulted in a savings of thousands of dollars to the State. The enlargement of the pond does not affect the flow rate in the canal, nor would it ever, and should therefore not be made a part of the current water rights settlement; it is a non-issue.

May I once again suggest that, in view of the history of this matter and of the many circumstances surrounding the diversion of water to the ranch, we consider proceeding with the formulation of a water rights document for the Marble Mountain Ranch which will assure 1) a continued recognition of the pre-1914 right to appropriate water from Stanshaw Creek for use on the Ranch, and 2) a maximum flow rate in the canal of 3 cfs.

I trust that a satisfactory resolution can be reached soon but that you will be so kind as to extend the existing deadline, if needed, to provide sufficient time for the transfer of essential information between us. I remain

Respectfully yours,



R. Gary Squires
92520 Hwy. 96
Somes Bar, Calif. 95568
(530) 469-3437

P.S. If you wish, we could speed things up a bit by conversing via E-mail. My address is:
GARINGSQ@PCWEB.NET



Cal/EPA

State Water
Resources
Control Board

Division of Water
Rights
901 P Street
Sacramento, CA
95814
(916) 657-2167
FAX (916) 657-1485



Pete Wilson
Governor

MEMORANDUM

TO: Files 29449 and 29450

FROM: Christopher O. Murray
WRC Engineer
DIVISION OF WATER RIGHTS

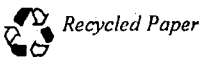
DATE: 6-5-98

SUBJECT: INSPECTION OF MARBLE MOUNTAIN RANCH'S DIVERSION
FACILITIES

As indicated in the preceding Contact Report dated 6-2-98, Mr. Cole has cancelled our meeting at his project site for 6-3-98. Basically, this trip was scheduled to assist Mr. Cole in determining how to proceed in order to either prove the extent of his pre-1914 claim or to continue processing these applications. The only piece of information which I needed was the rate at which he is currently diverting water. Because I had scheduled this trip to Mr. Cole's site in Somes Bar, I had scheduled to meet with DFG in Seiad Valley on another project the following day.

Since I had to drive to Seiad Valley anyway, I decided to stop off and measure the amount of water flowing through Mr. Cole's diversion facilities. I am familiar with the location of his diversion ditch by virtue of the fact that I visited the site and inspected the ditch with Doug Cole's father-in-law on September 23, 1997. I did not take a flow measurement during that visit due to time constraints. Mr. Cole's diversion ditch lies entirely upon Forest Service property. Consequently, no permission from the Cole family is required to inspect the site or measure the flow.

I hiked to the POD from Highway 96, following Stanshaw Creek until I reached the diversion ditch. I photographed the diversion structure and the ditch in various places. I noted the presence of a rainbow trout approximately 9 inches in length utilizing the buried sediment trap for cover. I located an area of the ditch which had a very uniform cross section and a smooth bottom. From here I measured the flow in the ditch using a pygmy meter. I estimated the velocity prior to initiating the flow measurement as a check on the



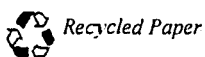
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CWB

flow rate I obtain with the instrument. I estimated the velocity to be approximately 1 foot/second (probably a little more than that). Based on a quick calculation of the cross sectional area (2.54 Sq. Ft.) I obtained an estimated flow rate of approximately 2.5 cfs. The flow rate I obtained using the pygmy meter matched very closely my estimate of the flow rate. The measured flow rate was determined to be 2.4 cfs. This flow was measured near the point of diversion.

The ditch is a mile or so long, and some conveyance loss is expected over that distance. The water near the terminus of the ditch appeared to be flowing at a rate comparable to the beginning of the ditch. I would regard the conveyance losses to be a small fraction (20% maximum for loss of 0.5 cfs) of the flow of the ditch although the flow was not measured near the penstock. The entire flow of the ditch was being diverted through the penstock.





Cal/EPA

State Water Resources Control Board

Division of Water Rights

Mailing Address: P.O. Box 2000 Sacramento, CA 95812-2000

901 P Street Sacramento, CA 95814 (916) 657-2167 FAX (916) 657-1485

MARCH 19 1997

In Reply Refer to: 332:CM:25446



Pete Wilson Governor

Michael Brickell, Elizabeth Brickell, Barbara Short, Steve Robison, Bruce Robinson and Susie Robison c/o Barbara Short Patterson Ranch Somes Bar, CA 95568

Doug Cole, Heidi Cole, Norman D. Cole, and Caroline Cole c/o Doug Cole 92520 Highway 96 Somes Bar, CA 95568

Dear Mr. Cole and Ms. Short:

APPLICATIONS 25446, 29449, AND 29450 TO APPROPRIATE WATER FROM STANSHAW CREEK AND UNNAMED TRIBUTARIES TO STANSHAW CREEK IN SISKIYOU COUNTY

I have recently been assigned the task of processing the above mentioned applications. My review of the files for these applications indicates that a dispute exists between the parties regarding priority of use. I also understand that the Cole's believe they possess a valid pre-1914 appropriative right and Brickell, et al. believe they possess valid riparian rights. Both groups appear to have some interest in cancelling the above mentioned applications in favor of these claims of right in order to obtain a better priority.

Please be advised that while the Division of Water Rights (Division) does not currently have sufficient information to refute these claims of right, we believe that the validity of both claims is uncertain at this time and may not withstand more intensive review. Only a court of competent jurisdiction can make a final determination of the validity and priority of these claims of right. This can be time consuming as well as an expensive process upon which to embark. If your claims of right do not fully cover all of your diversions, you would be trespassing against the State of California and would also be subject to appropriate enforcement actions including the imposition of significant fines. Consequently, we do not believe that cancellation of your applications is in your best interests at this time. We recommend that the processing of your applications be resumed.

To that end, we need written confirmation regarding whether you wish to proceed with these applications or have them cancelled. If you wish to cancel your application(s), we need either:

Handwritten: CM 3-18-97 KRM 3-18-97

MARCH 19 1997

Mr. Cole and Ms. Short

-2-

1. Verification of the validity of the rights under which you will be diverting water; or
2. A written statement that the diversion and use of water will be terminated.

Verification of riparian or pre-1914 claims rights will not be easy. There are at least two ways to achieve this. The first way is to retain the services of an attorney or a consultant who is well versed in water rights law and have that individual prepare a written analysis in support of your claimed rights. If the Division agrees with the conclusions of such an analysis, your applications could be cancelled with a considerably reduced risk of enforcement action at a later date.

The other option is to schedule a field inspection by Division staff to examine your diversion and use of water and any other evidence you may have that supports your claims of right. If Division staff conclude that adequate riparian or pre-1914 rights exist, a letter would be sent to that effect and cancellation proceedings would be initiated. If Division staff conclude that adequate riparian or pre-1914 rights do not exist to justify all of your diversions, we could attempt to find a mutually acceptable resolution that would allow for issuance of permits under your pending applications. If such a solution could not be found, this inspection would also serve as a field investigation as required by Section 1345 et seq. of the Water Code (copy enclosed). A final staff recommendation regarding disposition of protests and action on the pending applications would be developed as soon as possible thereafter.

Please notify this office within 30 days from the date of this letter of the course of action you wish to pursue. If you wish to pursue the first course of action and need additional time to prepare supporting documentation, please let us know how much additional time will be required. If you wish to pursue the field investigation by Division staff, please let us know if there is a specific time of year that you feel would be best for an inspection. We would attempt to provide two to three weeks advance notice of any inspection. If there are any questions, I can be reached at the above address or at (916) 657-2167.

Sincerely,

ORIGINAL SIGNED BY:

Christopher O. Murray
WRC Engineer
Applications and Petition Unit #2

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Our mission is to preserve and enhance the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.

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STATE WATER RESOURCES CONTROL BOARD

PAUL R. BONDERSON BUILDING
901 P STREET
SACRAMENTO, CALIFORNIA 95814
(916) 657-1954
FAX: 657-1485

Mailing Address

DIVISION OF WATER RIGHTS
P.O. BOX 2000, Sacramento, CA 95812-2000



FEBRUARY 22 1995

In Reply Refer
to: 331:WV:25446

29449

Doug Cole, Heide Cole,
Norman D. Cole and Caroline Cole
c/o Doug Cole
92520 Highway 96
Somes Bar, CA 95568

Dear Mr. Cole:

APPLICATION 25446 OF MICHAEL BRICKEL ET AL.--UNNAMED STREAMS TRIBUTARY TO STANSHAW CREEK IN SISKIYOU COUNTY

In 1980, Bob and Judy Allen Young (Young), as prior owners of your commercial enterprise, filed a protest against the above referenced application to appropriate water from tributaries to Stanshaw Creek. Young claimed prior rights to all the flow of Stanshaw Creek and tributaries based on a claim of pre-1914 appropriative rights and a claim of riparian rights. The Young protest was accepted by the Division of Water Rights (Division) though Young was subsequently advised that such acceptance did not substantiate his claimed water rights. Nevertheless, and in an attempt to resolve the protest, Division staff proposed reducing the diversion rate for irrigation under Application 25446 from 0.14 to 0.07 cubic foot per second (cfs) and proposed a requirement for metering the diversion from the tributaries to Stanshaw Creek. These conditions were acceptable to Young and the representative, at that time, of the applicant. Due to various reasons, however, apparently including litigation between the parties, further processing of Application 25446 was deferred for a number of years.

In late 1994, we advised the applicant that a permit was finally ready to be issued. Ms. Barbara Short, current representative of the applicant, by letter of January 18, 1995 requested that the metering requirement be deleted from the permit and provided hydrologic and other information in support of her request. A copy of that letter and the March 17, 1990 report by Marvin Goss, Hydrologist, is enclosed. This is the first time Division staff was aware of any hydrologic data on Stanshaw Creek.

The only evidence in our file of a pre-1914 appropriative right for the property you acquired from Young is a water notice (copy enclosed) which accompanied the Young protest of Application 25446. In the absence of back-up material (map, etc.) this notice, by itself, is inconclusive that a pre-1914 appropriative right attaches to the property. In addition, there is no Statement of Water Diversion and Use (Statement) on file with the Division for diversion of water from Stanshaw Creek. All diverters of surface water, with certain exceptions which are not applicable in this situation, are required to file a Statement with the Division pursuant to Water Code Section 5100 et seq.

FEBRUARY 29 1995

This requirement applies to water diverted under claim of riparian right and to appropriations initiated prior to December 19, 1914, the effective date of the California Water Commission Act. Young was advised on several occasions of this requirement.

Even if we are to assume a valid pre-1914 right attaches to your property, the amount claimed in the 1867 notice, which is illegible but stated to be 600 miners inches or 15 cfs¹, is well in excess of past use which is documented in the Goss Report at 0.49 cfs from 1958 to 1990. On the basis of this information, the right to any amount in excess of 0.49 cfs would have been lost through five years of non-use (Smith v. Hawking 42 P.454). It also appears that a substantial portion of the water presently being diverted by you from Stanshaw Creek is for hydro power use. According to information in the files of Applications 29449 and 29450, which were recently assigned to you, the hydro power turbine was installed between 1940 and 1942, well after 1914. Therefore, it appears that any pre-1914 claim, even if valid, to Stanshaw Creek water would most likely be limited to the consumptive use on your property for domestic and irrigation purposes. This use was determined to be 0.11 cfs (Application 29450). As can be seen from the Goss Report, the estimated flow of Stanshaw Creek at the Young Ranch diversion is well in excess of this amount, even in drought years.

In consideration of the above, as well as the request of Ms. Barbara Short, we will delete the previously agreed to metering requirement and re-instate the initially requested irrigation direct diversion rate of 0.14 cfs for processing any permit issued pursuant to Application 25446 unless, within 60 days from the date of this letter you provide information that clearly documents the existence of a valid pre-1914 appropriative or riparian claim of right to the waters of Stanshaw Creek for your property. If you do not submit the verifying documentation, we will assume that you do not object to the above described process, and we will proceed toward issuance of a permit for Application 25446.

If you have any questions regarding this matter, please contact Wm. Van Dyck of my staff at (916) 653-0438.

Sincerely,

ORIGINAL SIGNED BY
Murt Lininger
Program Manager
Application and Hearing Section

Enclosures

CERTIFIED

cc: Brickell et al.
c/o Ms. Barbara Short
Mountain Home/Patterson Ranch
Somes Bar, CA 95568

bcc: A29449-50
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