



STATE WATER RESOURCES
CONTROL BOARD

2012 OCT -2 AM 10:41

DIV OF WATER RIGHTS
SACRAMENTO

MJM
WR-67
A029449

500 Capitol Mall, Suite 1600
Sacramento, California 95814
main 916.447.0700
fax 916.447.4781
www.stoel.com

October 1, 2012

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

VIA E-MAIL AND FIRST-CLASS MAIL

Matt McCarthy
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

**Re: MCarthy: A029449/ Diversion Rights in Stanshaw Creek in Siskiyou County:
63:MC:262.0(47-40-01);A029449**

Mr. McCarthy:

Marble Mountain Ranch (the "Ranch"), located in Siskiyou County, is owned and operated by Douglas and Heidi Cole (the "Coles"). The Coles have diverted water from Stanshaw Creek since purchasing the property in 1994 and continue to use the water to support the Ranch. Previously, the Coles have informed staff for the State Water Resources Control Board ("Board") that the right to divert the water is based on their pre-1914 appropriative rights. Accordingly, the Coles are already entitled to divert water from Stanshaw Creek for irrigation and domestic use and hydroelectric production.

Board staff contends that the Coles do not have a valid pre-1914 claim to the water rights because there is insufficient evidence that the diversion of water has been continuously maintained as to the amount diverted since December 19, 1914. (Letter from Board, September 15, 1998.) However, there is no basis for this assertion and the Coles have enclosed evidence of continuous diversion and use of water from Stanshaw Creek since the 1860's.

Moreover, under California Water Code section 1202, the Board has no jurisdiction over Marble Mountain's pre-1914 water rights. Numerous Board water right decisions and orders confirm that the Board has no authority to adjudicate a pre-1914 water right. (See Board Decisions, D934; D1282; D1290; D1324; D1379.) The Board has conceded to this fact in a letter to the Coles dated August 22, 2002, in which Edward C. Anton, Chief of the Division of Water Rights states,



Matt McCarthy
October 1, 2012
Page 2

“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. ... 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.”

Accordingly, the Board’s arguments regarding the validity of the Coles pre-1914 appropriative rights are moot and Board staff has no authority to make this determination. Once the claimant of a pre-1914 water rights presents prima facie evidence of the existence of a pre-1914 right, the burden shifts to the petitioner, or in this instance Board staff, to show that the pre-1914 right was lost. Board staff has not met this burden and in fact, the evidence establishes a pre-1914 water right, none of which has been lost or diminished.

Board staff argues that the Coles are limited to 0.49 cubic feet per second (cfs) and relies solely on information obtained in a 1965 bulletin by the Department of Water Resources entitled “Land and Water Use in the Klamath River Hydrographic Unit” (Bulletin No. 94-6). Bulletin 94-6 identifies the total amount diverted for irrigation, domestic, stockwatering, and power production of 362 acre-feet, annually. Board staff further states that the information was confirmed by Mr. Marvin Goss, Forest Service Hydrologist, who lived on the property under prior ownership. Mr. Goss inappropriately claimed the flow capacity of the ditch to be 1.25 cfs, limited by a low point in the channel and that water had been used at a rate of 0.49 cfs for many years.

There is no sound evidence which demonstrates the Department of Water Resources’ basis for the total amount of diverted water. In addition, the information documented by Mr. Goss is insufficient. His reading was based on a one-time analysis during a relatively dry season, using a leaf to measure the water flow. It is also well-known in the community that Mr. Goss had a contentious relationship with Lue and Agnes Hayes, the owners of the property at the time of Mr. Goss’ reading. That fact, in conjunction with historic canal dimensions and the vast use of water at that time, dispute Mr. Goss’ reading. The enclosed details the history of use which evidence prior use of at least 3.6 cfs from Stanshaw Creek (see Attachment A, “Summary of Continuous Water Use at Marble Mountain Ranch”). Furthermore, the Board has previously determined that



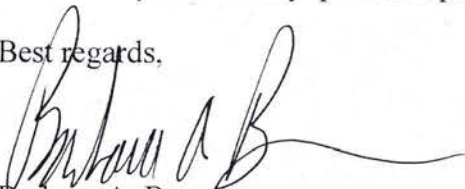
Matt McCarthy
October 1, 2012
Page 3

evidence introduced in support of a pre-1914 water right must be considered in the light most favorable to the claimant. (Board Order No. WR 95-10.)

It is also established in common law that the quantity of water to which an appropriator is entitled is determined by quantifying the maximum amount of water reasonably and beneficially used by the appropriator within the five previous calendar years. (*Smith v. Hawkins* (1898) 120 Cal. 86, 87.) The Coles have presented evidence that their use of water from Stanshaw Creek amounts to 3.6 cfs over the past five years, consistent with the amount of water diverted and put to use under previous Ranch ownership.

On these bases, the Coles have the right to divert water from Stanshaw Creek for all their irrigation and domestic consumption as well as hydroelectric power production at a minimum of 3.6 cfs. If you have any questions please contact me at 916-447-0700.

Best regards,



Barbara A. Brenner
Counsel for Marble Mountain Ranch

BB:jhc
Enclosure

cc: Phillip Crader
Doug and Heidi Cole

Attachment A
Summary of Continuous Water Use
At Marble Mountain Ranch

In 1867, the United States of America granted a parcel located in Dillon's Township, Klamath County, California to Samuel Stanshaw who hired Chinese laborers to dig canals on the parcel of land that measured approximately 3.5 feet deep, 2 feet across the bottom, and 10 feet across the top, creating a cross section of 21 feet. (See Sean Bagheban, P.E.) In 1867, Samuel Stanshaw filed a claim for water rights amounting to 600 inches to be used for a gold mining operation and irrigation purposes on several areas of the Stanshaw property, including what is now known as the Marble Mountain Ranch. (Water Notice recorded March 25, 1867 in Book of Mining Claims 232 at Page 397.) Samuel Stanshaw hired 600 miners to mine for gold and created a community for the miners to work and live on the ranch with their families. In 1870, the mining rights were leased to Bow & Company, certain "Chinamen" to take gold ore from the Stanshaw Mining Company who also mined for gold. A requirement under the mining lease was that Bow & Company purchase their eggs from the ranch operating at the Stanshaw Mining Company. Commencing in 1867 water was diverted from Stanshaw Creek to Marble Mountain for reasonable and beneficial use.

In 1911, Samuel Stanshaw patented his mining claim which granted water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with those water rights. This patent granted him the pre-1914 appropriative water rights that continued to be diverted and put to use at Marble Mountain. Commencing in 1911 approximately 15 cubic feet per second (cfs) of water from Stanshaw Creek was diverted to Marble Mountain.

During this time, the State commenced construction of State Highway 96 and the construction crew lived on the site while the mining, ranching and domestic operations were ongoing. Each of these operations relied on Samuel Stanshaw's appropriative water rights until 1922 when the Stanshaw mine/homestead ranch was sold to Guy McMurtry, a state road engineer. Mr. McMurtry was assigned by the State to complete construction of the last unfinished section of Highway 96, between Orleans and Happy Camp. The water distribution system on Marble Mountain Ranch was utilized to support the construction work and soon, Mr. McMurtry built additional housing for these crew members and their families. The Stanshaw Creek pre-1914 water diversion was continuously relied upon and was the sole source of water for all water demands at the ranch.

The population burst prompted the State to build a school on site to service the children of all the people living on the ranch. The first school was a log building with one classroom, situated over Stanshaw Creek. In 1935 the County Superintendent of Schools in Siskiyou County determined that the one room classroom was insufficient to support the 52 children and made arrangements to construct a supporting school house adjacent to Marble Mountain Ranch. The new school house included bathrooms, a kitchen, dining room, and housing for the two teachers on site.

Meanwhile, Mr. McMurtry operated a dairy farm and provided milk and milk delivery services to the community on the ranch. There is some testimony by past residents and locals of a DC powered light system being used to illuminate/heat the main ranch house and the hen house on the ranch then owned by McMurtry. Further evidence of a DC hydroelectric power system is the remnant abandoned penstock system leading to the current powerhouse location and the knob and post electrical remnants removed from the original ranch house during renovations by the Coles in 2006. A single ditch line carrying approximately 4 cfs provide adequate sufficient water for all domestic and agricultural water uses. Although the original mining operation had ceased, the property still demanded water for the agricultural operations and domestic consumption by the residents and school. At this time the water was also used to generate power and the hydropower was and remains as the sole source of power generation.

The McMurtry's utilized the ditch for domestic consumption, as well as agricultural purposes to raise hay, fetch, vegetable garden, and the dairy farm until 1958 when it was sold to Lue and Agnes Hayes. The Hayes operated a cattle ranch with one hundred cattle from 1958 to 1994. The ranch sustained 16 homes and outbuildings and housed State road workers, United States Forest Service employees and transient recreational fisherman. The ditch lines and foundational domestic/agricultural water lines that are in place today were the same lines that existed when the Hayes' purchased the property. The lines carried approximately 4 cfs and supported all the people living on the ranch at that time, the cattle ranch operation and continued agricultural production.

The Hayes' continued to use the water for domestic consumption to support the many residents on the property. In addition, they irrigated hay and alfalfa pastures by turning out water from the ditch in various places and flooding the pastures. Some of the diverted water was returned to Stanshaw Creek. The dimensions of the ditch remained the same from the time the Hayes' purchased the property to the time the Ranch was sold to the Cole's. The Hayes also operated a pelton wheel generator for electricity, still in use today. The wheel generator was a 4 inch line, then increased to a 14 inch line utilized to create electricity for the occupants on the Ranch.

After diverted water was funneled into the domestic water line and hydropower penstock, remaining flows and power plant effluent continued through the lower elevation canals and were diverted at appropriate spots to flood irrigate alfalfa hay pastures, vegetable gardens, fruit trees, and lawns. Per Lue Hayes, there were times in his ownership that virtually every available bit of Stanshaw Creek water was diverted into the canals and used in power generation and irrigation of crops at the ranch. During the Hayes family occupation, the power plant was upgraded to a facility that produced about 40 KW of AC power that was needed for an increasing ranch residency population.

During these years, the Hayes' family maintained the ditch to ensure that any gravel and silt that settled in the ditch was excavated and the flume was kept in good condition particularly because the wood would deteriorate and branches would clog the flume. The Hayes family removed redwood plank ditch linings that had rotted in various places in the canal system and maintained and replaced a wooden flume section at various times during their occupation of the

ranch. The agricultural uses of the ranch continued through the Hayes family era with flood irrigation as the primary agricultural water distribution system.

The Hayes' measurement of the ditch at that time ranged from 2 -1/2 feet to 5 feet wide and from 2-1/2 feet to 1-1/2 feet deep, depending on the water flow. The abandoned ditch, which has now been inactive for approximately 140 years, is the same size as the original ditch in use today. The ranch was then sold to the Young family in 1972 when the Young's licensed the ranch as a state licensed mobile home/RV park with a permitted capacity of 57 mobile home hook-ups. The continuing rental of the 10 previously constructed cabins and three homes also added to the ranch population. Much of the water use was directed at domestic consumption and power generation to support ranch residents. However, the ranch still sustained alfalfa pastures, fruit and nut orchards, and large vegetable gardens.

The Young's Ranch Resort had a resident population between 100 – 200 persons consuming ranch water and hydroelectric power. Past Young's ranch visitors returning to Marble Mountain ranch recant stories of Young's ranch management needing to patrol the ranch routinely to chastise those ranch residents using more than their allotted share of power and water during low Stanshaw Creek stream flow periods during the summer months. Again, during this period, the original Stanshaw Creek canal system carried water at full capacity during periods of available flow, and carried nearly all of Stanshaw Creek flows during periods of diminished low Summer flows.

When the Cole family purchased the ranch in 1994, the infrastructure load requirements for power production and consumption were beyond the capacity of the ranch in the Cole's estimation. A change in business model was implemented at this time to reduce the ranch residency to a smaller population by targeting short term residents on a full service recreational visit. The target guest population now at Marble Mountain Ranch is 30 – 35 visitors on a full service short term guest ranch visit. Guided rafting, fly fishing, trail rides and other recreational activities along with food/meal service provide higher income returns per resident with fewer residents on location to deplete power and water resources. Additional water distribution improvements have been implemented by switching the agricultural uses from flood irrigation to sprinkler irrigated pastures, drip irrigated gardens and by installing culverts in the canal systems to reduce seepage of captured water. Additionally, the hydroelectric power plant was upgraded in 1997 to allow for more efficient power production with available Stanshaw Creek stream flows. Ongoing efforts to improve efficiency of Stanshaw Creek water and reduce demand include grant applications for canal system piping/culverting, and power plant upgrades.

Marble Mountain Ranch, since the Cole's ownership, has beneficially used approximately 4 cfs maintained by the Marble Mountain Ranch predecessors and current occupants. There has been no 5 year continuous lapse of water transport, or truncated use (despite seasonal variations in flow), that might suggest a diminished capacity. In fact, the historical growth and development of the ranch operations over 150 years speaks to the undeniable maintenance of the canal systems and beneficial use of all water diverted from Stanshaw Creek.