

June 12, 2014

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Re: Draft Marble Mountain Ranch Stanshaw Creek Water Rights Report

Dear Ms. Lennihan and Mr. Howard:

Thank you for your thorough research about Marble Mountain Ranch's claimed pre-1914 right to water from Stanshaw Creek. I appreciate the opportunity to submit comments before you finalize the draft Marble Mountain Ranch Stanshaw Creek Water Rights Report (Draft Report). In preparing the final report, I urge you to consider the following:

Marble Mountain Ranch is Not Successor-in-interest to Stanshaw's 1867 Mining Water Right

The Coles' claimed pre-1914 water right is founded on the assumption that they are successors in interest to the water right established by the 1867 "Water Notice" by E. Stanshaw. This claim is debunked by the fact that Stanshaw's water right was used for mining that took place primarily, if not exclusively, on land that I now own. The place of use of Stanshaw's water right can be documented by historic land title searches, evidence of very extensive hydraulic mining on my property, and water diversion pipes and ditches that lead to my property and are located on U.S. Forest Service land.

This fact is also substantiated by the Cascade Stream Solutions' (CSS) Water Use Technical Memorandum ("Technical Memo") which reads: "[T]here are mine tailings at the mouth of Stanshaw Creek, and none on the MMR." (P. 12)

This fact is further substantiated by the fact that the Coles' predecessors (the Youngs) submitted an application for a water right for hydropower production in 1989. Had the Youngs' believed they held a valid pre-1914 water right, they would likely not have applied for a new water right. Until very recently, the Coles continued to seek approval of this water right application.

CSS should further investigate on-the-ground evidence of water use on my land and consult with me personally, just as they have investigated water use on the Coles' land and consulted with Doug Cole personally. Additionally, Lennihan Law and/or CSS should investigate historic land title documents to determine exactly how much of Stanshaw's original land claim is now owned by myself versus the Coles.

Stanshaw's Original Water Right Has Been Forfeited Due to Non-use

Even if Stanshaw's original mining water right had been exercised on land now owned by the Coles, this right would have been forfeited due to non-use with the possible exception of a water right adequate to meet domestic and irrigation needs. The State Water Resources Control Board's (SWRCB) staff arrived at a similar conclusion based on the assumption that Coles are successors in interest to the Stanshaw water right. A September 15, 1998 letter to Doug Cole from Harry M. Schueller, Chief of SWRCB's Division of Water Rights reads: "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 .11 cfs." A May 22, 2002 letter from Michael Contreras of SWRCB's Complaint Unit reads: "A court of competent jurisdiction would 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." Both of these letters are in your files under "unsorted documents."

This period of non-use began when hydraulic mining ended or became illegal and lasted until hydroelectric power generation was initiated. According to the Draft Report, hydraulic mining at the site ended in the 1920s or 1930s. Moreover, hydraulic mining became illegal in 1884 based upon the court's ruling in *Woodruff v. North Bloomfield Gravel Mining*, 18 F. 753 (D. Cal. 1884). Illegal water diversions cannot be used to substantiate a pre-1914 water right. Therefore, for the purposes of establishing a pre-1914 water right, hydraulic mining ended in 1884.

The Draft Water Rights Report cites ample evidence, including documents written by the Coles and a previous owner of MMR, indicating that "hydroelectric generation was initiated in the 1940's or later." (Draft Water Rights Report at p. 14.) The report also asserts that these documents may be considered binding.

Given the ample evidence to the contrary, and limited evidence in the affirmative, the final report should revisit the conclusion that "power generation was initiated before 1914." Nothing in the record demonstrates or establishes that mining or power generation took place during this time period. The Draft Water Rights Report makes the assumption that it did, and then determines the maximum amount of water that could have been diverted during that time period based upon equipment from the 1950s.

The period of time with no evidence of water use for mining or power production is too long to satisfy the burden of proof applied to pre-1914 water right claimants.

Domestic & Irrigation Use of 0.35 CFS Would Be Wasteful & Unreasonable

According to the Technical Memorandum, the SWRCB estimated the Cole's domestic and irrigation use at 0.103 cfs. (Technical Memo at p. C9.) The draft report notes that Cole's predecessors (the Youngs) conceded that their domestic and irrigation water needs were 0.11 cfs. The 2009 Statement of Diversion of Use signed and filed by Doug Cole estimated domestic and irrigation use to be 0.353 cfs. (Technical Memo at p. C9.) The Draft Water Rights Report's conclusion relies upon Dough Cole's higher estimate rather than the more substantiated estimates of SWRCB and the Youngs.

The final report, should determine the actual domestic and irrigation water needs based on: (1) actual irrigated acres; (2) actual numbers of dwellings; and (3) Department of Water Resources' standard water use volumes for domestic and irrigation values.

Conveyance Loss of 0.5 CFS is Wasteful & Unreasonable

The Draft Report assumes conveyance losses are excluded from the aforementioned estimates for domestic and irrigation water use. Regardless of whether this is true, in this instance a conveyance loss of 0.5 CFS would be considered wasteful and unreasonable. Simply piping water from Stanshaw Creek to its place of use would eliminate the vast majority of conveyance loss. The existing unlined conveyance ditch is not only wasteful, but it washes out many winters creating mudslides that cause plumes of muddy water to enter the Klamath River from the mouth of Stanshaw Creek.

MMR's Diversion Violates Laws that Supersede Valid pre-1914 Water Rights

The Draft Report correctly cites several laws that MMR's diversion may violate. These include the Public Trust Doctrine, the Reasonable Use Doctrine, the state and federal Endangered Species Acts, and Fish and Game Code section 1600. MMR's diversion also violates Fish and Game Code section 5937.

California Department of Fish and Wildlife (DFW) and the National Marine Fisheries Service (NMFS) both issued minimum bypass flow recommendations necessary to protect endangered coho salmon. MMR's diversion does not comply with these recommendations.

Diversion Method and Location of Return Flow May be Unlawful

As stated above, MMR's diversion ditch washes out many winters causing mudslides that fill Stanshaw Creek and enter the Klamath River. Moreover, the portion of MMR's diversion that is not consumptively used is returned to Irving Creek, not Stanshaw Creek. I urge you to evaluate the whether the diversion ditch itself and location of return flow comply with existing laws.

Report Should Estimate Minimum & Maximum Volume of Claimed Water Right

As detailed above, the Draft Report makes numerous assumptions to arrive at the maximum possible estimate of MMR's water right. Specifically, the Draft Report concludes that the MMR water right is "up to 0.35 cfs for domestic and irrigation, 0.31 cfs for power generation, plus reasonable losses in the range of 0.5 cfs."

I respectfully request that the final report include minimum (i.e. "as little as") estimates in addition to maximum ("up to") estimates. Doing so would best serve the purpose of the report, which is to bring interested parties to a negotiated, mutually agreeable solution.

Physical Solutions

Fortunately, physical solutions exist that would protect the Coles' business interests, eliminate the threat of regulatory action against the Coles by government agencies, end the take of endangered species, and preserve my ability to exercise my riparian water right for hydropower production in the future. I encourage all interested parties to explore such physical solutions with me as well as MMR.

Until a long-term physical solution can be implemented, the Coles should install a pipe into Stanshaw Creek that is adequate to meet their domestic and irrigation water needs. This interim solution would allow Coles to bypass water that is not needed and/or cannot be legally diverted.

Again, thank you for your thorough research. Please feel free to contact me if you have any questions or need additional information.

Sincerely,



Konrad Fisher