

## Stanshaw Creek Water Conservation Meeting Notes

December 17, 2014, Noon-3 p.m.

Panamnik Building, Orleans, CA

### ATTENDEES:

Will Harling, Mid Klamath Watershed Council; Mark Elfgen, ;Janae Scruggs, California Department of Fish and Wildlife; Bob Pagliuco, National Oceanic and Atmospheric Administration Restoration Center; Joey Howard, Cascade Stream Solutions; Konrad Fisher, property owner and Klamath Riverkeeper; Leaf Hillman, Karuk Tribe; Craig Tucker, Karuk Tribe; Toz Soto, Karuk Tribe; Taro Murano, State Water Resources Control Board Division of Water Rights; Sky Anderson, State Water Resources Control Board; Josh Saxon, Salmon River Restoration Council; Margaret Tauzer, National Oceanic and Atmospheric Administration Fisheries;; Adam Kohl, Marble Mountain Ranch; Doug Kohl, Marble Mountain Ranch; Chelsea Sunitsch, Marble Mountain Ranch; Leroy Cyr, Six Rivers National Forest; Drevet Hunt, Karuk Tribe attorney of Lawyers for Clean Water; Andrew Taurienan, State Water Resources Control Board senior staff Council (phone); Barbara Brenner, Kohl Family Attorney (phone); Ann Butterfield, National Fish and Wildlife Foundation (phone); Donna Cobb, California Department of Fish and Wildlife; Gary Curtis, California Department of Fish and Wildlife; Martha Lennihan, Lennihan Law; Dan Dill, Six Rivers National Forest; George Frey, Six Rivers National Forest.

Will offers context for meeting. Trying to get return flow back in Stanshaw Creek, but CDFW needs a number to legally justify new flow.

Agenda, plus two handouts available.

All available documentation reviewed to produce technical memo and legal report. This meeting is arranged to hear from all the stakeholders about the reports. Not trying to arrive at a conclusion today.

Power Point presentation offering history, analysis, possible physical solutions and next steps by Will Harling.

Kohls bought Marble Mountain Ranch in 1994. 2001 stakeholder meeting didn't produce any definitive action. There were unresolved complaints to hydropower application at that time and we've been in stasis ever since. In 2004 MKWC did a grant to DFG FRGP program to fund piping return flow back to Stanshaw.

2006 flood mobilized a lot of sediment which was transported down Stanshaw Creek. MKWC submitted proposal to remove sediment from pool just above Stanshaw mouth, installed silt-

fence. Current proposal to put in a wood structures and meanders in tailings reach where habitat has been simplified (not yet funded). Hwy 96 culvert (about 300 feet long) is a barrier to fish passage. This is on short list of projects for Cal Trans to address through replacement in next 5 years because bottom of culvert is wearing out.

Right now, creek disconnects from river. MKWC does some manual treatment to keep creek connected to river around June.

MKWC wants to restore connectivity.

Pending NFWF funding support to analyze costs and feasibility of various physical solutions. Joey Howard from Cascade Stream Solutions would be contracted to do that. Should know by March whether that's funded.

1.16 cfs as a possible consumptive/non-consumptive (hydropower) use water right?

What do people think of the reports and how should we move forward?

Josh: Is CDFW willing to accept stakeholder solution or is quantifiable water right still needed?

Gary Curtis: There needs to be resolution of quantifiable water right issue with water board, we need them to codify right. The holdup is not knowing the right or how to size the infrastructure.

Konrad: If stakeholders can agree, can you fund that, or you need the water board to approve...?

Gary: Need to know that water board probably will approve...

Craig Tucker: Karuk can't support solution that doesn't quantify water right because we don't want to get down the road and encounter problems with that.

Will: Does water board have an opinion?

Taro Murano: More info is available now, staff reviewed file and report, we want to hear from agencies about report contents, how much is water right?, will new quantity still be protective of coho?

Joey Howard: We pulled together readily available info based on requests to stakeholders, site visit. We tried to reconstruct a history with very little documentation on certain points. There's a large gap between Taft water right documentation and contemporary, anecdotal info, contradictory info. Reconstruction based on usage and application rates.

Craig: Discrepancy between previous 1993 water board (.11 use) and current report (.35) is troubling.

Joey: Based on descriptions and land use rates we came up with current report number.

Will: 1993 number may have come from arbitrary estimate from Bob Young. Current report is based on Doug Kohl's estimate. There were mobile homes before, not now. There was no livestock then, and there is now.

Craig: If landowner increased their domestic use since 1993, I'm not sure if a competent court would find that a justification of a quantifiable water right.

Joey: My report doesn't address what the right quantity of water. These tables (such as Table 6 and 7) represent the information at different points in time. Martha's report delves into that.

Doug Kohl: A point of reference ten or twenty years ago compared to now is problematic because the use of the property has evolved over time quite a bit. Also, there's no way to verify if Bob Young's numbers and it's a frivolous argument anyway.

Konrad: We've been at this for decades (more than a century) and I think a solution that meets everyone's needs is possible. Let's focus on physical solutions, not who has the legal upper hand.

Martha: There's a conflict as you note about the volume of domestic use.

Craig Tucker: .11 number came from memo from Water Rights division in 1993.

Martha: We don't know if that's actually what their use was. Their application may not have covered all use. I don't think that's likely but it's one possibility. Typically courts are not so hard on pre-1914 water rights holders. We tried to defer that. In my judgement, I don't think the lowest number in history will be the one that determines the right. This is a middle of the road approach. The current number reflects hydropower use through gravity fed system (much larger demand on creek).

Konrad: I think courts do tend to rule in favor of pre-1914 water rights holders, but not to the extent suggested in this report. Earlier number may be at least as good. Also, it's not hard to figure out the current needs. Another giant leap in report on page 16 beyond what the owners of the land are even saying. Seems like this report deferred to largest possible water right, more so than the water board's analysis and numbers from the last century.

Doug: We've got many sources of anecdotal data such as from Lou Hayes, Bob Young and me, and they will all vary. Lou Hayes stated that there was a power plant in existence when they bought ranch and that it was expanded.

Josh: How much power was it producing in Hayes era.

Doug: One anecdote suggests 6 inch line, another says there was a dc power plant which would suggest 2 inch line. Penstock remnants suggest a 14 inch line. All I know is there is a long history of hydropower on this ranch.

Josh: Where is evidence that this use predates 1914?

Martha: Page 15, but multiple sources of documentation conflict on this.

Craig: The debate is over whether the right was contiguous.

Martha: We don't have any evidence that the power generation was abandoned. We have evidence that it was increased. One gentleman didn't list hydropower amongst uses. Does that mean it wasn't a use? We'd have to cross-examine him to know.

Doug: Right now, our diversion carries 2.5-3 cfs. We assert that our quantifiable right is the capacity of the ditch, regardless of loss. I think we can meet all needs. My interest is in putting this thing to bed.

Craig: We want it fixed too. We think we've invested a lot in habitat improvements. We want it fixed so we can be done with it. I don't think your number is consistent with state and federal laws that protect coho.

Doug: There are things we could do better in terms of efficiency. Those things are all on the table. Ditch was built and mining happened without regard for Stanshaw Creek. We can't change how that happened. But let's move forward.

Craig to SWRCB: If we worked with Mr. Kohl and came up with a magic number that worked for everyone, how would the magic number become the quantifiable water right.

Taro M: If we agreed upon a number, Mr. Kohl wouldn't be able to divert beyond that regardless of ditch loss. The 1998 report was based on limited information, without enough info to make a good decision. I believe this report is much more comprehensive. We don't have permitting authority on pre-1914 water rights. The only action we'll take is if the user is over-diverting. But water board does have authority to quantify a right.

Donna and Gary: Quantity needed to know infrastructure sizing and permitting specifications. The 1600 permit will get hung up without a quantifiable water right.

Gary: We're waiting on water board.

Doug: Adjudication would be long and drawn out. We'd like to avoid that.

Martha: There is not a way to go to the water board and ask for agreement with the report without initiating some kind of procedure. They could do an enforcement proceeding or wait to see if a physical solution will work, according to their own discretion. If a physical solution reduces water demand, no problem. If the water demand is more, the water rights division needs to bless.

Josh: What's the water right?

Martha: What's in the memo.

Craig: That's not the water right. That's what you think it would be if you think if it was adjudicated.

Martha: Pre-1914 rights were grandfathered in. Typically, there's little or no accurate documentation of these rights. Often documentation by miners very squishy on numbers. There is inherent uncertainty with these rights. That's why standard of review mentioned in report was made. It's a big question whether the Youngs' applications to appropriate quantified pre-1914 rights.

Martha: Water board open to physical solution proposal. Water board won't come out and say number is pre-1914 right without a full proceeding.

Taro: We can render an opinion/staff finding in the matter. That's what we intend to do.

SWRC: There is a pending complaint currently. A likely next step would be an investigation report, as there was in 1998 and 2002. I would expect to be able to make findings on whether there would be an enforcement action. This would determine the level of pre-1914 right. Get concerns about Martha's report to SWRCB now. We'll probably make a report in the next few months.

Barbara: Did the water board not yet have the opportunity to comment on the report?

Taro: This is the first time we've had a chance to look at the report.

Barbara: We're still of the opinion this is a 3 cfs water right. The question is, can we agree to some kind of physical solution.

Taro: I don't think we can get to the final stage without us giving an opinion.

Konrad: What do NFWF and NOAA need to fund a solution?

Bob: We need a number to move forward with a solution. We don't want to revisit in 10 or 15 years. We have money set aside. We need a number that's going to make everyone feel comfortable.

Doug: What's wrong with the number in the report?

Craig: We remain unconvinced that number in report is best number. Half a cfs in conveyance loss is not reasonable to us. That half cfs should be in creek. That amount of conveyance loss is unacceptable.

Donna: 3.5 in use, .5 in ditch loss. If we can agree to that, can my conservation agency counterparts agree that conservation measures will be implemented?

Craig: Water right needs to be less. Capacity of diversion and water board ruling need to reflect lower numbers.

Donna: Can we codify savings via 1707 application?

Martha: You can request an agreement binding property owners and assigns. There are more tools in the toolbox. I'm pretty confident that conveyance loss would be found valid because of standards applied to conveyance loss.

Barbara: I hear arguments the water rights should be less. We think water right should be more, based on Martha's report.

Adam: Mr Tucker, could you clarify your issues with consumption rate?

Craig: An adjudicatory proceeding would lead us to argument about conflicting evidence. We will not continue to tolerate dewatering of delta of that creek.

Adam: I agree, but it wasn't a ranch before 1914. It's confusing to try to compare.

Margaret: NOAA fisheries is looking for bypass flow requirements. That's our main issue and it should be a component of the water right. We wrote 1.5 cfs bypass plus return flow from hydro plant in 2002 report.

Craig: The ESA is going to trump your water right.

Bob and Margaret: There are opportunities for storage. If we focus on bypass flow and try to come up with way to get ranch the water it needs, that would be the best way.

Craig: There are different ways to memorialize solution.

Chelsea: Winter and summer demands of business vary. We need minimal amounts of water for beautification and 30 guests to run our business and keep our family afloat.

Donna: We can allow people to divert water when instream needs aren't so great and store it and forebear right when instream needs are great. Is there a possibility of doing a 1707 permit?

Taro: I didn't even really consider that.

Donna: I think we can probably work through this without having to go through courts.

Konrad: Water board denies lots of 1707 permits for lots of wacky reasons, like if a water right is in dispute. Let's talk about higher point of diversion.

Skylar: Is there flow data for Stanshaw? Let's get it and look at it.

Toz: About 100 data points over last 15 years. Big drop July-August. In late September, flows usually bump back up in late Sept. Flows typically measured right at Hwy 96 below diversion and in Irving Creek diversion outflow. Roughly 80 percent goes down ditch.

Skylar: There will be times when domestic needs can't be met based on ESA requirements.

Doug: By June, we had to shut down our hydropower plant. We had to burn a lot of diesel (\$4,00) to get by using our generator. If we've got a sufficiently solvent business, we can afford that.

Taro: It seems with the hydrograph, we may not be able to meet all needs.

Doug: We can't meet our need every year with what nature gives us. I accept that.

Josh: How many cfs does it take to run state of the art hydro system?

Doug: We run between 35 and 40 kw from hydro system. We could move point of diversion higher or install piped conveyance system and increase ranch efficiency and improved infrastructure transmission capability. There are ways to do that.

Joey: Currently Doug can only run on one source of power. System could be redesigned to combine sources. Solar and other solutions could also be looked at. Somebody needs to quantify how much water needs to be at delta and where should return point be. Then we'll have some baseline numbers to work with. We should identify some action items.

2:10 TEN MINUTE BREAK

2:30 RECONVENE

Will: We need a number because NOAA has been holding this money for a physical solution for a while. What are the needs of the fish? If those needs are met, can we move forward? There could be a smaller meeting with Karuk and Kohls.

Craig: Number and how it's memorialized matter.

Taro: We can do an investigative report that would detail what the pre-1914 right is with all the info in hand. We still have a major concern about the data and whether any diversion preserves instream flows and habitat for fish. At this point, if the agencies or anyone else (ie: Karuk) have comments on the numbers in the report, submit them.

Donna and Gary: That investigative report would give us what we need to issue a 1600 permit for a physical solution. FRGP or other source of funding would require slightly different process, with CEQA costs. You may also need to get a permit depending on our outcome of Farm Bureau 1602 lawsuit.

Doug: I would also like to see our solution memorialized.

NOAA and CDFW will revisit and try to agree upon needed bypass flows. Karuk will try to come up with analysis shortly after Christmas.

CDFW: ITP, consistency determinations with NOAA Biological Opinion for compliance with CESA. Feds and state try to sync up.

USFS: Nolan wanted to be here but couldn't. We want to step in and help out how we can.

Craig: A legal question: if we reconfigure point of diversion, does Marble Mountain need a special use permit?

USFS: Yes. Depending on what the proposed changes are, it may need a NEPA analysis. No matter what it will be an action taken on federal lands.

Craig: Karuk may be able to help secure public funding. Karuk and Marble Mountain should have a meeting and jointly present what we arrive at back to agencies. Agencies could then tell us what requirements would be.

Donna: FRGP would make it easier on everyone, and CDFW can codify diversion operations, probably under categorical exclusions.

Mark: There has to be a water dedication back to creek for piping solution.

Bob: If this is funded through PacifiCorp, there's a piping standard.

FS would have about 80-90 percent of what we need once FRGP or NOAA processes are completed for legal compliance. This would rise to top of priorities if it's a collaborative solution.

Craig: We want to solve this before it's July and we're stressing about water in the creek again.

Leroy: We've collected a lot of data in the last 15-20 years and we'd be happy to share that.

Will: Also, this NFWF funding source will sunset in a few years.

Agencies still waiting on water board report before approving funding for more work by Joey to analyze scenarios.

Doug: There's a chicken-egg problem. How do we start discussions with Karuk without understanding of capacity in different scenarios are?

**ACTION ITEMS:** Follow up meeting with Karuk and Marble Mountain Ranch and presentation back to group, All comments on data or evidence will be submitted to State Water Resources Control Board by end of January, State Water Resources Control Board will come up with report by February or March, Bob and Gary will go back to NFWF about chicken egg problem.