

**WATER AND POWER
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To: Andrew Tauriainen
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State Water Resources Control Board

From: Paul Stanton Kibel
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On behalf of Old Man River Trust

Re: **Supplemental Information and Unresolved Issues Regarding Pre-1914
Appropriative Right Claims of Coles-Marble Mountain Ranch to Water from
Stanshaw Creek**

We submit this memo on behalf of the Old Man River Trust (OMRT) in connection with the State Water Resource Control Board's (SWRCB) review of the pre-1914 appropriative rights claim of the Coles to divert and use water from Stanshaw Creek, a tributary to the Klamath River, for use on Marble Mountain Ranch (MMR).

OMRT is the owner of real property located along Stanshaw Creek that is immediately adjacent to the MMR property owned by the Coles. Konrad Fisher lives on the property owned by OMRT and is a beneficiary of the OMRT.

The information presented in this memo is submitted by OMRT to assist the SWRCB staff in their review of the pre-1914 appropriative water right in question, and with the objective of contributing to an outcome that is workable for all of the parties and agencies affected by the use of this right.

I. The Pre-1914 Appropriative Right in Question Is Held Jointly by the Coles and OMRT.

In September 2014, Lennihan Law (a private law firm based in Sacramento) submitted a document to the SWRCB titled "Marble Mountain Ranch Stanshaw Creek Water Rights Report" (Lennihan Report). This report was commissioned for the Mid Klamath Watershed Council and was prepared in collaboration with the environmental consultant Cascade Stream Solutions. The central question addressed in the Lennihan Report was the extent to which the Coles may lawfully rely on an 1867 Water Notice filed by E. Stanshaw (1867 Water Notice) to justify current their diversions and use of water from Stanshaw Creek.

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OMRT agrees with many of the findings and conclusions in the Lennihan Report. In particular, OMRT concurs with the conclusion that most of the original 15 cfs (cubic feet per second) diversion right in the 1867 Water Notice has been forfeited/abandoned through historical reduced use, and that the current 3 cfs rate of diversion by the Coles significantly exceeds the small portion of the remaining diversion right that has not already been lost (abandoned) by the Coles and their predecessors through historical reduced use.

Although OMRT concurs with part of the Lennihan Report, we address certain factual and legal issues that were overlooked. Perhaps the most significant issue is “who” is the holder, or more to the point “who” are the holders, of the pre-1914 appropriative right established pursuant to the 1867 Water Notice.

The Lennihan Report assumes throughout that the Coles are the sole successors-in-interest to the pre-1914 appropriative right. This assumption, however, is incorrect. OMRT is also a successor to this right. As acknowledged in the Lennihan Report (p. 13), “Marble Mountain Ranch was originally a portion of a larger property patented to Stanshaw.” Of the lands presently owned by the Coles (as MMR), only a small portion consists of lands covered by the 1867 Water Notice. Additionally, most of the lands previously owned by E. Stanshaw and covered by that notice (as place of use) are now owned by OMRT.

OMRT is not a third party complaining about the Coles’ exercise of the pre-1914 right. Rather, along with the Coles, OMRT is the joint holder and joint successor to this right. Moreover, given that OMRT owns more than 50% of the acreage designated as the place of use in the 1867 Water Notice, it is OMRT, rather than the Coles, that appears to have the more dominant claim to such rights.

In light of OMRT’s status as a joint holder of the pre-1914 right, there are several potential remedies available to OMRT to obtain clarification of its appropriative rights vis-à-vis the Coles. For instance, OMRT could file an administrative petition to modify this right with the SWRCB in which it could ask for apportionment between the Coles and OMRT. As another example, OMRT could also file a quiet title action in California Superior Court to apportion the right. See *Nicoll v. Rudnick*, 160 Cal. App.4th 550 (2008). In *Nicoll*, the California Court of Appeal upheld the use of a quiet title action to apportion a pre-1914 right between joint successors in interest, and further affirmed the Superior Court’s reliance on respective acreage as a proper basis for such apportionment. The Court determined that the upslope owner held title to 52% of the original ranch designated as the place of use under the pre-1914 right, while the downslope owner held title to 48% of the original ranch; and it apportioned the right based on these same percentages.

Under the method employed by the California Court of Appeal in *Nicoll*, OMRT (as owner of the majority of the lands covered by the 1867 Water Notice) would be apportioned the majority of the right traceable to the 1867 Water Notice, and the Coles would be apportioned a lesser amount of that right.

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In the event that OMRT were to file a petition with the SWRCB, or quiet title action with Siskiyou County Superior Court, to apportion the pre-1914 right, OMRT would also highlight evidence showing that most if not all of the pre-1914 mining-related use occurred on the lands now owned by OMRT. This evidence could provide additional support for apportioning most of the right to OMRT.

II. The Coles' Use of Stanshaw Creek Water for Hydropower Generation Does Not Appear to Be Covered by the Pre-1914 Appropriative Right Because Such Use Decreased Return Flow, Thereby Injuring Downstream Water Users and Fisheries.

The 1867 Water Notice indicated that the water diverted would be used for irrigation and hydraulic mining. There was no mention of hydropower generation. According to the Lennihan Report, there is scant if any evidence to suggest that water was used for hydropower generation on the former Stanshaw lands prior to 1914, and the best evidence suggests that such generation began sometime in the 1940s or 1950s. As explained below, however, the fact that hydropower use was not listed in the 1867 Water Notice, and the fact that it appears that such hydropower use did not begin on the former Stanshaw lands until the 1940s or 1950s, does not answer the broader question whether the Coles may lawfully use this right for this purpose.

The Lennihan Report (p. 11) discusses Section 1706 of the California Water Code, which provides: “The persons entitled to the use of water by virtue of an appropriation other than under the Water Commission Act [a pre-1914 appropriation] . . . may change the point of diversion, place of use, or purpose of use **if others are not injured by such change . . .**” (emphasis added). The report suggests that, pursuant to Section 1706, it may have been lawful to change the purpose of use under the pre-1914 right so long as this change in use did not injure others. When framed within the context of Section 1706, the critical question that emerges is therefore whether the change to hydropower use that began in the 1940s injured others.

Prior to the hydropower use that likely began in the 1940s or 1950s, there was a narrow shallow earthen ditch that conveyed water for domestic use from Stanshaw Creek to the dwellings on the land now owned by the Coles. Prior to the 1940s or 1950s, the amount of water that was diverted into and conveyed through this ditch was minimal. With the change to hydropower use in the 1940s or 1950s, however, the amount of water diverted into and carried in this earthen canal increased dramatically.

With the hydraulic mining and irrigation uses that occurred on the Stanshaw lands prior to 1914 (and prior to the 1940s), most of the water eventually returned to the Klamath River close the where Stanshaw Creek empties into the Klamath River. This is because the water used for mining in the pre-1940s period was not conveyed in the earthen canal, which during that period was only used for domestic and possibly irrigation supply. The water applied to the mining areas made its way back to the Klamath River adjacent to the mouth of Stanshaw Creek as return flow. This meant that most of the water diverted for mining and irrigation uses prior to the 1940s was returned for the benefit of other water users and fisheries (such as coho salmon) at or near the confluence of Stanshaw Creek and the Klamath River.

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According to the Lennihan Report, however, the change to hydropower use meant that the diverted water no longer made its way back to the Klamath River near the confluence with Stanshaw Creek. The Lennihan Report (p. 19) acknowledges that “the return flow [associated with the Coles’ hydropower water usage] are not tributary to Stanshaw Creek but to Irving Creek.” This change occurred because all of the water diverted for hydropower use was conveyed in the above-noted earthen canal, which was extended to reach Irving Creek. That creek empties into the Klamath River approximately one mile downstream from the confluence of Stanshaw Creek and the Klamath River. Therefore, while a change to hydropower use in the 1940s or 1950s may not have been *per se* unlawful, this change injured other legal users, as well as coho salmon, in Stanshaw Creek, contrary to Section 1706.

Additionally, the use of the earthen canal to transport increased flow for hydropower use has had other adverse upstream impacts. Due to the limited capacity of this shallow and narrow canal (which was previously designed to handle minimal flows for domestic and irrigation uses), routine spills occur onto the adjacent lands, particularly those lands near the point of diversion. The result of these spills is that large volumes of sediments are washed into Stanshaw Creek. As noted in the Lennihan Report, Stanshaw Creek is prime spawning habitat for coho salmon and such spawning requires clear water. Sediment discharge caused by spills associated with the hydropower use is degrading this fisheries habitat and water quality. These adverse impacts would be avoided if the Coles were to select an alternative point of diversion on Stanshaw Creek that took better advantage of gravity to create the head and force for their hydropower generation, thereby reducing the large amounts of water currently diverted into the canal and the resulting spills.

These impacts on downstream coho salmon, if avoidable by change in point of diversion, are contrary to the requirements of the public trust doctrine. As established in the California Supreme Court’s decision in the Mono Lake Cases, the public trust provides the SWRCB with independent authority and a continuing duty to ensure that public trust resources (like fisheries) are protected whenever feasible. *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419 (1983). The public trust applies to fisheries in non-navigable tributaries to navigable waters. *California Trout, Inc. v. State Water Resources Control Board*, 207 Cal.App.3d 585, 630 (1989). The Mono Lake Cases have been relied upon repeatedly by the SWRCB and the California courts to ensure that diversions do not cause unnecessary harm to salmon. For example, in *Consolidated California Water Resources Control Board*, the California Court of Appeal affirmed that the public trust provides the SWRCB with broad discretion to regulate water rights to fulfill the salmon-related water quality objectives in the Delta Water Quality Plan. 182 Cal.App.3d 82 (1986). Similarly, in its 1990 decision in *Environmental Defense Fund v. East Bay Municipal Utility District*, the Alameda County Superior Court confirmed that, if a current point of diversion on the American River were shown to significantly harm downstream salmon, an alternative point of diversion would need to be evaluated. Case No. 425955, Superior Court of Alameda County (January 2, 1990). This holding seems particularly relevant here, since the location of the point of diversion for the Coles’ hydropower use accounts for much of the adverse impacts on water quality and coho habitat. As one last example, Revised Water Rights Decision 1644 (2003) imposed instream flow requirements (and restrictions on diversions) to restore salmon fisheries on the Lower Yuba

River. These decisions show the independent authority of the SWRCB under California public trust law to impose appropriate restrictions on diversions to ensure adequate instream flows for salmon.

III. The High Rates of Water Loss Associated with the Coles' Conveyance of Water for Hydropower Generation and the Coles' Continued Diversion of Water When the Hydropower Facilities Are Offline Constitute Waste and Unreasonable Use Under the California Constitution and the California Water Code.

Article X of the California Constitution and Section 100 of the California Water Code both provide that all uses of water and all methods of diversion or use of water in California must be reasonable and cannot be wasteful.

A. Water Loss Associated with Earthen Canal Conveyance

The Lennihan Report (p. 24) concluded that, of the original 15 cfs pre-1914 right traceable back to the 1867 Water Notice, only a small amount remains potentially valid for the Coles. As the Lennihan Report explained (pp. 23-24): “The pre-1914 appropriative water right supports diversion and use of up to 0.35 cfs for domestic and irrigation, 0.31 for power generation plus reasonable losses in the range of 0.5cfs, for a total water right of 1.16 cfs.” These losses relate to water diverted from Stanshaw Creek that seeps into the ground as it travels through the long earthen ditch on its way to the Coles' hydropower facilities. Thus, of the total 1.16 cfs right of diversion potentially held by the Coles, 43% is lost in transmission before it even reaches the Coles' hydropower facilities.

The Lennihan Report suggests that such high transmission loss rates should be considered reasonable in the context of the reasonable use and waste provisions of the California Constitution and the California Water Code. OMRT disagrees and believes that such high transmission losses constitute a wasteful method of diversion and conveyance under California reasonable use law.

In *Erickson v. Queen Valley Ranch Company*, 22 Cal.App.3d 578 (1971), the California Court of Appeal reviewed a trial court decision in which it had been determined the a significant portion of the water diverted into an earthen canal was lost en route to the point of use for agricultural irrigation due to seepage into the ground. While the trial court had found these transmission losses to be reasonable, the California Court of Appeal reversed. “By holding that transmission losses amounting to five-sixth's of the flow are reasonable and consistent with local custom, the court effectually placed the judicial seal of approval on what appears to be an inefficient and wasteful means of transmission A finding of reasonableness which cloaks [such] a transmission loss . . . of the diverted flow fails to respond to the demands of constitutional policy.” *Id.* at 585. As was the case in *Erickson*, the high losses associated with the Coles' diversion through their earthen ditch are an unreasonable and wasteful method of diversion and conveyance.

B. Continued Diversions when Hydropower Facilities Are Offline

According to Konrad Fisher, who currently resides on the OMRT property, during much of the summer insufficient water is available to the Coles to operate their hydropower facilities. When this happens, the Coles take these facilities offline. However, when the facilities are offline, the Coles nonetheless continue to divert large quantities of water from Stanshaw into the earthen canal, and this water is then simply dumped into Irving Creek without having been used for any purpose. As documented in previous investigations by the California Department of Fish and Game (CDFG), these diversions deprive coho salmon on Stanshaw Creek of the fresh water flow needed to maintain their habitat. These diversions also reduce the water available in Stanshaw Creek for other water users (such as OMRT) whose points of diversion are located downstream on Stanshaw Creek.

Since the reduction in summer flows in Stanshaw Creek harms fisheries and other downstream users, OMRT maintains that the Coles' diversion into the earthen canal when their hydropower facilities are offline constitutes an unreasonable and wasteful use and diversion of water under the California Constitution and the California Water Code.

IV. In Evaluating the Validity and Extent of the Pre-1914 Appropriative Right Claims to Stanshaw Creek Water Made by the Coles, the SWRCB Is Not Required to Evaluate Evidence in the Light Most Favorable to the Coles.

The Lennihan Report (p. 8) discusses SWRCB Order WR 95-10. According to the report, the SWRCB held that, when evaluating evidence regarding the extent of a claimed pre-1914 appropriative water right, it must evaluate the record in the light most favorable to the party claiming the pre-1914 water right. OMRT disagrees with this interpretation of SWRCB Order WR 95-10, and furthermore believes that the interpretation (even if accepted) offers no guidance in the current situation where there are joint holders (OMRT and the Coles) of the pre-1914 right who disagree over the apportionment and scope of entitlement under such right.

First, Order WR 95-10 does not adopt a standard of review requiring consideration of the evidence in the light most favorable to a party claiming a pre-1914 right. Rather, the SWRCB merely commented that, even if it were to consider the evidence in the light most favorable to the party claiming the pre-1914 right, this evidence was still insufficient to support the claim. When read in context, the "light most favorable" language was employed to highlight how weak the alleged pre-1914 claim was from an evidentiary standpoint, not to establish a standard of review. Indeed, the concept of viewing evidence in the light most favorable to a particular party comes from summary judgment procedure in courts. That is, when ruling on a summary judgment motion, a court will construe the evidence in the light most favorable to the non-moving party. The importation of this peculiar judicial standard into routine administration of water rights makes no sense.

Second, even if it is assumed that the SWRCB did adopt the "light most favorable" standard of review suggested in the Lennihan Report, this holding is not relevant to this investigation. OMRT and the Coles are joint holders of the pre-1914 right in question. Given

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that OMRT and the Coles have offered conflicting interpretations and evidence in regard to the scope and apportionment of this right, it would be nonsensical (and perhaps impossible) for the SWRCB to view the conflicting claims of OMRT and the Coles both in the “light most favorable.”

V. The Court of Appeal’s Millview Decision Does Not Control this Investigation.

In September 2014, the First District Court of Appeal issued an opinion in *Millview County Water District v. State Water Resources Control Board*. The SWRCB has appealed this decision to the California Supreme Court, so the ultimate resolution of this litigation remains to be determined. Given that the *Millview* litigation also involved the question of pre-1914 appropriative rights and the extent to which such rights may be lost or reduced due to reduced usage, it is foreseeable that there may be some consideration to how the California Court of Appeal’s 2014 holding may affect the water rights analysis in the present situation. The Lennihan Report (p. 9) addressed this decision.

In *Millview*, the SWRCB had determined that much of an irrigation district’s claimed pre-1914 right had been lost as the result of a protracted multi-decade period of reduced use. We note that, in that case, the current use continued the pre-1914 use (irrigation). In its decision, the California Court of Appeal held that the SWRCB could not maintain that the amount of the pre-1914 right should be reduced unless the SWRCB could establish that a “complaint” had been filed during the period in which it was alleged that the reduced usage occurred. The Court clarified that this did not require the filing of a lawsuit during the relevant period of reduced usage, rather that a party who believed its interest was being impacted by the pre-1914 right have raised this issue with the SWRCB or other appropriate agencies during the relevant period of reduced usage.

The *Millview* decision, even if affirmed on appeal, should not affect the evaluation of the extent of the Coles’ usage of the pre-1914 right in Stanshaw Creek. First, beginning in 1995, the resident on the OMRT property (Konrad Fisher) began filing written complaints with the Coles, SWRCB, and CDFG alleging how OMRT’s interests were being adversely impacted by the Coles’ diversions of Stanshaw Creek water for hydropower use. More specifically, the complaints alleged that: (1) the volume of water for this new use was a reduced portion of the original pre-1914 right, and that therefore much of the original pre-1914 right had been lost through reduced usage, and (2) that the change from mining use to hydropower use had reduced return flow in Stanshaw Creek. Fisher’s prior filing of these complaints satisfies *Millview*’s requirement that a complaint was filed by an adversely impacted party during the alleged period of reduced usage.

Second, the *Millview* case did not involve a change in the purpose of use. As a result, the question of whether a change caused injury to other legal users or fisheries pursuant to Section 1706 did not arise. In this case, there is ample evidence that the change from mining to hydropower use injured and continues to injure other legal users and fisheries, and that therefore the current hydropower use is not within the scope of the Coles’ pre-1914 right. *Millview* does

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not limit the application of Section 1706's injury prohibition when a party proposes a change in use to the original uses. *Millview* therefore does not excuse the Coles' violation of Section 1706.

We note that the *Millview* decision has been the subject of widespread criticism, and may be vulnerable to reversal if the California Supreme Court takes up the SWRCB's appeal. More specifically, the pertinent provisions of the Water Code that address forfeiture do not mention any requirement for the filing of an adverse claim during the alleged period of reduced usage. The inference of such a requirement essentially would make forfeiture akin to a prescriptive right, by insisting that a "hostile/adverse" claim is asserted for forfeiture to be proper. The plain meaning of the Water Code, as well as legislative history, show that forfeiture may occur even if an adverse claim was not filed during the period of reduced usage.

Another reason why *Millview* may be vulnerable on appeal is that it does not recognize that the forfeiture provisions of the Water Code provide protection not only for other legal users but also for public trust uses. More specifically, the public trust doctrine requires that water rights be used to result in adequate instream flows in Stanshaw Creek and the Klamath River to support native fisheries like coho salmon. This instream consideration related to the Water Code's forfeiture provisions appear to have been overlooked completely by the California Court of Appeal in *Millview*.

Conclusion

Thank you for considering these comments. Please contact Paul Kibel at (510) 499-1649 or pskibel@waterpowerlaw.com, or Richard Roos-Collins at (510) 296-5589 or rcollins@waterpowerlaw.com, with any questions.