
State Water Resources Control Board

TO: Eileen Sobeck
Executive Director
State Water Resources Control Board

FROM: Erik Ekdahl 
Deputy Director
Division of Water Rights

DATE: December 9, 2021

SUBJECT: ASSIGNMENT OF MATTER OF ALLEGED WASTE, UNREASONABLE USE, UNREASONABLE METHOD OF USE, AND UNREASONABLE METHOD OF DIVERSION OF WATER BY DOUGLAS AND HEIDI COLE AND MARBLE MOUNTAIN RANCH TO THE ADMINISTRATIVE HEARINGS OFFICE

The State Water Resources Control Board (State Water Board or Board) Division of Water Rights (Division) recommends assignment of the matter of alleged waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water by Douglas and Heidi Cole and Marble Mountain Ranch (MMR) to the Administrative Hearings Office (AHO) for additional work, pursuant to Water Code section 1112, subdivisions (c) (2) and (3). Additional AHO work may include preparation of a proposed order, solicitation and consideration of any public comments, and facilitation of the Board's consideration of the proposed order. Considering the significant increase in workload for the Division because of drought conditions statewide, the Board's action on this application would be aided by an assignment of this matter to the AHO.

Given that the original hearing officer in this matter, former Board Vice Chair Steven Moore, is no longer a member of the Board, this application would be aided by the AHO's role in ensuring water rights matters are resolved in a timely manner. Mara Irby, environmental scientist for the Division, is a subject matter expert on this case. She has worked on the matter since it was brought to the Division for the 2017 hearing. She was not involved in the enforcement or prosecution of this matter. Given her familiarity with the details of the matter and the proceeding and the absence of any conflict of interest, the Division recommends she work closely with the AHO to bring this matter to conclusion.

Background

The Coles own and operate MMR, a commercial guest ranch located at 92520

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Highway 96 in Somes Bar, Siskiyou County. Surface water to serve MMR is diverted from a single point of diversion on Stanshaw Creek, a tributary to the Klamath River, under a pre-1914 claim of right to 3 cubic feet per second (cfs) and a Small Domestic Use Registration. The claimed beneficial uses are: domestic, irrigation, power, fish and wildlife preservation and enhancement, stockwatering, and fire protection.

On July 17, 2013, the Division received a complaint alleging that the Coles were diverting water in excess of their pre-1914 claim of right. The complaint also alleged that Stanshaw Creek was being dewatered in most summers, causing impacts to public trust resources. The creek feeds a large pool within the Klamath River floodplain, which is critical rearing habitat for threatened Southern Oregon/Northern California Coast (SONCC) coho salmon. The salmon use this pool for thermal refuge in the summer and for velocity refuge in the winter. On January 29, 2014, the Division received a video dated January 2014 from Konrad Fisher, the sole downstream landowner, which appeared to Division staff to show the MMR diversion diverting nearly the entire flow of Stanshaw Creek. This video also appeared to show a lack of connectivity between the Stanshaw Creek refugial pool and the Klamath River.

On August 30, 2016, the Division's Enforcement Branch (Enforcement) issued a draft order to the Coles containing findings of: 1) waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water, 2) unreasonable harm to public trust resources, and 3) corrective actions with interim and final implementation deadlines. Enforcement informed the Coles that Enforcement had requested a hearing be scheduled on the matter, for which Enforcement would request postponement if the Coles complied with the corrective actions required by the draft order's first interim deadline, October 15, 2016. By June 9, 2017, no request for postponement of the hearing had been received; therefore, the matter was noticed for public hearing.

Hearing and Evidentiary Record

The Board held the public hearing concerning this matter November 13–16, 2017. During the hearing, the Board hearing officer and Board staff heard testimony and received evidence. Eight parties participated in the hearing and submitted closing briefs: the Board's Prosecution Team, the Coles, the Karuk Tribe, the National Marine Fisheries Service, the California Department of Fish and Wildlife, the Old Man River Trust, the California Sportfishing Protection Alliance, and the Klamath Riverkeeper.

At the direction of the Board Hearing Officer, Board Vice Chair Steven Moore, the hearings team prepared a preliminary proposed order based on the evidentiary record developed through the hearing on this matter. The evidentiary record and hearing documents for this matter are available on the Water Board's website at https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marble_mountain/.

Recommendation

Because of the Division's current workload, the Division recommends assigning this matter to the AHO to assist the Board to efficiently resolve this matter.

If you have any questions regarding this memo, please contact Conny Mitterhofer,

Chief of the Hearings and Special Projects Section, at 916-341-5720 or by email at conny.mitterhofer@waterboards.ca.gov.

cc: Michael Lauffer, Chief Counsel, Office of Chief Counsel
Diane Riddle, Assistant Deputy Director, Bay-Delta and Hearings Branch
Conny Mitterhofer, Hearings and Special Projects Section Chief