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10 DOUGLAS COLE, HEIDI COLE, AND
11 MARBLE MOUNTAIN RANCH

12 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

13 In the Matter of Douglas Cole and Heidi Cole
14 and Marble Mountain Ranch, Draft Order No.
15 2017-00XX-DWR

**RESPONDENTS' OBJECTIONS TO
TESTIMONY SUBMITTED BY THE
CALIFORNIA DEPARTMENT OF FISH
AND WILDLIFE, THE KARUK TRIBE,
THE NATIONAL MARINE FISHERIES
SERVICE, OLD MAN RIVER TRUST, AND
KLAMATH RIVERKEEPERS**

16 **I. Introduction**

17 Douglas and Heidi Cole (the "Coles") and Marble Mountain Ranch (the "Ranch") object
18 to several items of the testimony and exhibits submitted by the California Department of Fish and
19 Wildlife ("DFW"), the Karuk Tribe, the National Marine Fisheries Service ("NMFS"), Old Man
20 River Trust, Klamath Riverkeepers, and the State Water Resource Control Board, Office of
21 Enforcement, Prosecution Team ("Prosecution Team") in relation to the November 13, 2017,
22 public hearing regarding the Coles diversion and use of water. The Coles objections to the
23 Prosecution Team's Exhibits and testimony are extensive and will follow in a separate statement.

24 The Coles objections to the remaining parties' Exhibits and testimony fall into one of four
25 categories: (1) testimony beyond the scope of the public hearing's key issues should be stricken,
26 (2) exhibits that are hearsay should be stricken, (3) testimony related to a NMFS exhibit that was
27 not included in the exhibits served on all parties should be excluded, (4) NMFS and the Karuk
28 Tribe have failed to show good cause to allow additional time for their witnesses to testify in

1 excess of the limits established in the Notice of Hearing and should not be allowed to testify for
2 the additional time identified in their Notices of Intent to Appear (“NOI”).

3
4 **II. Testimony and Evidence that is not Relevant to the Proceedings Should be Stricken.**

5 Adjudicative proceedings are conducted in accordance with the provisions and rules of
6 evidence set forth in Government Code section 11513. (Cal. Code Regs., tit. 23, § 648.5.1.) The
7 hearing need not be conducted according to technical rules relating to evidence and witnesses.
8 (Gov. Code, § 11513, subd. (c).) Relevant evidence is admissible “if it is the sort of evidence on
9 which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of
10 the existence of any common law or statutory rule which might make improper the admission of
11 the evidence over objection in civil actions.” (*Ibid.*) Relevant evidence is defined as evidence
12 “having any tendency in reason to prove or disprove any disputed fact that is of consequence to
13 the determination of the action.” (Evid. Code, § 210.) Evidence that is beyond the scope of the
14 public hearing does not function to “to prove or disprove any disputed fact that is of consequence
15 to the determination” of the Coles’ diversion and use of water. (*Ibid.*) Therefore, that evidence
16 should be excluded.

17 **A. Testimony and Evidence Addressing the Coles’ Established Pre-1914 Water**
18 **Right are not Relevant to this Proceeding. Any Evidence Challenging Their Right**
19 **Should be Stricken.**

20 According to the Notice of Public Hearing for this proceeding, there are two (2) key issues
21 to consider at the Public Hearing:

- 22 1. Does the past or current diversion or use of water by Douglas and Heidi Cole and
23 Marble Mountain Ranch constitute a waste, unreasonable use, unreasonable method of
24 use, or unreasonable method of diversion of water, particularly in light of any impacts
25 to public trust resources?
- 26 2. If the past or current diversion or use of water by Douglas and Heidi Cole and Marble
27 Mountain Ranch constitutes a waste, unreasonable use, unreasonable method of use, or
28 unreasonable method of diversion of water, what corrective actions, if any, should be

1 implemented, and with what time schedule should they be implemented? How should
2 the implementation time schedule for any corrective actions be coordinated with the
3 requirements of the Cleanup and Abatement Order issued by the North Coast Regional
4 Water Quality Control Board?

5 The two questions above do not raise any issues regarding the Coles' pre-1914 right to
6 divert three (3) cfs from Stanshaw Creek. Any evidence presented to challenge the Coles' pre-
7 1914 right would have not prove or disprove whether the diversion constitutes waste,
8 unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.
9 Therefore, that evidence is not relevant to this proceeding.

10 The Coles divert surface water from Stanshaw Creek under a pre-1914 claim of right in
11 two Statements of Water Diversion and Use ("Statements"), S015022 and S016375. Following an
12 extensive study and review period, the State Water Board, Division of Water Rights, confirmed
13 the Coles' pre-1914 three (3) cfs claim in 2014. (See Division of Water Rights, Report of
14 Inspection, Inspection Dates December 12, 2014 and February 12, 2015, p. 14 ["Given the
15 unsettled legal issues surrounding forfeiture, the State Water Board or a reviewing court could
16 reasonably conclude that the MMR pre-1914 water right may be up to the full capacity of the
17 ditch, which MMR claims to be 3 cfs. On that basis, the Division [of Water Rights] concludes that
18 MMR's diversion do not appear to be in excess of its claimed pre-1914 right."].) Even the Notice
19 of Hearing recognizes the Coles' pre-1914 right: "Surface water to serve Marble Mountain Ranch
20 is diverted from a single point of diversion on Stanshaw Creek, a tributary to the Klamath River,
21 under a pre-1914 claim of right and a Small Domestic Use Registration." (Notice of Hearing, p.
22 1.) The Coles' pre-1914 right cannot be challenged in a proceeding to determine waste,
23 unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.
24 Any evidence contradicting their pre-1914 claim of right to three (3) cfs is thus irrelevant to this
25 proceeding. The Coles request that the exhibits and any discussion related to the exhibits outlined
26 below, organized by the party submitting the exhibit, be stricken from the record because the
27 exhibit exceeds the scope of the public hearing by addressing the Coles pre-1914 3 cfs right.
28

1 DFW

2 Exhibits 3, 8, 20-21, and 28-39 discuss DFW's activities related to the establishment of
3 the Coles' pre-1914 water right, not the issue of the Coles' diversion and use of water. Therefore,
4 those Exhibits and reference or discussion of those Exhibits should be stricken.

5 Karuk Tribe

6 Exhibits 1-3 discuss the Coles' pre-1914 3 cfs right rather than the Coles' diversion and
7 use of water. Therefore, those Exhibits and any discussion of them should be stricken from the
8 record.

9 Old Man River Trust

10 Exhibits 1, 2, 4-6, 9 and 10 challenge the validity of the Coles' pre-1914 right. Those
11 Exhibits do not address the Coles' diversion and use of water, especially as it relates to public
12 trust resources. Therefore, Old Man River Trust's Exhibits 1,2,4-6, 9 and 10 and any discussion
13 of those Exhibits should be excluded.

14 Exhibits 3, 7-8, 11 discuss matters related to the Coles' hydroelectric power generation,
15 which is provided through their established pre-1914 3 cfs right. The Coles' method of producing
16 electricity at the Ranch is not at issue in the hearing. Therefore these Exhibits and any testimony
17 related to them should be excluded.

18 Klamath Riverkeepers

19 Klamath Riverkeepers included a letter as Exhibit 6. All discussion in that letter that
20 addresses the scope and extent of Coles' pre-1914 right should be stricken as outside the scope of
21 this hearing. Further, Klamath Riverkeepers' Exhibits 1, 2, and 3 should also be stricken as those
22 Exhibits only addresses the validity or establishment of the Coles' pre-1914 3 cfs right.

23 **B. Exhibits discussing other River Systems or Fishery Management outside of the**
24 **state of California are Not Relevant and should be Stricken from the Proceedings.**

25 DFW

26 Exhibits 4 and 27 discuss conditions that are outside of the Klamath River system.
27 Exhibit 4 discusses the Shasta River. Though the Shasta River is near the Klamath River, it is a
28 separate system with different environmental factors that are not relevant to the Klamath River.

1 Exhibit 27 discusses flow management approaches for fishery resources in Canada. Canadian
2 fishery management is not a precedent setting approach for fishery management in the state of
3 California. Neither of these Exhibits is relevant to fishery management in Stanshaw Creek and the
4 Klamath River and the Exhibits and any discussion related to them should be excluded.

5 NMFS

6 Exhibits 21 and 43 discuss the Shasta River, not the Klamath River. The Shasta River is a
7 separate system subject to different conditions and impacts to fishery resources. Therefore,
8 NMFS' Exhibits 21 and 43 and any discussion related to those Exhibits should be stricken.

9 Karuk Tribe

10 Exhibits 6, 8, and 9 discuss flow measurements and impacts in creeks throughout the Six
11 Rivers National Forest range for the Klamath River. Any streamflow information beyond the
12 flow in Stanshaw Creek is irrelevant to the Coles' diversion and use of water. Therefore, all but
13 pages 10-11 of Exhibit 6, pages 25-31 of Exhibit 8, and pages 116-119 of Exhibit 9 should be
14 stricken.

15 **III. Hearsay Evidence must be Excluded where it is Used to Show the Truth of the**
16 **Matter Asserted.**

17 Hearsay is evidence of a statement, other than by a witness, that is offered to prove the
18 truth of the matter stated, *i.e.*, an out-of-court statement offered for its truth. (Evid. Code, § 1200,
19 subd. (a).) Hearsay evidence may only be used to supplement or explain other evidence. (Gov.
20 Code, § 11513, subd. (d).) Upon a timely objection, such hearsay evidence shall not be sufficient
21 in itself to support a finding, unless it would be otherwise admissible over objection in civil
22 actions. (*Ibid.*) Therefore, hearsay evidence offered for the truth of the matter asserted must be
23 excluded based on the following objections

24 DFW

25 Exhibits 17-19, and 22 are grant applications prepared by Will Harling, an individual who
26 will not testify at the public hearing. The testimony submitted by DFW relies on the truth of the
27 matters asserted in those grant application exhibits regarding fishery resource and the Coles'
28

1 diversion. (Exhibit CDFW-13, pp. 4-6.) Therefore, those exhibits are inadmissible hearsay and
2 should be excluded.

3 Old Man River Trust

4 Old Man River Trust submitted two letters: Exhibits 2 and 9 signed by Konrad Fisher. In
5 Old Man River Trust's Amended NOI, submitted with the Exhibits on October 6, 2017, Mr.
6 Fisher is not included as a witness. The letters were submitted to stand alone, therefore they were
7 submitted for the truth of the matters asserted within them. Thus, they are inadmissible hearsay
8 and should be excluded from the record, if not already excluded for irrelevance to the key issues
9 of the public hearing.

10 Klamath Riverkeepers

11 Exhibits 4 and 5 are quotations for electrical generators provided as part of the Exhibit 6.
12 Klamath Riverkeepers have not specified who will be testifying on their behalf, other than
13 "members of Klamath Riverkeepers," but Exhibit 6 is the only Exhibit submitted that resembles
14 written testimony. (Klamath Riverkeepers NOI, July 6, 2017.) Exhibit 6 is authored by Paul
15 Stanton Kibel, and is from a law firm, Water and Power Law Group PC, located in Berkeley,
16 California. The quotations included in Exhibits 4 and 5 are from alternative power companies located
17 in Red Bluff, California and Boise, Idaho, respectively. Exhibit 6 relies on these quotations for the
18 truth of the matters asserted in them regarding the cost of the power generators. Therefore Exhibits 4
19 and 5 are inadmissible hearsay and should be excluded.

20 **IV. NMFS and the Karuk Tribe Have Not Presented Good Cause for Additional Time to**
21 **Present Direct Oral Testimony.**

22 The Notice of Hearing includes information about the hearing procedures and defines
23 certain limitations for direct testimony. "Witnesses will be allowed up to (20) minutes to
24 summarize or emphasize their written testimony on direct examination. Each party will be
25 allowed up to one (1) hour total to present all of its direct testimony." (Notice of Hearing,
26 Information Concerning Appearance at Water Right Hearings, p. 5.) "The hearing officer may, for
27 good cause, approve a party's request for additional time to present direct testimony during the
28 party's case-in-chief." (*Id.* at p. 5, fn. 3.)

1 Both NMFS and the Karuk Tribe have indicated that they will provide direct oral
2 testimony in excess of the time limits established in the Notice of Hearing, but have not presented
3 good cause for additional time to present direct oral testimony. NMFS's NOI submitted on July 6,
4 2017, indicated that Margaret Tauzer will testify for 45 minutes. This exceeds the single witness
5 time limit of 20 minutes. NMFS has not offered good cause for this additional time. Therefore,
6 Margaret Tauzer's direct oral testimony should be limited to the 20 minute time limit provided in
7 the Notice of Hearing.

8 As part of the Karuk Tribe's submission of Exhibits on October 6, 2017, though the
9 Exhibits were not served on the other parties involved in the public hearing until the following
10 Monday, October 9, 2017, the Karuk Tribe include a revised NOI. That NOI indicates that the
11 Karuk Tribe will provide direct oral testimony of thirty minutes for three separate witnesses. This
12 exceeds both the 20 minute time limit for individual testimony and the 1 hour limit for a party's
13 testimony in total. The Karuk Tribe has not provided good cause for either the extension of the 20
14 minute individual time limit, or the 1 hour total direct oral testimony time limit. Therefore, the
15 Karuk Tribe's testimony should be limited to the time limits provided in the Notice of Hearing.

16 **V. NMFS Failed to Provide an Exhibit in its Service to the Other Parties.**


17 Margaret Tauzer's testimony included as NMFS Exhibit 1 references a spreadsheet that
18 was used to evaluate the NMFS bypass flow recommendation for Stanshaw Creek based on the
19 flow in a nearby creek and identifies that spreadsheet as NMFS Exhibit 4. However, NMFS
20 Exhibit 4 was not included in the documents NMFS served on all parties on October 6, 2017. The
21 email message providing service of NMFS' documents including Exhibits 1 and 4 notes that "the
22 exhibits include a large excel spreadsheet that is not formatted to be printed. The excel
23 spreadsheet is included as a link to the pdf exhibit 4" but no link to exhibit 4 was included.
24 (Margaret Tauzer email, Marble Mountain Ranch Cole Hearing, Oct. 6, 2017.) The Coles request
25 that any reference to the NMFS Exhibit 4 be stricken from the record. Therefore, any statements
26 based on the NMFS Exhibit 4 are conclusory and unsupported by factual evidence.

1 **VI. Conclusion**

2 The Coles respectfully request that the Hearing Officer: (1) strike all exhibits and
3 testimony challenging the Coles pre-1914 3 cfs right as irrelevant to the questions to be
4 considered at the public hearing, (2) strike all testimony and exhibits that reference other stream
5 systems outside of the Klamath River and references to fishery management outside of the state of
6 California, (3) exclude improper hearsay evidence, (4) limit NMFS and the Karuk Tribe to the
7 direct oral testimony time limits provided in the Notice of Hearing based on a failure to show
8 good cause, and (5) exclude discussion related to NMFS Exhibit 4 for failure to serve it on the
9 other parties to the public hearing.

10
11 Dated: October 13, 2017

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By 

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