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6 DOUGLAS COLE, HEIDI COLE, AND  
MARBLE MOUNTAIN RANCH  
7

8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD  
9

10 In the Matter of Douglas Cole and Heidi Cole  
and Marble Mountain Ranch, Draft Order No.  
11 2017-00XX-DWR

**RESPONSE TO PROSECUTION TEAM'S  
OBJECTIONS TO REQUEST FOR  
ADDITIONAL TIME FOR DIRECT ORAL  
TESTIMONY AND FOR SUBMISSION OF  
WRITTEN TESTIMONY BY STEVEN  
CRAMER; HEARSAY OBJECTIONS TO  
MMR-11 AND MMR-12; MOTION TO  
STRIKE MMR-12, MMR-13, AND MMR-14**

15 **I. Introduction**

16 Douglas and Heidi Cole (the "Coles") and Marble Mountain Ranch (the "Ranch") provide  
17 this response to the objections raised by the State Water Resources Control Board ("State Water  
18 Board"), Division of Water Rights, Prosecution Team ("Prosecution Team").

19 First, as demonstrated herein, good cause exists to extend the time for Douglas Cole to  
20 testify to one (1) hour and for all the Coles' direct testimony, including Mr. Cole's testimony, to a  
21 total of two (2) hours.

22 Steven Cramer should be allowed to submit supplemental written testimony because such  
23 testimony will provide data and analytical support for the conclusions made in his already  
24 submitted written testimony, facilitating his oral testimony. Allowing Mr. Cramer's supplemental  
25 testimony ensures the Coles may exercise their full due process rights in defending their pre-1914  
26 3 cubic feet per second ("cfs") right. (*United States v. State Water Resources Control Bd.* (1986)  
27 182 Cal.App.3d 82, 101 ("*United States*").) Mr. Cramer's data and analysis is the most current  
28 information regarding Stanshaw Creek and the Coles' diversion and use of water. Providing Mr.

1 Cramer's testimony no later than October 31, 2017, nearly two (2) weeks before the public hearing  
2 is scheduled to commence, will not prejudice the Prosecution Team or any other parties to the  
3 public hearing. Two weeks is more than ample time to review and analyze data that supports  
4 conclusions and observations that were included in Mr. Cramer's testimony that was submitted on  
5 October 6, 2017.

6 MMR-11 and MMR-12 are admissible as hearsay because they supplement and explain  
7 portions of the written testimony of Douglas Cole. MMR-12, MMR-13, and MMR-14 are not  
8 submitted to challenge a final order, rather they provide supplemental evidence that the diversion  
9 is a reasonable use of water and method of diversion and that the Coles are not engaged in a waste  
10 of water.

11 **II. Additional Time for Oral Testimony Should be Allowed Given the Extensive Breadth**  
12 **and History of the Case**

13 To clarify the Coles' initial request for additional time, the Coles request: (1) that the total  
14 time to present direct testimony be extended from one (1) hour to a total of two (2) hours, and (2)  
15 the direct oral testimony for Douglas Cole be extended from twenty (20) minutes to one (1) hour.  
16 The Coles intend to present two other witnesses: Steven Cramer and Jeffery Meyer. If the Coles'  
17 request to extend the testimony of Douglas Cole is granted, then the total time limit for the Coles'  
18 three witnesses will be one (1) hour, forty (40) minutes. The Coles seek a total of two (2) hours for  
19 all direct testimony to ensure that Mr. Meyer and Mr. Cramer have enough time to testify in full.  
20 As discussed further below, Mr. Cramer's testimony will include additional information and data  
21 from his visit to the Ranch during the first week of October 2017. It is unclear how much  
22 additional time Mr. Cramer, Mr. Cole, or Mr. Meyer may require to address that information.  
23 Therefore, the Coles seek a total of two (2) hours for direct testimony.

24 The Coles' case focuses extensively on the testimony of Mr. Cole. The Coles have relied  
25 on the diversion for over 20 years to operate the Ranch. The history of the diversion is extensive,  
26 as demonstrated in the lengthy testimony of Mr. Cole. He will testify to, among other issues, the  
27 many stakeholder meetings and efforts he engaged in on behalf of the Ranch, the establishment of  
28 the Coles' pre-1914 water right, the State Water Board's and North Coast Regional Water Quality

1 Control Board’s (collectively, “State Water Boards”) various inspection and enforcement efforts,  
2 his actions to substantially improve the diversion, and his limited financial resources to undertake  
3 large infrastructure improvements. His testimony will be crucial to establishing the Coles’ case  
4 that the diversion is not a waste, not an unreasonable use of water, and not an unreasonable method  
5 of diversion. Mr. Cole is one of the only consistent actors in the ongoing discussions related to the  
6 Ranch, other stakeholders along Stanshaw Creek, and the State Water Board. Thus, the probative  
7 value of Mr. Cole’s testimony is significant. Due to the breadth and extent of his testimony, the  
8 Coles request that Mr. Cole’s direct oral testimony be extended to one (1) hour. As the Prosecution  
9 Team agrees, the issues and facts in the proceeding are extensive and complex. (Prosecution  
10 Team’s Objection to Diverter’s Request for Additional Time for Direct Oral Testimony and For  
11 Submission of Written Testimony by Steven Cramer, Hearsay Objection to MMR-11 and MMR-  
12 12; Motion to Strike MMR-12, MMR-13, MMR-14 (“Prosecution Team’s Objections”), p. 2.) The  
13 Coles have established good cause to extend the testimony of Mr. Cole to one (1) hour.

14 While the Coles will strive to complete their direct oral testimony within a reasonable time,  
15 to account for the additional information pending from Mr. Cramer’s visit to the Ranch and other  
16 contingencies, the Coles request that the total time to present direct oral testimony be extended to  
17 two (2) hours total, including Mr. Cole’s one (1) hour of testimony. Given the importance of the  
18 diversion to the Coles’ livelihood and that the continued existence of the Ranch depends on the  
19 outcome of this proceeding, the Coles would be highly prejudiced if their requests for additional  
20 time were not granted. The Coles have established good cause to extend the total time for direct  
21 testimony to two (2) hours.

22 **III. Additional Direct Written Testimony by Steven Cramer Should be Allowed to Clarify**  
23 **and Provide Support for the Conclusions Made in his Testimony**

24 The Prosecution Team seems to confuse the reason for additional direct written testimony  
25 from Mr. Cramer—his supplemental written testimony will not be based on additional visits and  
26 inspections at the Ranch. As stated in his testimony, Mr. Cramer visited the Coles’ diversion and  
27 the Ranch on October 2 and 3, 2017. The deadline for submitting written testimony was on  
28 October 6, 2017. In order to meet the October 6, 2017, submission deadline, Mr. Cramer provided

1 his initial observations and recommendations as part of his testimony. During his site visit, Mr.  
2 Cramer also gathered numerous measurements and other data, including: (1) the area and location  
3 of spawning gravel patches; (2) the jump height and horizontal distance, as well as jump pool  
4 depth, at potential passage barriers; (3) the depth and area dimensions of the pond at its mouth; (4)  
5 the elevation, length, and width of the pool outlet at the Klamath River; and (5) the reach below  
6 the inflow of the diversion. Based on these measurements and related observations, Mr. Cramer  
7 made observations and conclusions as part of his testimony submitted on October 6, 2017.  
8 However, he was unable to analyze the data he collected by the October 6, 2017, deadline. Mr.  
9 Cramer lacked the time and resources necessary to analyze the data on-site or shortly after his visit.

10 The comments, observations, and conclusions in Mr. Cramer's testimony can be further  
11 clarified and explained with data and analysis. However, Mr. Cramer requires additional time to  
12 analyze the data. The Coles anticipate that Mr. Cramer's supplemental written testimony will  
13 consist of data and analysis to clarify his conclusions and recommendations, and more fully  
14 developed conclusions based on his analysis of the data. Any supplemental written testimony from  
15 Mr. Cramer will not be substantially new or different than his initial testimony. The Prosecution  
16 Team and all other parties served with Mr. Cramer's testimony on October 6, 2017, are, therefore,  
17 already aware of the general content of Mr. Cramer's supplemental testimony.

18 Further, allowing Mr. Cramer to provide supplemental written testimony will facilitate his  
19 oral testimony. By providing his data and analysis as supplemental written testimony, Mr.  
20 Cramer's direct oral testimony can focus on substantive issues. Such explanatory information will  
21 be easier to comprehend in written format, rather than orally. The Prosecution Team asserts that it  
22 is concerned that allowing the supplemental written testimony will leave the parties with  
23 insufficient time to review, examine, and prepare for the public hearing. (Prosecution Team's  
24 Objections, p. 3.) Allowing Mr. Cramer to submit supplemental written testimony, by October 31,  
25 2017, one day short of two (2) weeks before the public hearing is scheduled to commence, will  
26 provide the Prosecution Team and all other parties to the public hearing with ample time to prepare  
27 their cases. This data and analysis will provide the basis for the conclusions already provided and  
28 more fully develop those conclusions. Nearly two (2) weeks is a reasonable time period to allow

1 all parties to the public hearing to review and understand the data that underscores Mr. Cramer's  
2 already disclosed conclusions. Thus, the Prosecution Team and all other parties to the public  
3 hearing will not be prejudiced by allowing Mr. Cramer to submit supplemental written testimony.

4 To the contrary, not providing the Coles the opportunity to fully defend their use of their  
5 full pre-1914 3 cfs water right by supplementing Mr. Cramer's testimony will result in extreme  
6 prejudice to the Coles and restrain the Coles from exercising their due process rights at the public  
7 hearing. (*United States, supra*, 182 Cal.App.3d at p. 101.) As demonstrated in the Coles' request to  
8 submit supplemental written testimony, the wildfires near the Ranch during the summer season  
9 have been a significant impediment to the Coles' preparation of their defense of their water right.  
10 The Notice of Public Hearing was provided on June 9, 2017, and wildfires have been raging in the  
11 Six Rivers National Forest near the Ranch for most of July, August, and September. Following  
12 Notice of the Public Hearing, there has not been a safe time for Mr. Cramer to visit the Ranch until  
13 his visit the first week of October. Once they could guarantee that Mr. Cramer could safely visit  
14 the Ranch, the Coles moved expeditiously to have Mr. Cramer at the Ranch to review and inspect  
15 Stanshaw Creek, its public trust resources, and the impact of the Coles' current operations on those  
16 public trust resources.

17 Mr. Cramer's testimony, both the testimony that has already been submitted and the  
18 supplemental testimony, is integral to understanding how the Coles' current operations and the  
19 existing environment at Stanshaw Creek are impacting public trust resources. This is the key issue  
20 of the public hearing. Mr. Cramer's supplemental testimony will provide the most up to date  
21 analysis and review of public trust resources at Stanshaw Creek. Thus, not allowing Mr. Cramer to  
22 submit supplemental testimony will prohibit the Coles from providing the basis of a key witness'  
23 testimony. Consequently, if Mr. Cramer is not allowed to submit supplemental testimony, the  
24 Coles' due process right to vigorously defend their rights are restricted, and the Coles are severely  
25 prejudiced. (*United States, supra*, 182 Cal.App.3d at p. 101.)

26 Mr. Cramer and the Coles will provide any supplemental written testimony as soon as  
27 possible, and at the latest by October 31, 2017.

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1 **IV. Hearsay Evidence is Admissible to Supplement and Explain the Testimony of Douglas**  
2 **Cole; Alternatively, the Evidence Should be Considered as Policy Statements**

3 Under the procedures governing the public hearing, hearsay evidence is admissible to  
4 supplement or explain other evidence. (Gov. Code, § 11513; 23 CCR § 648.5.1.) Draft Order No.  
5 2017-00XX-DWR (“Draft Order”) alleges that the diversion system at the Ranch is an  
6 unreasonable use of water and unreasonable method of diversion. As part of his written direct  
7 testimony, Mr. Cole provides a thorough explanation of why the diversion is not an unreasonable  
8 use of water, unreasonable method of diversion, or wasteful (MMR-1, pp. 2-3), and his efforts to  
9 reduce sedimentation impacts to waters of the state (MMR-1, pp. 8, 10-11, 13-14).

10 Exhibit MMR-11 consists of two documents: (1) a declaration from David Markin, District  
11 Fire Manager Officer with the United States Forest Service (“Forest Service”); and (2) an email  
12 conversation between Douglas Cole and Curtis Coots, the Forest Fire Management Officer for the  
13 Mendocino National Forest. Mr. Markin’s declaration explains how the Forest Service used the  
14 Ranch as a base of operations and “use[d] water from the diversion ditch that provides water to the  
15 Ranch at its full capacity of three (3) cubic feet per second ... .” (MMR-11, p. 1.) The email from  
16 Mr. Coots explains that the Forest Service set up water drafting equipment at the Ranch. (MMR-  
17 11, pp. 2-3.) Such water drafting can be used as an emergency water source for fire suppression if  
18 other water sources are unavailable. The diversion provides an important fire suppression resource  
19 for the local community and state. These statements supplement and explain why the Coles’  
20 diversion is not an unreasonable use of water, unreasonable method of diversion, or wasteful, and  
21 support Mr. Cole’s testimony that the Ranch is used as a fire camp.

22 Exhibit MMR-11 is not submitted on its own to support a finding that the diversion is  
23 reasonable and not wasteful. Instead, Exhibit MMR-11 is provided to clarify and elaborate on  
24 other testimony from Mr. Cole. (See MMR-1, pp. 2-3, 9-10.) Taken together, the testimony of Mr.  
25 Cole and Exhibit MMR-11 provide evidence that the diversion at the Ranch is reasonable and not  
26 wasteful. Alternatively, the information provided in Exhibit MMR-11 should be accepted as policy  
27 statements discussing the Forest Service’s use of the Ranch.

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1 Exhibit MMR-12 is a sedimentation assessment of the diversion at the Ranch by Rocco  
2 Fiori of Fiori Geosciences, completed on April 4, 2017, and includes a preliminary technical  
3 memorandum, completed on May 12, 2016. The written testimony from Mr. Cole includes  
4 information of his efforts to reduce sedimentation impacts to waters of the state from overtopping  
5 or erosion. (MMR-1, pp. 8, 10-11, 13-14.) As part of these efforts, Mr. Cole retained Rocco Fiori  
6 to complete a sedimentation analysis of the diversion. (MMR-1, p. 14.) As stated in Mr. Cole's  
7 testimony, the Fiori report recommended piping or lining the first 1,000 feet of the diversion as a  
8 practical approach to improving the diversion and addressing sediment and stability concerns  
9 regarding the diversion. (MMR-1, p. 14; see also MMR-12, pp. 19-20.) The Coles have actively  
10 engaged in efforts to implement this recommendation. (See MMR-1, p. 14; MMR-15.) Exhibit  
11 MMR-12 provides context and corroboration for the extensive efforts the Coles have taken to  
12 comply with the Water Boards' enforcement efforts. The documents submitted as part of Exhibit  
13 MMR-12 do not stand on their own. Instead, Exhibit MMR-12 is admissible hearsay because it  
14 supplements and explains portions of Douglas Cole's testimony related to his efforts to address  
15 State Water Board concerns with regard to his diversion.

16 For the foregoing reasons, Exhibits MMR-11 and MMR-12 are admissible hearsay to  
17 supplement and explain other evidence. Alternatively, the information provided in Exhibit MMR-  
18 11 should be accepted as policy statements.

19 **V. Exhibits MMR-12, MMR-13, and MMR-14 are Being Offered to Supplement and**  
20 **Explain Why the Coles' Diversion is Reasonable and Not Wasteful—Not to**  
21 **Contradict Clean Up and Abatement Order R1-2016-0031**

22 Exhibits MMR-12, MMR-13, and MMR-14 are not being submitted to challenge the North  
23 Coast Regional Water Quality Control Board's Clean Up and Abatement Order R1-2016-0031  
24 ("CAO"). Rather, the Coles submit Exhibits MMR-12, MMR-13, and MMR-14 to show their  
25 efforts to comply with the Water Boards' enforcement actions and that their diversion at the Ranch  
26 is reasonable and not wasteful. As part of its requirements, the CAO required the Ranch to engage  
27 in various activities to maintain the integrity of the diversion ditch and limit downstream  
28 sedimentary pollution, these requirements are also directly related to requirements under the Draft  
Order, the basis of the November 13, 2017, public hearing. Those requirements include installation

1 of conveyance infrastructure in the ditch, stabilizing the headcut and slope at Irving Creek. (Draft  
2 Order, p. 21.) Further, the Notice for the Public Hearing issued on June 9, 2017, acknowledges the  
3 interrelated nature of the CAO and the Draft Order, specifically identifying the CAO as part of the  
4 second key issue for consideration at the public hearing.

5 Exhibit MMR-12 is a sedimentation analysis of the diversion ditch. Part of the analysis  
6 demonstrates that the sedimentation impacts to waters of the state from the diversion are not  
7 significant threats. (MMR-12, p. 18.) The Coles have taken significant efforts to comply with the  
8 CAO, the Draft Order, and their requirements, including deepening and improving the diversion  
9 ditch by removing sediment from the ditch bed and placing that material along the berm for  
10 reinforcement. (MMR-1, p. 11.) This maintenance effort has proven successful to avoid erosion  
11 and overtopping. (*Ibid.*) Additionally, the report encourages the Coles to continue their successful  
12 inspection and maintenance efforts targeted towards reports of seepage and other minor failure  
13 problems before they evolve into larger catastrophic failures. (MMR-12, p. 19.) Exhibit MMR-12  
14 provides context and supplements Mr. Cole's testimony regarding his efforts to maintain the  
15 diversion and avoid any sedimentary impacts to waters of the state from the diversion. (See MMR-  
16 1, pp. 8, 10, 11, 14.) Exhibit MMR-12 is relevant because it directly addresses the Draft Order's  
17 allegations of unreasonable use of water and unreasonable method of diversion.

18 Exhibit MMR-13 is a report of waste discharge, which addresses allegations in the CAO of  
19 sedimentation at the diversion's discharge into the tributary to Irving Creek and the Draft Order's  
20 requirement to stabilize the headcut and slope at Irving Creek. (MMR-1, p. 10; see also MMR-13,  
21 p. 5.) The waste discharge report includes a plan to improve the outfall at the tributary to Irving  
22 Creek. (MMR-13, pp. 6-7.) Exhibit MMR-13 demonstrates the Coles' efforts to reduce any  
23 sedimentary impacts to waters of the state, which supports the Coles' argument that the diversion  
24 at the Ranch is reasonable and not wasteful. MMR-13 is relevant because it relates to the Draft  
25 Order's allegations of unreasonable use of water and method of diversion and addresses its  
26 requirement to stabilize the slope and headcut at Irving Creek.

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1 Exhibit MMR-14 is a proposed water quality monitoring plan, as required by the CAO.  
2 Again, Exhibit MMR-14 is not submitted to challenge the CAO, but rather to show the Coles'  
3 meaningful efforts to comply with the Water Boards' enforcement actions. The water quality  
4 monitoring plan demonstrates the Coles' intent to ensure water quality and that the diversion does  
5 not result in an unreasonable use of water or method of diversion or waste. (MMR-1, p. 12.) Thus,  
6 Exhibit MMR-14 is relevant to the Draft Order's allegations of unreasonable use of water and  
7 method of diversion.

8 For the foregoing reasons, Exhibit MMR-12, MMR-13, and MMR-14 are relevant to the  
9 Draft Order's allegations of unreasonable use of water and method of diversion and waste.

10 **VI. Conclusion**

11 The Coles request that additional time be extended for the testimony of Douglas Cole to  
12 one (1) hour and for all direct testimony, including Douglas Cole's testimony, to two (2) hours.  
13 Given the highly probative value of this testimony and the extreme burden placed on the Coles and  
14 the Ranch, the Coles have established good cause to extend time for their case-in-chief.

15 Steven Cramer should be allowed to provide supplemental written testimony as there is no  
16 prejudice to the other parties by granting this request. Allowing Mr. Cramer to supplement his  
17 testimony with data and analysis will provide the Prosecution Team and all other parties with  
18 better insight as to the basis of his conclusions that were included in his already submitted  
19 testimony. Prohibiting Mr. Cramer from submitting supplemental testimony will prejudice the  
20 Coles and restrict their due process right to vigorously defend their pre-1914 3 cfs right. (*United*  
21 *States, supra*, 182 Cal.App.3d at p. 101.) Mr. Cramer's testimony is the most current testimony  
22 offered with regard to Stanshaw Creek and the impact of the Coles' operation of their diversion  
23 and use of water from Stanshaw Creek on public trust resources.

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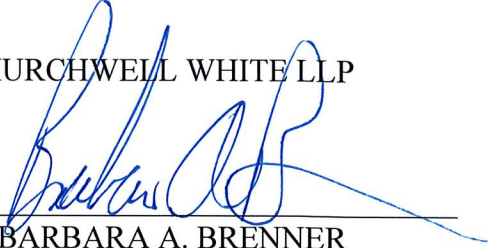
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1 Hearsay evidence is admissible to supplement or explain other evidence. Exhibits MMR-11  
2 and MMR-12 are admissible hearsay because they supplement and explain portions of Mr. Cole's  
3 written testimony. Exhibits MMR-12, MMR-13, and MMR-14 are relevant to the allegations in the  
4 Draft Order and demonstrate that the diversion is a reasonable use of water and method of  
5 diversion and not a waste of water.

6  
7 Dated: October 16, 2017

CHURCHWELL WHITE LLP

8  
9 By 

10 BARBARA A. BRENNER  
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12 *Douglas Cole and Heidi Cole and*  
13 *Marble Mountain Ranch*

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