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7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

8 STATE OF CALIFORNIA

9
10 In the Matter of:
DOUGLAS AND HEIDI COLE AND MARBLE
11 MOUNTAIN RANCH

) **OPPOSITION TO DIVERTERS'**
) **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 RIVERKEEPER**

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13 **I. INTRODUCTION**

14 The Prosecution Team offers this opposition to the objection submitted by Douglas and Heidi Cole
15 and Marble Mountain Ranch (collectively the "Diverters") to testimony submitted by the California
16 Department of Fish & Wildlife (DFW), the Karuk Tribe, the National Marine Fisheries Service (NMFS),
17 Old Man River Trust, and Klamath Riverkeeper. Contrary to the Diverters' assertion, evidence addressing
18 the Diverters' pre-1914 claim of appropriation is relevant. Furthermore, the Diverters' motion to strike is
19 improper, because under the Government Code, hearsay is admissible in administrative adjudicative
proceedings.

20 **II. EVIDENCE ADDRESSING THE DIVERTERS' PRE-1914 CLAIM OF APPROPRIATION**
21 **IS RELEVANT**

22 The State Water Resources Control Board (State Water Board) conducts adjudicative proceedings in
23 accordance with the provisions and rules of evidence set forth in section 11513 of the Government Code.
(Cal. Code Regs., tit. 23, § 648.5.1.) Pursuant to the Government Code, "[a]ny relevant evidence shall be
24 admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of
25 serious affairs, regardless of the existence of any common law or statutory rule which might make improper
26 the admission of the evidence over objection in civil actions." (Cal. Gov. Code, § 11513, subd. (c).)

1 Article X, section 2 of the California Constitution and section 100 of the Water Code both provide
2 that water rights are limited to water reasonably required for the beneficial use served and shall never extend
3 to the waste, unreasonable use, unreasonable method of use, or unreasonable method of diverting water.¹
4 Assessing the scope and extent of a basis of right is a reasonable threshold question in hearings where the
5 unlawful diversion and use of water is at issue. (*Young v. State Water Resources Control Board* (2013) 219
6 Cal.App.4th 397, 406-407.) The State Water Board’s authority to make a threshold determination of a basis of
7 right is not limited to rights and claims of right subject to its permitting authority. (*Id.*) As a result the State
8 Water Board has the authority to make an initial determination of whether a party claiming a pre-1914
9 appropriation or riparian has the right claimed. (*Id.*) Although the State Water Board conducts reasonable
10 use proceedings under the authority of Water Code section 275, as opposed to other sections of the Water
11 Code such as 1052 or 1831, the State Water Board has nonetheless begun reasonable use proceedings by
12 reviewing the basis of right for the party alleged to be misusing water.

13 In Water Right Decision 1600 (D-1600), the rights of the Imperial Irrigation District (IID) were not
14 at issue except insofar as its right was limited by misuse. (Prosecution Team Exhibit WR-20², Bates 1664.)
15 There was also no dispute between competing water right holders. (WR-20, Bates 1684.) Still, the State
16 Water Board proceeded to survey the various bases for IID’s right to divert and use water, which included
17 contracts, court decisions, water transfers, and legislation. (WR-20, Bates 1664-1673.) Even though IID’s
18 rights were not at issue or disputed by another water right holder, the State Water Board still found it
19 necessary to review IID’s rights, because an initial review of IID’s rights was necessary to subsequently
20 assess and understand whether IID was misusing water.

21 Water Right Order 2012-0004 similarly began with an extensive discussion of the construction and
22 operation of Hidden Lakes Estates and discussed the bases of right for diverting and using water. (WR-63,
23 Bates 2315-2316.) This included evidence that Hidden Lakes Estates purchased water from San Juan Water
24 District (SJWD) and evidence of SJWD’s basis of right. (WR-63, Bates 2316.) Like IID, reviewing Hidden
25 Lakes Estates’ rights for using water was necessary to understand whether it was misusing water.

26 The Diverters have a pre-1914 *claim* of appropriation. Their claim has never been adjudicated by a
27 court or addressed in any decision or order of the State Water Board. A threshold assessment of the scope
28 and extent of the Diverters’ pre-1914 claim as a right is therefore appropriate. Consequently, evidence
addressing the Diverters’ pre-1914 claim of appropriation is relevant.

29 **III. HEARSAY IS ADMISSIBLE IN STATE WATER BOARD ADJUDICATIVE** 30 **PROCEEDINGS**

31 In State Water Board proceedings, hearsay may be used for the purpose of supplementing or
32 explaining other evidence but over timely objection shall not be sufficient in itself to support a finding

33 _____
34 ¹ State Water Board regulations collectively refer to this as the “misuse of water.” (Cal. Code Regs., tit. 23, § 855,
35 subd. (b).)

36 ² Further references to Prosecution Team exhibits will be “WR-[Exhibit Number].”

1 unless it would be admissible over objection in civil actions. (Gov. Code, § 11513, subd. (d).) An objection
2 is timely if made before submission of the case or on reconsideration. (*Ibid.*) The presiding officer has
3 discretion to exclude evidence if its probative value is substantially outweighed by the probability that its
admission will necessitate undue consumption of time. (*Id.*, subd. (f).)

4 Consequently, hearsay evidence is admissible in State Water Board proceedings. Hearsay evidence
5 is merely insufficient, on its own, to support a finding. Even then, hearsay evidence may support a finding
6 on its own if it would be admissible over objection in a civil action. The Diverters' own characterization of
7 the law does not support their motion, which does not allege that hearsay is inadmissible. The Diverters also
8 fail to allege that any of the evidence offered that they object to fails to supplement or explain any non-
9 hearsay evidence. In addition, the Diverters also fail to allege that the probative value of any of the hearsay
10 evidence they object to would outweigh its probative value or necessitate an undue consumption of time.
11 Regardless, when parties have not yet submitted their cases, it is too soon to know whether additional
evidence will be offered that is either not hearsay or that is hearsay admissible over objection in a civil
proceeding.

12 The Diverters' motion to strike should therefore be denied.

13 **IV. CONCLUSION**

14 Evidence addressing the Diverters' pre-1914 claim of appropriation is relevant. Hearsay evidence is
also admissible. The Diverters' objections should be overruled.

15 Respectfully submitted,

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17 Kenneth Petruzzelli

18 **OFFICE OF ENFORCEMENT**
19 Attorney for the Prosecution Team

SERVICE LIST OF PARTICIPANTS
Douglas and Heidi Cole and Marble Mountain Ranch
Waste and Unreasonable Use Hearing
Scheduled for August 22, 2017

PARTIES

THE FOLLOWING **MUST BE SERVED** WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)

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SERVICE LIST OF PARTICIPANTS
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PARTIES, CONT'D

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