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7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
8 STATE OF CALIFORNIA

9 In the Matter of:) OBJECTION TO DIVERTER'S REQUEST FOR
10 DOUGLAS AND HEIDI COLE AND MARBLE) ADDITIONAL TIME FOR DIRECT ORAL
MOUNTAIN RANCH) TESTIMONY AND FOR SUBMISSION OF
11) WRITTEN TESTIMONY BY STEVEN
12) CRAMER; HEARSAY OBJECTION TO MMR-
13) 11 AND MMR-12; MOTION TO STRIKE MMR-
14) 12, MMR-13, MMR-14

13 **I. INTRODUCTION**

14 The Prosecution Team objects to the request of Douglas and Heidi Cole and Marble Mountain
15 Ranch (collectively the "Diverters") for additional time for oral direct testimony and for additional time for
16 Steven Cramer to submit additional written testimony. The Prosecution Team also objects to the Diverters'
17 Exhibits MMR-11 and MMR-12 on the basis that they constitute hearsay. Finally, the Prosecution Team
18 moves to strike Exhibits MMR-12, MMR-13, and MMR-14 on the basis that they relate to issues addressed
19 in Cleanup and Abatement Order (CAO) R1-2016-0031, a final order whose substantive nature is no longer
open to review.

20 **II. THE DIVERTER'S REQUEST FOR ADDITIONAL TIME FOR ORAL TESTIMONY IS
UNCLEAR, UNECESSARY, AND UNSUPPORTED**

21 The Diverters state "The Coles hereby request the additional time of one (1) hour for Mr. Cole's direct
22 testimony based on the breadth of topics he will testify to and the length of the time period his direct testimony
23 encompasses, and a total of two (2) hours for all of the direct testimony they plan to present." (Diverters'
24 Request for Additional Time for Direct Oral Testimony With Showing of Good Cause, Request to Submit
25 Supplemental Written Testimony on Behalf of Steven Cramer, and Request to Set Steven Cramer's Oral
Testimony ("Diverters' Request", p. 2.)

26 The hearing procedures, issued June 9, 2017, state

27 The Notice of Intent to Appear must state the name and address of the participant. Except
28 for interested persons who will not be participating as parties, the Notice of Intent to
Appear must also include: (1) the name of each witness who will testify on the party's
behalf; (2) a brief description of each witness' proposed testimony; and (3) an estimate of
the time (not to exceed the total time limit for oral testimony described in section 9, below)

1 that the witness will need to present a brief oral summary of his or her prior-submitted
written testimony. (See section 6, below.)

2 (Information Concerning Appearance at Water Right Hearings (“Hearing Procedures”)¹, p. 3.)

3 For oral direct testimony, the Hearing Procedures state “Witnesses will be allowed up to **(20)**
4 **minutes** to summarize or emphasize their written testimony on direct examination. Each party will be
5 allowed up to **one (1) hour total** to present all of its direct testimony.” (Hearing Procedures, p. 5.) Footnote
6 3 then states “The hearing officers may, for good cause, approve a party’s request for additional time to
present direct testimony during the party’s case-in-chief.”

7 Taken together, it is unclear whether the Diverters are requesting two additional hours, for a total
8 three hours of direct oral testimony, or whether they seek a total of two hours for oral direct testimony. The
9 Diverters allege that Mr. Cole requires more time to present his testimony, up to 60 minutes, because his
10 testimony is so broad it covers testimony for three persons. The Diverters further state that Jeff Meyer and
11 Steven Cramer, together, will require an hour, but do not explain why the these witnesses will require an
12 hour. While the Diverters at least advance a “good cause” for Mr. Cole’s direct testimony, they provide
none for Messrs. Meyer and Cramer. They simply allege that more time is required.

13 Per the Hearing Procedures, the purpose of oral direct testimony is for each witness to “summarize
14 or emphasize their written testimony.” The purpose of oral direct testimony is not for a witness to repeat his
15 or her written testimony. The Prosecution Team concurs that the issues and facts in the proceeding are
16 extensive and complex. Prosecution Team testimony from the water right records must summarize
17 testimony from the many persons involved in the Marble Mountain Ranch water rights over the course of
more than twenty-five years. Nonetheless, the Prosecution Team is endeavoring to limit its testimony to an
hour and each witness to no more than 20 minutes.

18 The Hearing Officer should deny the Diverters’ request for additional time and limit each witness,
19 particularly the witnesses Jeff Meyer and Seven Cramer, to 20 minutes each, considering no cause is
20 offered to support their need for additional time. If the Hearing Officer grants the Diverters additional time,
21 the Prosecution Team requests that the Hearing Officer specify up to how much time each of the Diverters’
22 witnesses would have to provide oral direct testimony and, furthermore, allow the Prosecution Team an
equal amount of time to cross-examine the Diverters’ witnesses.

23 **III. ADDITIONAL DIRECT WRITTEN TESTIMONY BY STEVEN CRAMER SHOULD BE**
24 **EXCLUDED**

25 The Diverters request until October 31, 2017 for Steven Cramer to submit additional written
26 testimony. The Hearing Officer should deny this request.

27 The Prosecution Team requested this hearing on August 30, 2017. The Hearing Team noticed the

28 ¹ Available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/notice_marblemountain.pdf (accessed Oct. 8, 2017).

1 hearing on June 9, 2017. Since then, it extended the deadline for the submission of written testimony three
2 times. Initially, the deadline was July 25, 2017. (Hearing Notice (Jun. 9, 2017), p. 3.) However, the hearing
3 date was postponed and the deadline for written testimony extended to September 8, 2017, or later. (Notice
4 of Postponement of Public Hearing (July 19, 2017), p. 1.) Then the hearing was rescheduled and the
5 deadline for written testimony extended a second time to October 2, 2017. (Notice of Rescheduled Public
6 Hearing (Aug. 16, 2017), p. 2.) Finally, the deadline for written testimony was extended a third time to
7 October 6, 2017. (Notice of Rescheduled Exhibit Deadline (Sep. 30, 2017), p. 1.)

8 The Diverters have already had ample time to prepare written testimony. Steven Cramer's
9 testimony, the Diverters' Exhibit MMR-17, includes photographs of himself visiting the cold water pool
10 near the Klamath River, demonstrating that he has had an opportunity to visit Stanshaw Creek and Marble
11 Mountain Ranch. Regardless, receiving Steven Cramer's additional written testimony on October 31, 2017
12 would leave other parties little time, less than two weeks, to review and examine that testimony. The
13 Diverters' request for additional time to submit written testimony from Steven Cramer should therefore be
14 denied.

15 **IV. THE DIVERTERS' EXHIBITS 11 AND 12 CONSTITUTE HEARSAY**

16 The Diverters' Exhibit MMR-11 is a declaration from David Markin, District Fire Management
17 Office for the United States Forest Service ("USFS"). MMR-11 also includes an e-mail from Mr. Cole to
18 Curtis Coots, the Forest Fire Management Officer for the Mendocino National Forest. (MMR-11, p. 2-3.)

19 Exhibit MMR-12 is a report prepared by Rocco Fiori, an engineering geologist. The Diverters listed
20 Mr. Fiori as a witness on their July 6, 2017 Amended NOI. However, their Request for Additional time
21 indicates he will not appear to provide oral direct testimony.

22 The State Water Resources Control Board ("State Water Board") conducts adjudicative proceedings
23 in accordance with the provisions and rules of evidence set forth in section 11513 of the Government Code.
24 (Cal. Code Regs., tit. 23, § 648.5.1.) Pursuant to the Government Code, "[a]ny relevant evidence shall be
25 admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of
26 serious affairs, regardless of the existence of any common law or statutory rule which might make improper
27 the admission of the evidence over objection in civil actions." (Gov. Code, § 11513, subd. (c).) Parties to
28 State Water Board adjudicative proceedings have the right to call and examine witnesses, introduce exhibits,
cross-examine opposing witnesses; impeach witnesses, and rebut evidence against themselves. (*Id.*, subd.
(b).)

Hearsay evidence is evidence of a statement that was not made by a witness while testifying at the
hearing and is offered to prove the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) In State
Water Board proceedings, hearsay evidence may be used for the purpose of supplementing or explaining
other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would
be admissible over objection in civil actions. (Gov. Code, § 11513, subd. (d).) An objection is timely if
made before submission of the case or on reconsideration. (*Ibid.*) Rules of privilege are effective in State

1 Water Board hearings to the extent that statute otherwise requires the State Water Board to recognize them
2 in a hearing. (*Id.*, subd. (c).) The presiding officer has discretion to exclude evidence if its probative value is
3 substantially outweighed by the probability that its admission will necessitate undue consumption of time.
(*Id.*, subd. (f).)

4 As previously mentioned, Rocco Fiori was listed as a witness on the Diverters' July 6, 2017
5 Amended NOI. However, the Diverters' Request indicates he now will not appear as a witness to provide
6 oral direct testimony. David Markin and Curtis Coots have never been listed as witnesses. This testimony
therefore constitutes hearsay.

7 **V. MOTION TO STRIKE EXHIBITS MMR-12, MMR-13, MMR-14**

8 Exhibits MMR-13 is a report of waste discharge. Exhibit MMR-14 is a water quality monitoring
9 plan. The Diverters have submitted these exhibits, in addition to MMR-12, to the North Coast Regional
10 Water Quality Control Board ("Regional Water Board") to comply with corrective actions ordered in CAO
R1-2016-0031.

11 The Prosecution Team stipulates that these documents have been submitted to the Regional Water
12 Board and reflect the Diverters' efforts to comply with CAO R1-2016-0031. However, CAO R1-2016-0031
13 is a final order. The Diverters submitted a petition for reconsideration of CAO R1-2016-0031 to the State
14 Water Board on September 6, 2016. (Prosecution Team Exhibit WR-145, WR-151.) The State Water Board
15 took no action and the petition was dismissed by operation of law on December 5, 2016. The Diverters filed
16 no legal challenges to CAO R1-2016-0031. Therefore, pursuant to Water Code section 13330, CAO R1-
17 2016-0031 is no longer subject to judicial review. The substantive nature of CAO R1-2016-0031, which
18 includes its findings and corrective actions, are no longer open for consideration. Additionally, the
19 Diverters' compliance with CAO R1-2016-0031 is a matter for determination by the Regional Water Board.
20 The Diverters' Exhibits MMR-12, MMR-13, and MMR-14 therefore do not appear to be offered for any
relevant purpose. These exhibits and the related testimony in Exhibit MMR-1 should be struck and their
admission denied.

21 **VI. CONCLUSION**

22 The Prosecution Team requests that the Hearing Officer limit the Diverters' direct oral testimony to
23 one hour with up to 20 minutes per witness, consistent with the hearing procedures. If the Hearing Officer
24 grants the Diverters additional time for direct oral testimony, the Prosecution Team requests that the
Hearing Officer limit the direct oral testimony of Jeff Meyer and Steven Cramer to 20 minutes each as no
25 cause has been given for their need for additional time.

26 The Prosecution Team further requests that the Hearing Officer deny the Diverters' request for
additional time to provide written testimony from Steven Cramer.

27 In addition, Prosecution Team objects to Exhibits MMR-11 and MMR-12 on the basis that they
28 constitute hearsay.

1 Finally, the Prosecution Team requests that the Hearing Officer deny the admission of the Diverters'
2 Exhibits MMR-12, MMR-13, and MMR-14 on the basis that issues raised by this testimony address CAO
3 R1-2016-0031, a final order no longer subject to review and on the additional basis that compliance with the
4 order is a matter for determination by the Regional Water Board.

5 Respectfully submitted,



6 Kenneth Petruzzelli

7 **OFFICE OF ENFORCEMENT**

8 Attorney for the Prosecution Team

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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
Douglas and Heidi Cole and Marble Mountain Ranch
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PARTIES, CONT'D

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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