

1 KENNETH PETRUZZELLI (SBN 227192)  
2 HEATHER MAPES (SBN 293005)  
3 OFFICE OF ENFORCEMENT  
4 STATE WATER RESOURCES CONTROL BOARD  
5 801 K Street, 23rd Floor  
6 Sacramento, California 95812-0100  
7 Tel: (916) 319-8577  
8 Fax: (916) 341-5896

9 Attorneys for the Prosecution Team

10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD  
11 STATE OF CALIFORNIA

12 In the Matter of: )  
13 DOUGLAS AND HEIDI COLE AND ) PRE-HEARING BRIEF  
14 MARBLE MOUNTAIN RANCH )  
15 \_\_\_\_\_ )

16 **I. INTRODUCTION**

17 The Prosecution Team for the State Water Resources Control Board (State Water Board),  
18 Division of Water Rights (Division) submits this pre-hearing brief in support of a request for the  
19 State Water Board to adopt a draft order (“Draft Order”) finding that Douglas and Heidi and  
20 Marble Mountain Ranch (collectively the “Diverters”) have diverted and used water and continue  
21 to divert and use water in a manner constituting a waste, unreasonable use, unreasonable method of  
22 use, or unreasonable method of diversion; and have diverted water in a manner which is injurious  
23 to public trust resources.<sup>1</sup> (Prosecution Team Exhibit WR-1<sup>2</sup>) The Prosecution Team further  
24 requests that the State Water Board order corrective actions, in accordance with a time schedule, to  
25 eliminate the misuse, and prevent further harm to public trust resources.

26 The Prosecution Team alleges that the Diverters have diverted water and continue to divert  
27 water in violation of Article X, section 2 of the California Constitution and section 100 of the  
28 California Water Code<sup>3</sup>, which provides that the right to water or to the use or flow of water in or  
from any natural stream or water course in this State is and shall be limited to such water as shall  
be reasonably required for the beneficial use to be served, and such right does not and shall not  
extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of

<sup>1</sup> Under regulations implementing Article X, section 2 of the California Constitution and section 100 of the California Water Code, any waste, unreasonable use, unreasonable method of use, or unreasonable method of diverting of water is collectively referred to as a “misuse of water” or “misuse.” (23 Cal. Code Regs. §855, subd. (b).)

<sup>2</sup> Further references to Prosecution Team exhibits will be “WR-[Exhibit Number].”

<sup>3</sup> All references to the “Water Code” shall refer to the California Water Code.

1 diversion of water.

2 **II. BACKGROUND**

3 **A. Marble Mountain Ranch and Its Diversion Works**

4 Marble Mountain Ranch (MMR) is located at 92520, Highway 96 in Somes Bar, Siskiyou  
5 County. MMR is owned and operated by the Cole family. (WR-7; WR-87.) MMR functions as a  
6 commercial guest ranch that offers activities such as horseback trail and arena riding, hiking,  
7 whitewater rafting, jet boat rides, sport shooting, fly fishing and kayaking. The Diverters divert  
8 surface water from Stanshaw Creek, a tributary to the Klamath River in Siskiyou County.

9 Stanshaw Creek has a short but significant section of habitat for Coho salmon  
10 (*Onchorhynchus Kisutch*) below the Highway 96 crossing, including an off-channel pond or pool  
11 located just upstream of its confluence with the Klamath River. (WR-7; WR-141.) Both juvenile  
12 Coho salmon and steelhead have been documented in Stanshaw Creek. This pool is filled by cold  
13 Stanshaw Creek water which is biologically significant for non-natal juvenile Coho salmon because  
14 when high flows in the Klamath River subside, the pool provides a high quality summer and winter  
15 rearing refugia habitat. Although the creek's moderate channel slope and relative lack of suitable-  
16 sized substrate diminishes its importance as a significant spawning stream within the Klamath River  
17 watershed, the stream does harbor a resident steelhead and rainbow trout population, and the off-  
18 channel pond provides excellent habitat for both summer and winter rearing of non-natal Coho  
19 salmon, Chinook salmon, and steelhead trout. The National Marine Fisheries Service (NMFS),  
20 Department of Fish & Wildlife (DFW), and the Karuk Tribe have asserted that the Diverters'  
21 diversion and use of water adversely impact Coho salmon and Steelhead trout in violation of the  
22 federal Endangered Species Act and other laws. (WR-35; WR-36; WR-37; WR-51; WR-52.)

23 The Diverters' point of diversion (POD) is located approximately three-quarters of a mile  
24 upstream of the Highway 96 crossing, on United States (USFS) property. (WR-9; WR-82; WR-87.)  
25 The POD consists of a handmade rock wing diversion dam that extends about halfway across the  
26 creek. A partially lined ditch conveys the water by gravity approximately one-half mile southeast to  
27 MMR. The POD and ditch were constructed in the late 1800s. The Diverters continue to rely on these  
28 diversion works today.

At MMR, a 2-inch PVC water line takes water from the diversion ditch by gravity and is  
routed to a set of water storage containers that the Diverters use for their domestic water supply. A  
subsequent junction splits water used for irrigation and water used for hydropower.

1 The Diverters POD diverts excess water in the a portion of the ditch that has two outfall  
2 structures located downstream from the POD to relieves excess amounts of water diverted prior to  
3 the ditch narrowing approximately 5-feet in width. The outfall structures are located  
4 approximately 50-feet downstream 300-feet downstream from the POD and discharge excess  
5 amounts of diverted water by hand stacking of rocks and flash board risers. Both outfall locations  
6 discharge water back to Stanshaw Creek causing erosion of the stream banks.

6 The Diverters rely on a Pelton wheel to generate hydropower. The penstock uses 200 feet of  
7 fall to turn a Pelton wheel turbine. The hydroelectric generator produces a maximum of 33.9  
8 kilowatts of electricity at 80% turbine efficiency. This is sufficient to meet MMR's peak demand  
9 during its busy season and requires a diversion of about 3 cfs. The Diverters use a diesel generator  
10 when they cannot divert sufficient flows from Stanshaw Creek to meet power demands. The  
11 Diverters discharge their hydropower effluent into a ditch leading to an in-ditch pond  
12 predominantly used for recreation and fire protection. The pond overflow flows into another  
13 unlined ditch and discharges into a tributary to Irving Creek, another tributary to the Klamath River  
14 southeast of MMR.

14 The ditch has a capacity of approximately 3 cfs, but frequently fails, causing severe erosion  
15 and discharging sediment into Stanshaw Creek. (WR-82; WR-87; WR-89.) The POD has no fish  
16 screen and operates independent of demand. The Diverters can only regulate the diversion rate  
17 through a time and labor-intensive process of rearranging and re-stacking the diversion dam's  
18 rocks by hand. As a result, during low-flow periods the Diverters have diverted all or most of the  
19 flow of Stanshaw Creek. The hydropower effluent discharge into Irving Creek causes additional  
20 erosion at the outfall, and discharges eroded soils to an unnamed tributary of Irving Creek. In  
21 addition, the Pelton wheel requires a minimum flow in order to generate a useful amount of  
22 electricity. As a result, during low-flow periods when the Diverters fail to adequately restrict their  
23 diversion, they may divert more water than necessary to meet their consumptive use demands, but  
24 not enough for useful hydroelectric generation. This unused water flows through the Pelton wheel,  
25 serving no beneficial use, but nonetheless discharging into Irving Creek. Conversely, during high  
26 flow periods of the year when MMR has less demand it may still divert up to 3 cfs, but since the  
27 power generated exceeds the demand, MMR must rely on a heat sink resistor to avoid overloading  
28 its electrical system. There is no data on the effect of the heat sink resistor discharge on water  
temperature when discharged to the ditch returning flows to Irving Creek and tributary streams.

1           **B.       The Klamath River**

2                   **1.       Wild and Scenic River System and Fully Appropriated Stream**

3           The Klamath River is a recreational component of the Wild and Scenic Rivers System.  
4 (Pub. Res. Code, § 5093.54.) Under the California Wild and Scenic Rivers Act, “It is the policy of  
5 the State of California that certain rivers which possess extraordinary scenic, recreational, fishery,  
6 or wildlife values shall be preserved in their free-flowing state, together with their immediate  
7 environments, for the benefit and enjoyment of the people of the state.” (Pub. Res. Code, §  
8 5093.50, subd. (a).) Furthermore, “such use of these rivers is the highest and most beneficial use  
9 and is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the  
10 California Constitution.” (*Id.*) The Klamath River was added to the Wild and Scenic Rivers System  
11 in 1982. (Pub. Res. Code, § 5093.54.) State Water Board Orders 91-07 and 98-08 included the  
12 Klamath River in the Declaration of Fully Appropriated Stream Systems. (WR-170; WR-171.) A  
13 fully appropriated stream system includes tributaries. (Water Code §1205, subd. (a).) The State  
14 Water Board has thus noted that “limitations on availability of unappropriated water in a particular  
15 stream should generally apply to tributary streams...” (WR-170.) The fully appropriated  
16 determination for the Klamath River system therefore includes Stanshaw Creek.

17                   **2.       North Coast Water Quality Control Plan**

18           The Water Quality Control Plan for the North Coast Region (Basin Plan) designates  
19 beneficial uses, establishes water quality objectives, contains implementation programs for  
20 achieving objectives, and incorporates, by reference, plans and policies adopted by the State Water  
21 Resources Control Board. (WR-62; WR-142.) Under the Basin Plan, “The beneficial uses of any  
22 specifically identified water body generally apply to all its tributaries.” Irrespective of any claimed  
23 or vested water right, there is no right to discharge waste. (Water Code § 13263, subd. (g).)

24           The Klamath River, within the Middle Klamath River Hydrologic Area, is classified as an  
25 impaired waterbody under section 303(d) of the Clean Water Act for sediment, temperature,  
26 microcystin, organic enrichment/low dissolved oxygen, and nutrients. (WR-13; WR-142.) Relevant  
27 beneficial uses include Cold Freshwater Habitat; Contact and Non-Contact Recreation;  
28 Commercial and Sport Fishing; Spawning, Reproduction and/or Early Development; Rare,  
Threatened or Endangered Species; Municipal; Hydropower Generation; and Migration of Aquatic  
Organisms. (WR-62; WR-142.) The Basin Plan contains a temperature objective for intrastate  
waters that prohibits any alteration of natural receiving water temperature “unless it can be  
demonstrated to the satisfaction of the North Coast Regional Water Quality Control Board

1 (Regional Water Board) that such alteration in temperature does not adversely affect beneficial  
2 uses.” (*Id.*) The Basin Plan also includes site specific dissolved oxygen objectives; a Total  
3 Maximum Daily Load (TMDL) Addressing Temperature, Dissolved Oxygen, Nutrient, and  
4 Microcystin; and an Implementation Plan for the Klamath and Lost River basins. (*Id.*)

5 The Basin Plan prohibits point source waste discharges in the Klamath River and its  
6 tributaries, other than as authorized in the Thermal Plan, Ocean Plan, and the Point Source  
7 Measures section of the Basin Plan. (*Id.*)

8 The implementation plan for the Klamath River includes a Thermal Refugia Protection  
9 Policy that provides enhanced protection of thermal refugia and includes a policy directive and  
10 recommendation for State Water Board staff to consider the impact of increased diversions in  
11 tributaries that provide thermal refugia when issuing water right permits for surface water  
12 diversions in the Klamath River Basin. (*Id.*) The Basin Plan identifies Stanshaw Creek as a  
13 tributary to the Klamath River known to provide thermal refugia. (WR-62.) According to the  
14 Thermal Refugia Protection Policy,

15 Thermal refugia are typically identified as areas of cool water created by inflowing  
16 tributaries, springs, seeps, upwelling hyporheic flow, and/or groundwater in an  
17 otherwise warm stream channel offering refuge habitat to cold-water fish and other  
18 cold water aquatic species. The refugia created by tributaries in the Klamath River  
19 Basin are typically in the plumes and pools of cold water that form in the mainstem  
20 at the tributary confluence. Refugia can also exist in tributary streams themselves.  
21 Thermal refugia are essential to the support of the cold water fishery because they  
22 moderate naturally elevated temperatures in the mainstem Klamath River.

23 (*Id.*)

24 The Basin Plan Policy for the Implementation of the Water Quality Objectives for  
25 Temperature states that “To attain and maintain the water quality objectives for temperature, the  
26 Regional Water Board and its staff will implement programs and collaborate with others in such a  
27 manner as to prevent, minimize, and mitigate temperature alterations associated with... activities  
28 with the potential to reduce instream flows or reduce sources of cold water, including cold water  
refugia.” (WR-185.) In addition, the Regional Water Board shall take various actions to achieve  
temperature objectives and implement temperature TMDLs, including EPA-established TMDLs.  
Such actions include coordinating “with the Division of Water Rights by participating in the water  
right application and petition process, providing monitoring recommendations, conducting joint  
compliance inspections, submitting data in support of 401 certifications related to water diversions  
and/or facilities regulated by the Federal Energy Regulatory Commission, and any other

1 appropriate means to help ensure that the terms of water right permits and licenses are consistent  
2 with the water quality objectives for temperature.” (WR-185.)

### 3 **C. Claimed Water Rights**

4 The Diverters divert under a pre-1914 claim of appropriation and a Small Domestic Use  
5 Registration. (WR-7.)

6 The Diverters’ pre-1914 claim of appropriation consists of two Statements of Water  
7 Diversion and Use (Statements) - S015022 and S016375. S015022, filed by Douglas Cole on  
8 December 1, 1998, claims a diversion works capacity of 2.5 cfs and an annual average diversion of  
9 0.49 cfs for domestic, power, irrigation, fish and wildlife protection and/or enhancement, fire  
10 protection and stock watering without seasonal restrictions. (WR-32.) S016375, filed under the  
11 name Marble Mountain Ranch on May 28, 2010, claims an average diversion rate of up to 3 cfs for  
12 irrigation and domestic uses without seasonal restrictions. (WR-61.) The Diverters also have a  
13 Small Domestic Use Registration, D030945R, filed on December 1, 1998. The purpose of the small  
14 domestic registration is to support a 10 acre-foot pond. (WR-58.)

15 The Diverters’ pre-1914 claims of appropriation originate from an 1867 claim by Mr. E.  
16 Stanshaw for six hundred (600) miner’s inches, about 15 cfs, to be used for mining, domestic and  
17 irrigation purposes on a large patented parcel that includes the present-day MMR property. (WR-7;  
18 WR-80; WR-87.) The patent date for the original parcel was March 27, 1911. (WR-15; WR-16.)  
19 Since then, the original property was subdivided, hydraulic mining ceased, and the quantities of  
20 water put to beneficial use diminished significantly, with only limited amounts, approximately 0.35  
21 cfs, put to beneficial use for domestic use and irrigation. (WR-82.)

22 In 1989, the Diverters’ predecessors in interest, Robert and Mary Young (the Youngs), filed  
23 water right Application A029449 to appropriate up to 3 cfs for hydroelectric power purposes.<sup>4</sup>  
24 (WR-4.) They claimed the pre-1914 appropriation for all or part of the water sought in the  
25 application. (*Id.*) However, permitting staff determined that, based on the amount of water  
26 consistently applied to beneficial uses in the five years prior to filing of the application, most of the  
27 pre-1914 right had been lost to forfeiture and only 0.49 cfs remained. (*Id.*) Later, permitting staff  
28 determined that 0.02 cfs would be sufficient to support the claimed domestic uses and 0.09 cfs  
would be sufficient to support the claimed irrigation uses. (*Id.*) According to the Youngs, their  
predecessor in interest informed them that the hydroelectric turbine was not installed until

---

<sup>4</sup> Application 29449 also sought to appropriate an additional 1 cfs for fish enhancement purposes, but this was later abandoned.

1     sometime between 1940 and 1942. (*Id.*) Even then, hydroelectric generation was limited until the  
2     1950s. (*Id.*)

3             In 1994, the Diverters purchased the property and took over Application A029449. (WR-  
4     24.) In 2000, several parties filed protests to the Diverters' application, including NMFS and the  
5     Department of Fish & Game (DFG). (WR-35; WR-36; WR-37; WR-38; WR-39; WR-42.) Both  
6     agencies agreed to dismiss their protests if the Diverters agreed to bypass flow. (WR-51; WR-52.)  
7     NMFS required 2.5 cfs to dismiss its protest, assuming the Diverters would not return hydroelectric  
8     effluent back to Stanshaw Creek. (WR-51.) DFG required 1.5 cfs to dismiss its protest, assuming  
9     the Diverters would return hydroelectric effluent back to Stanshaw Creek. (WR-52.) By  
10    comparison, the field report notes that, according to estimates by NMFS, unimpaired flow in  
11    Stanshaw Creek was less than 3 cfs from late July through October. (WR-40.) The Diverters agreed  
12    to alter the diversion system to return flows back to Stanshaw Creek, but only if they obtained  
13    outside funding from grants or other sources to cover the costs. When the Diverters failed to secure  
14    grant funding, they indicated they would not implement measures necessary for DFG or NMFS to  
15    dismiss their protests. (WR-64.) They further asserted they had a pre-1914 claim of appropriation  
16    to divert water from Stanshaw Creek at a minimum of 3.6 cfs for all their irrigation and domestic  
17    consumption, as well as hydroelectric power production – more than the estimated unimpaired flow  
18    for a third of the year. (WR-67; WR-69.) Since the Diverters now relied on a pre-1914 claim of  
19    appropriation, the Division cancelled Application A29449 with an order dated January 7, 2013.  
20    (WR-70.)

21             In 2014, the Mid-Klamath Watershed Council, with a grant from the National Fish and  
22    Wildlife Foundation (NFWF) Coho Enhancement Fund, hired Lennihan Law, P.C. to draft a report  
23    that would independently and neutrally evaluate the MMR water rights (Lennihan Report) to  
24    inform stakeholders and a physical solution process. (WR-80.) Cascade Stream Solutions drafted  
25    an accompanying technical report. (WR-82.) Various parties, including the Diverters and their  
26    legal counsel, provided information and documentation for the reports. They also commented on  
27    the draft report before it was finalized. Although the Diverters' legal counsel disagreed with the  
28    draft report's legal analysis and the weight given to certain facts, it did not dispute the facts  
29    themselves, such as the timeline of development of MMR or the description of MMR's diversion  
30    works and operations. (WR-86.) The Lennihan Report determined that, although MMR likely had a  
31    pre-1914 appropriation, most of the right had been lost due to diminished use and forfeiture, and

1 only about 1.16 cfs remained.<sup>5</sup> (WR-80.) However, between the Lennihan Report's completion and  
2 its publication, the Third District Court of Appeal held in *Millview County Water District v. State*  
3 *Water Resources Control Board* (2014) 229 Cal.App.4<sup>th</sup> 879, that forfeiture of a water right claim  
4 only occurs when a claimant's use of less than the full appropriation lasts at least consecutive five years  
5 and that at least some of that period has been in the face of a conflicting claim. (WR-80; WR-87.)

6 The Diverters now claims only 3 cfs under the pre-1914 appropriative right. (WR-110.)  
7 Recent consumptive use estimates range from 0.183 cfs to 0.235 cfs, depending whether the  
8 Diverters are supporting a fire camp. (WR-9; WR-140.) The Diverters use the remaining flow  
9 diverted to generate hydroelectric power with the Pelton wheel. (WR-82.)

#### 10 **D. Current Investigation and Enforcement Action**

11 In July 2013, Division enforcement staff received a complaint alleging the Diverters were  
12 dewatering Stanshaw Creek, and that Stanshaw Creek was being dewatered in most summers as a  
13 result, causing impacts to public trust resources. (WR-9; WR-87.) Then, on December 17, 2014,  
14 stakeholders, agencies, and tribes met in Orleans, California to discuss the recently completed  
15 Lennihan Report. (WR-9; WR-83.) Before the meeting, Division enforcement staff met with Mr.  
16 Cole for a facility tour to document the diversion facility, diversion facility operation, conveyance  
17 system, place of use and water discharge to Irving Creek. (WR-9; WR-83.) During the meeting  
18 there were multiple allegations of fish kills and harm to public trust resources. (WR-9.) After the  
19 meeting, Division enforcement staff discussed the fish kill allegations and flows protective of  
20 public trust resources with the Karuk Tribe and NMFS. (*Id.*)

21 On February 12, 2015, enforcement staff from the Division and Regional Water Board  
22 inspected the Diverters' diversion works. (WR-87; WR-89.) During the inspection, Regional Water  
23 Board enforcement staff identified evidence of significant erosion and failure in the diversion ditch,  
24 as well as evidence of erosion at the Irving Creek outfall. (WR-89.) Division enforcement staff  
25 identified diversion works incapable of reasonably regulating the diversion to simultaneously  
26 support MMR's demands and avoid harming public trust resources or downstream water rights.  
27 (WR-87.) Division enforcement staff also identified a series of leaking water tanks. (*Id.*)

28 On December 3, 2015, Division and Regional Water Board enforcement staff issued a  
combined letter to the Diverters. (WR-105.) The letter included inspection reports from Division  
and Regional Water Board enforcement staff. (*Id.*) The letter also included a draft cleanup and

---

<sup>5</sup> The 1.16 cfs included 0.35 cfs for domestic and irrigation uses, 0.31 cfs for power generation, and 0.5 cfs for reasonable conveyance losses.



1 abatement order (CAO) from the Regional Water Board. (*Id.*) The letter stated that the Regional  
2 Water Board and the Division enforcement staff had completed their investigations and would  
3 pursue formal enforcement action if the Diverters failed to respond to the letter in 30 days to  
4 discuss a response substantially addressing the concerns outlined in the inspection reports. (*Id.*)

5 The Division's Report of Inspection (ROI) incorporated the analysis and findings of the  
6 Lennihan Report and Cascade Stream Solutions Report. (WR-87.) It found that the Lennihan  
7 Report was an "exhaustive and authoritative review of the available record" and largely agreed  
8 with its findings. (WR-87.) In light of the recent *Millview* decision, however, the ROI concluded  
9 that MMR likely had a pre-1914 appropriative right as high as 3 cfs. (WR-87.) Although instream  
10 public trust resources may constitute a conflicting claim, the law remained insufficiently  
11 developed, as well as the evidence to conclude public trust resources constituted a conflicting claim  
12 during the potential forfeiture period. (*Id.*) The Division ROI nonetheless determined a misuse of  
13 water was occurring and that the misuse of water had harmed or was threatening to harm public  
14 trust resources. (*Id.*)

15 On January 14, 2016, Division and Regional Water Board staff met with Mr. Cole and  
16 various other stakeholders in Orleans, California. (WR-109.) NMFS staff presented instream flow  
17 recommendations. (*Id.*) The attendees also discussed the Regional Water Board and Division  
18 inspection reports and recommended corrective actions. (*Id.*) At the meeting, Mr. Cole indicated  
19 the Diverters had yet to institute any changes in their POD or methods of measuring their diversion  
20 and bypass flows. (*Id.*)

21 After the meeting, Diverters notified Division and Regional Water Board enforcement staff  
22 that they now claimed only 3 cfs under the pre-1914 appropriation. (WR-110.) In the letter, the  
23 Diverters claimed to have repaired all leaking water tanks identified in the Division inspection  
24 report. (*Id.*) The Diverters also outlined immediate and long-term solutions to address concerns  
25 raised in the Regional Water Board's CAO and the Division's ROI. (*Id.*) Nonetheless, due to the  
26 lack of timelines, specificity, identified consultants, and other factors, the Division and Regional  
27 Water Board enforcement staff concluded that the letter did not demonstrate a commitment to  
28 actions substantially addressing the concerns outlined in the Regional Water Board's CAO or the  
Division's ROI. (WR-112.) On February 12, 2016, the Regional Water Board and Division  
enforcement staff notified the Diverters in a joint letter that, in light of the response, they would  
pursue formal enforcement action. (*Id.*) However, they encouraged the Diverters to continue  
developing and implementing corrective actions, explaining that corrective actions the Diverters  
implemented could be considered in an enforcement proceeding. (*Id.*)

1 On March 24, 2016, the Diverters stated in a letter that they were committed to working  
2 with the Regional Water Board and Division to implement corrective actions. (WR-115.) The  
3 Diverters stated they had retained Cascade Stream Solutions, an engineering firm, to implement the  
4 improvements and were working with Mid Klamath Watershed Council to identify funding  
5 assistance. (*Id.*) The Diverters proposed a scope of work and time schedule that included installing  
6 a 6” pipe in the conveyance ditch by spring 2016 and finalizing a restoration monitoring plan by  
7 April 2016. (*Id.*) The Diverters would return hydropower effluent to Stanshaw Creek by June 2018.  
8 (*Id.*) They indicated they would voluntarily limit their diversion, temporarily, to only support their  
9 consumptive uses. (*Id.*) However, they further stated they would not abandon any portion of their 3  
10 cfs pre-1914 claim and once efforts to resolve stakeholder concerns and determine the best approach  
11 to maintain full use of the Stanshaw Creek ditch system were complete, they would resume diverting up  
12 to 3 cfs. (*Id.*)

13 On August 3, 2017, NMFS issued a letter to the Deputy Director for the Division with flow  
14 recommendations for Stanshaw Creek. (WR-141.) The flow recommendation applies to all  
15 diverters on Stanshaw Creek and requires a 90% bypass flow after water diverted for non-  
16 consumptive use is returned and a 2 cfs minimum bypass at a POD. (*Id.*) In the course of the  
17 Division’s investigation, enforcement staff identified two other diverters in the Stanshaw Creek  
18 watershed. After discussions with NMFS, these diversions were deemed too small to have any  
19 significant impacts, leaving MMR the only diversion of significance on Stanshaw Creek. (*Id.*)

20 On August 30, 2017, the Assistant Deputy Director responsible for the Division’s  
21 Enforcement Program requested that the State Water Board hold a hearing to consider a draft order  
22 (Draft Order) finding that the Diverters are misusing water or have misused water, particularly in  
23 light of impacts on public trust beneficial uses, and ordering corrective actions in accordance with a  
24 time schedule. (WR-2; WR-3.)

#### 25 **E. Parallel Enforcement and Regulatory Actions**

26 On August 4, 2016, the Regional Water Board issued CAO No. R1-2016-0031 (Final CAO)  
27 for the Diverters to eliminate the threat of future discharges and to clean up and abate the effects of  
28 discharges of soil, rock and miscellaneous debris into Irving Creek, Stanshaw Creek, and the  
Klamath River. (WR-142.) The Final CAO addresses water quality violations the Diverters cause  
with their diversion facility and conveyance system. Complementary, coordinated enforcement  
action using both the State Water Board’s water right enforcement authority and the Regional  
Water Board’s water quality enforcement authority is necessary to fully address water quality  
violations, misuse of water, and public trust impacts. The Diverters filed a petition with the State

1 Water Board on September 6, 2016 seeking review of the Regional Water Board CAO. (WR-145.)  
2 The State Water Board took no action and the petition was dismissed by operation of law on  
3 December 5, 2016. The Diverters filed no legal challenges to the Final CAO, therefore pursuant to  
4 Water Code section 13330 the Final CAO is no longer subject to judicial review . Since issuing the  
5 Final CAO, the Regional Water Board has issued three notices of violation. (WR-152; WR-162;  
WR-167.)

6 On February 6, 2017, DFW informed the Diverters that Fish & Game Code section 1602  
7 required the Diverters to notify DFW of the act of substantially diverting a stream. (WR-159.) The  
8 Diverters notified DFW and, on June 9, 2017, DFW issued a draft lake or streambed alteration  
9 agreement (LSA). (WR-164) The draft LSA, if final, would require the Diverters to undertake  
10 various actions to avoid harming public trust resources, including installing a fish screen,  
11 measuring the rate of diversion consistent with Senate Bill 88, piping the diversion ditch, and  
returning water diverted and not put to consumptive use back to Stanshaw Creek. (*Id.*)

#### 12 **F. Reasonable Use and the Public Trust Doctrine**

13 The State Water Board has the authority to prevent illegal diversions and the waste or  
14 unreasonable use of water, regardless of the basis under which the right is held. (*Cal. Farm Bureau*  
15 *Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429, *as modified* (Apr. 20,  
16 2011).) The State Water Board also has the authority to protect public trust resources, such as  
17 fisheries, wildlife, aesthetics, and navigation. The public trust doctrine provides that the State of  
18 California, as sovereign, “owns all of its navigable waterways and the lands lying beneath them as  
19 trustee of a public trust for the benefit of the people.” (*National Audubon Society v. Superior Court*  
20 (1983) 33 Cal.3d 419, 434 [internal quotations omitted].) The purpose of the public trust “evolve[s]  
21 in tandem with the changing public perception of the values and uses of waterways.” (*Id.*)  
22 Ecological and recreational values are among those values protected by the public trust. (*Id.* at 434-  
23 435.) The State’s obligation as trustee is to preserve public trust property from harmful diversions  
24 by water rights holders (*Id.* at 445-448.) The public trust doctrine prevents any party from  
25 acquiring a vested right to divert or use water in a manner harmful to the interests protected by the  
26 public trust. (*Id.* at 445.) The State Water Board has the obligation to protect the interests of the  
27 public in trust resources, including interests in commerce, fisheries, recreation, and ecology,  
28 whenever feasible. (*Id.*) All uses of water, including public trust uses, must conform to the standard  
of reasonable use. (*National Audubon Society, supra* 33 Cal.3d at 443.) The reasonable use and  
public trust doctrines are reinforcing and synergistic. Diverting and using water in a manner that

1 harms interests protected by the public trust may also constitute a misuse of water.<sup>6</sup> The Diverters’  
2 diversion and use of water in a manner that harms interests protected by the public trust constitutes  
3 a misuse of water.

4 Water Code section 275 provides that the State Water Board shall take all appropriate  
5 proceedings or actions to prevent the misuse of water. Under the California Code of Regulations,  
6 title 23, section 856 State Water Board staff shall investigate an alleged misuse of water: (1) when  
7 an interested person shows good cause; or (2) when the State Water Board itself believes misuse  
8 may exist. If an investigation indicates misuse of water has occurred, State Water Board staff shall  
9 notify interested persons and allow a reasonable period of time in which to terminate the misuse or  
10 demonstrate to the satisfaction of the State Water Board staff that misuse has not occurred. (23 Cal.  
11 Code Regs. § 857, subd. (a).) At the end of the time period set by State Water Board staff and upon  
12 the application of any interested person, the Board may hold a hearing to determine whether a  
13 misuse has occurred or continues to occur. (23 Cal. Code Regs. § 857, subd. (b).)

14 This investigation was conducted as part of the State Water Board’s continuing authority to  
15 prevent the misuse of water. The Prosecution Team gave the Diverters until June 30, 2018 to  
16 eliminate the misuse of water - the same date the Diverters proposed in their March 24, 2016 letter.  
17 (WR-1; WR-2; WR-3.) However, in order to ensure progress and avoid additional delay and harm  
18 to public trust resources, the Prosecution Team set a series of project milestones based on the time  
19 schedule provided by the Diverters. Many of deadlines the Diverters proposed has since lapsed  
20 before the Deputy Director requested a hearing and every deadline in the proposed time schedule  
21 was moved to at least 45 days after the date of the hearing request. The Prosecution Team then  
22 requested a hearing date 90 to 120 days after the first project milestone. If the Diverters met the  
23 first project milestone, the parties could request to postpone the hearing. At this time, the  
24 Prosecution Team has no evidence the Diverters have met any of the project milestones.

25 After a hearing, the State Water Board may issue an order requiring the prevention or  
26 termination of the misuse of water. (23 Cal. Code Regs. § 857, subd. (d).) Under Water Code  
27 section 1846, a person or entity may be liable for an amount not to exceed \$500 per day for  
28 violating an order adopted by the State Water Board. (Water Code § 1846, subd. (a)(2).) The State  
Water Board may also issue a cease and desist order for the violation of any order issued under  
Water Code section 275. (Cal. Water Code § 1831, subd. (d)(3).)

---

<sup>6</sup> For example, the State Water Board has the authority to enact regulations to proactively prevent the misuse of water for frost protection in order to prevent harm to threatened and endangered salmonids. (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4<sup>th</sup> 1463, 1489.)

1 **III. KEY ISSUES**

2 **A. Key Issue 1 - Does the past or current diversion or use of water by Douglas and**  
3 **Heidi Cole and Marble Mountain Ranch constitute a waste, unreasonable use,**  
4 **unreasonable method of use, or unreasonable method of diversion of water,**  
5 **particularly in light of any impacts to public trust resources?**

6 Evidence shows the Diverters have misused water in the past and continue to misuse water.  
7 Evidence further shows that the Diverters' misuse of water threatens public trust resources.

8 Evidence of misuse includes:

- 9 • The Diverters lack a measurement device and fail to employ a measurement method  
10 capable of reasonably measuring their rate of diversion. (WR-9; WR-87.) A direct diversion  
11 for a claimed right of more than 1,000 acre feet a year must be measured on an hourly or  
12 more frequent basis. (23 Cal. Code Regs. § 933.) The Diverters' current claim of 3 cfs  
13 translates to approximately 2,168 acre-feet over the course of the year. (WR-7; WR-69.)
- 14 • The POD lacks a fish screen. (WR-7; WR-9; WR-87.)
- 15 • NMFS has recommended flows protective of public trust resources. (WR-9; WR-141.) The  
16 Diverters do not implement these flows and, although they claim they have temporarily  
17 limited their diversions, they have not committed to implementing these flows in the future.  
18 (WR-9; WR-168.) To the contrary, they have stated they will resume diverting up to 3 cfs  
19 from Stanshaw Creek and discharging their hydropower tailwater into Irving Creek and its  
20 tributaries once efforts to resolve stakeholder concerns and a determination of the best  
21 approach to maintain full use of the Stanshaw Creek ditch system are complete. (WR-115.)
- 22 • The Diverters have been accused of dewatering Stanshaw Creek and fish kills have been  
23 identified in the cold water pool that provides refugia at the confluence with the Klamath  
24 River. (WR-87.) The Diverters have the only diversion of significance on Stanshaw Creek.  
25 (WR-141.) Furthermore, the Diverters' claim of 3 cfs exceeds Stanshaw Creek's estimated  
26 flows from late July through October. (WR-40.)
- 27 • The Diverters do not return water back to Stanshaw Creek that they divert and do not  
28 consumptively use. (WR-7; WR-9; WR-82.) This significantly increases net water  
depletions from Stanshaw Creek to the detriment of public trust resources. The NMFS flow  
recommendations require returning non-consumptive diversions back to Stanshaw Creek.  
(WR-141.)
- Transmission losses in the ditch have generally been estimated at approximately 0.5 cfs.  
(WR-9; WR-87.) The transmission losses increase the amount of water the Diverters must

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

divert in order to support their beneficial use requirements. The transmission losses are more than double the consumptive use amounts, which range from 0.183 cfs to 0.235 cfs.

- The Diverters divert water independent of demand. (WR-9; WR-82; WR-87.) During low flow periods, they may divert more than necessary to meet consumptive use requirements, but not enough to generate any useful power with the Pelton wheel. At such times, water flows through the penstock and discharges to Irving Creek, serving no beneficial use, while causing erosion and discharging sediment. Conversely, during high-flow periods with low demand, such as periods when few people occupy the ranch, the Diverters may nonetheless divert at the full capacity of the ditch and generate more power than necessary - enough that they must rely on a heat sink resistor to avoid overloading the system.
- The Diverters lack a reasonable method of regulating their diversion. As a result, they cannot implement any bypass flow requirement or limit their diversion to prevent waste.
- The ditch fails and overtops, causing erosion and discharging sediment into Stanshaw Creek. (WR-9; WR-13; WR-87; WR-88; WR-89.)

**B. Key Issue 2 –**

**1. If the past or current diversion or use of water by Douglas and Heidi Cole and Marble Mountain Ranch constitutes a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, what corrective actions, if any, should be implemented, and with what time schedule should they be implemented?**

The State Water Board should order corrective actions and a time schedule to ensure the Diverters eliminate the misuse of water. Evidence shows that the Diverters have misused water and continue to misuse water. Previous collaborative efforts spanning more than twenty years have failed to ameliorate the misuse, as have voluntary commitments. The Diverters’ initial efforts in response to the December 3, 2015 letter were encouraging. However, they have since fallen far behind their proposed time schedule. (WR-9.) They have further stated that returning flow to Stanshaw Creek is unlikely absent funding. (WR-168.) Since the Diverters’ current hydropower use makes implementing the NMFS flow recommendation difficult, unless they return flows diverted and not consumptively used back to Stanshaw Creek, the Diverters likely will not implement the NMFS flow recommendation. (*Id.*) Voluntary solutions lacking legal accountability will not eliminate the misuse of water.

An enforceable order issued by the State Water Board is therefore necessary to ensure the Diverters eliminate the misuse of water. Key corrective actions for the Diverters and the basis for

1 such actions include:

- 2 • An energy and water efficiency audit. This will provide information to assist in identifying
- 3 project alternatives and evaluating whether project alternatives will eliminate the misuse of
- 4 water and protect public trust beneficial uses.
- 5 • Installing a locking headgate, valve, or other device, appropriately sized and capable of
- 6 adequately regulating the POD.
- 7 • Measure water diversions consistent with the requirements of Title 23, sections 931-937 in
- 8 the Code of Regulations.
- 9 • Eliminating unreasonable conveyance losses in the ditch. Potential physical solutions
- 10 discussed thus far include piping or lining the ditch. Conveyance losses occur through
- 11 seepage, overtopping, and ditch failures. Although conveyance losses, such as those
- 12 typically observed in an unlined ditch, may be considered reasonable in some
- 13 circumstances, in this instance conveyance losses increase the amount of water the
- 14 Diverters must divert from Stanshaw Creek to support their beneficial use requirements and
- 15 decrease the amount of flow that would otherwise remain in Stanshaw Creek to support
- 16 public trust beneficial uses. Regardless, conveyance losses that result in erosion or a
- 17 discharge of pollutants or create a nuisance are per se unreasonable.
- 18 • Implementing the NMFS flow recommendation to cease harming or threatening to harm
- 19 public trust beneficial uses. Since the NMFS flow recommendation requires returning water
- 20 diverted and not put to consumptive use back to Stanshaw Creek, implementing the NMFS
- 21 flow recommendation would simultaneously eliminate hydropower effluent discharged to
- 22 Irving Creek.
- 23 • Require submittal of all past due annual reports for Statements 15022 and 16375 and timely
- 24 submittal of all future annual reports.

25 **2. How should the implementation time schedule for any corrective actions**

26 **be coordinated with the requirements of the Cleanup and Abatement**

27 **Order issued by the North Coast Regional Water Quality Control**

28 **Board?**

The implementation time schedule for corrective actions must be coordinated with the requirements of the Regional Water Board's CAO. The CAO is a final order. Its findings, time schedule, and corrective actions are no longer subject to judicial challenge or review. If the implementation time schedule is not coordinated with the requirements of the CAO, the Diverters could be subjected to conflicting or inconsistent obligations. The time schedule and requirements in

1 the Regional Water Board CAO should therefore be considered carefully.

2 **IV. CONCLUSION**

3 Evidence shows the Diverters have misused water and continue to misuse water. There is  
4 also evidence that the Diverters' misuse of water threatens public trust resources. The Diverters  
5 will likely continue misusing water absent an order from the State Water Board that will hold them  
6 legally accountable. The Prosecution Team therefore requests that the State Water Board find that  
7 the Diverters have misused water and continue to misuse water. The Prosecution Team further  
8 requests that the State Water Board order the Diverters to cease misusing water and order  
9 corrective actions, in accordance with a time schedule, to eliminate the misuse.

9 Respectfully submitted,

10 

11 Kenneth Petruzzelli

12 **OFFICE OF ENFORCEMENT**

13 Attorney for the Prosecution Team

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



**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.)

<p><b>DIVISION OF WATER RIGHTS</b> Prosecution Team Ken Petruzzelli, Attorney III State Water Resources Control Board Office of Enforcement 801 K Street, 23rd Floor Sacramento CA 95814 <a href="mailto:kenneth.petruzzelli@waterboards.ca.gov">kenneth.petruzzelli@waterboards.ca.gov</a> <a href="mailto:heather.mapes@waterboards.ca.gov">heather.mapes@waterboards.ca.gov</a></p>	<p><b>DOUGLAS AND HEIDI COLE, MARBLE MOUNTAIN RANCH</b> Barbara A. Brenner 1414 K Street, 3rd Floor Sacramento, CA 95814 <a href="mailto:barbara@churchwellwhite.com">barbara@churchwellwhite.com</a> <a href="mailto:kerry@churchwellwhite.com">kerry@churchwellwhite.com</a></p>
<p><b>CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE</b> Stephen Puccini, Staff Counsel Nathan Voegeli, Staff Counsel 1416 Ninth St. Sacramento, CA 95814 <a href="mailto:stephen.puccini@wildlife.ca.gov">stephen.puccini@wildlife.ca.gov</a> <a href="mailto:nathan.voegeli@wildlife.ca.gov">nathan.voegeli@wildlife.ca.gov</a></p>	<p><b>CALIFORNIA SPORTFISHING PROTECTION ALLIANCE</b> Chris Shutes 1608 Francisco St. Berkeley, CA 94703 <a href="mailto:blancapaloma@msn.com">blancapaloma@msn.com</a></p> <p>Michael Jackson P.O. Box 207 75 Court Street Quincy, CA 95971 <a href="mailto:mjatty@sbcglobal.net">mjatty@sbcglobal.net</a></p>
<p><b>KLAMATH RIVERKEEPER</b> Paul Kibel 2140 Shattuck Ave., Suite 801 Berkeley, CA 94704-1229 <a href="mailto:pskibel@waterpowerlaw.com">pskibel@waterpowerlaw.com</a></p>	<p><b>KARUK TRIBE</b> Fatima Abbas, General Counsel 64236 Second Ave. Happy Camp, CA 96039 <a href="mailto:fabbas@karuk.us">fabbas@karuk.us</a></p>

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

**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.)

<p><b>NATIONAL MARINE FISHERIES SERVICE</b> Christopher Keifer, Attorney NOAA Office of General Counsel, 501 W. Ocean Blvd., Suite 4480 Long Beach, CA 90802 <a href="mailto:christopher.keifer@noaa.gov">christopher.keifer@noaa.gov</a> <a href="mailto:margaret.tauzer@noaa.gov">margaret.tauzer@noaa.gov</a> <a href="mailto:justin.ly@noaa.gov">justin.ly@noaa.gov</a></p>	<p><b>OLD MAN RIVER TRUST</b> Konrad Fisher 100 Tomorrow Rd. Somes Bar, CA 95568 <a href="mailto:k@omrl.org">k@omrl.org</a></p>
<p><b>PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES</b> Noah Oppenheim Regina Chichizola P.O. Box 29196 San Francisco, CA 94129-8196 <a href="mailto:regina@ifrfish.org">regina@ifrfish.org</a></p>	