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DOUGLAS COLE AND HEIDI COLE AND MARBLE MOUNTAIN RANCH

BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

## I. Introduction

Douglas and Heidi Cole (the "Coles"), owners and operators of Marble Mountain Ranch ("Ranch") submit this closing brief for the public hearing that commenced on November 17, 2017, to determine the following two key issues with regard to the Coles' diversion and use of water at the Ranch:

> 1) Does the past or current diversion or use of water by Douglas and Heidi Cole and Marble Mountain Ranch constitute a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, particularly in light of any impacts to public trust resources?
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> 2) 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? How should the implementation time schedule for any corrective actions be coordinated with the requirements of the Cleanup and Abatement Order issued by the North Coast Regional Water Quality Control Board?

(Notice of Public Hearing, p. 2)

The evidence presented at the public hearing does not support a finding that the Coles' diversion and use of water at the Ranch constitutes "a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, particularly in light of any impact to public trust resources." The Coles have established that they put all water they divert to beneficial use and use of earthen ditches to convey that water is not a waste, unreasonable use, or unreasonable method of diversion of water. Moreover, the sediment and ditch failure of the conveyance infrastructure is not a waste or unreasonable use, unreasonable method of use, or unreasonable method of diversion based on the use of ditches, such as the Coles, throughout the state with similar features to the Coles', including similar ditch failures.

The evidence the National Marine Fisheries Service ("NMFS") witnesses provided shows that Stanshaw Creek was some of the best habitat for fishery resources in the mid-Klamath Basin in 2012, during a time when the Coles were diverting their full pre-1914 water right of three (3) cubic feet per second ("cfs") of water for domestic and hydropower use at the Ranch. Additionally, the Prosecution Team, the agencies responsible for fishery resources, NMFS and the California Department of Fish and Wildlife ("CDFW"), along with the Karuk Tribe have not presented any evidence establishing any impact from the Coles' diversion to the fishery resources at Stanshaw Creek. Impacts to fishery resources at Stanshaw Creek are the same as the impacts that occur throughout the mid-Klamath Basin and limiting the Coles' diversion is to benefit fishery resources, not a remedy to address harm to those resources. The evidence provided instead demonstrates that there are other intervening human influences beyond the Coles' diversion at the refugia pool at the confluence of Stanshaw Creek and the Klamath River.

Further, the State Water Resources Control Board ("State Water Board") lacks the jurisdiction to require that the Coles implement improvements at the Ranch under the public trust doctrine. The public trust doctrine does not provide the State Water Board with jurisdiction to regulate an established pre-1914 water right holder after the State

Water Board has already made the determination that a pre-1914 water right has been properly established.

With regard to key issue number two, should the State Water Board make a finding of waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, the Coles' initial time schedule for implementing many of the improvements outlined in the Draft Order No. 2017-00XX-DWR ("Draft Order") and the North Coast Regional Water Quality Control Board's ("Regional Water Board") Cleanup and Abatement Order ("CAO") was based on the availability of grant funding. As the Prosecution Team's witness Joey Howard testified, upon issuance of both the Draft Order and the CAO, the Coles would have had to permanently reduce their diversion to keep the funding they had secured for improvements at the Ranch or lose the grant funding that was necessary to implement projects on the time schedule they initially proposed. (Howard, Hearing Transcript Vol. 1, 56:9-57:2.)

The Coles lost grant funding in order to ensure they could continue to divert water for hydropower use. The Coles' financial information further supports the necessity of the grant funding to implement improvements at the Ranch. The expenses associated with the projects in both the Draft Order and the CAO will cost into the millions of dollars. The financial information provided demonstrates that the Coles do not have sufficient assets to fund the requirements under the CAO and the projects proposed under the Draft Order that will cost into the millions of dollars. Thus, the Coles have demonstrated that they lack the ability to pay in conformance with the requirements established in the State Water Board's Water Quality Enforcement Policy, Ability to Pay and Ability to Continue in Business evaluation. Any coordination of the requirements under the CAO and any order issued as a consequence of the public hearing, should allow for flexibility to address the time required to establish funding for all required projects.

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## II. Legal Argument

### A. Key Issue Number 1

#### 1. The Coles diversion and use of water at the Ranch does not constitute a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.

A strict definition of what constitutes an unreasonable use or waste of water has never been established. (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1473.) Instead, the determination is made by evaluating the circumstances in which the water is used. (*Ibid.*) The circumstances of the Coles' diversion and use of water at the Ranch are similar to systems across Northern California that rely on old mining ditches, including the required ongoing maintenance of those ditches to address ditch failures and sediment buildup.

##### a. The use of earthen ditches to convey water is not a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water

The State Water Board has found that use of an unlined ditch in a desert environment to irrigate crops where improvements could result in significant conservation was not a waste of water. (California State Water Resources Control Board, Imperial Irrigation District Alleged Waste and Unreasonable Use of Water, Decision 1600 (June 21, 1984) [finding that failing to implement a conservation plan was an unreasonable use of water, but the unlined ditches themselves were not an unreasonable use) ("Imperial Irrigation District decision"].) This is in line with the California Supreme Court's holding that appropriators, as a matter of law, possess the right to divert water through earthen ditches, provided that conveyance losses are reasonable. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489.)

The Coles' diversion ditch is similar to those that were not an unreasonable use or waste of water in the Imperial Irrigation District decision and are in the vein of other similar "old mining ditches" used to convey water "for hundreds of miles" across Northern California. (Meyer, Hearing Transcript Vol. 2, 138:4-21.) The Coles' diversion uses unlined ditches to convey water to the Ranch and is operated in a manner to keep

conveyance loss to a minimum. (Cole, Hearing Transcript Vol. 2, 177:10-11; Exhibit MMR-1, pg. 4.) The calculated ditch loss for the Coles' diversion ditches has been estimated to be between 15 percent and 33 percent which is a "reasonable" amount. (Meyer, Hearing Transcript Vol. 2, 139:16-19.) Given the reasonableness of the ditch loss and the use of these types of mining ditches to convey water in many other areas of Northern California, the circumstances establish that the Coles' use of earthen ditches is not a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion.

All of the water the Coles divert is put to a beneficial use, as has been demonstrated in their testimony and exhibits for the public hearing. (*See* Cole, Hearing Transcript Vol. 2, 178:1-17, 179:1-17; Meyer, Hearing Transcript Vol. 2, 137:1-21; Exhibit MMR-1 and Exhibit MMR-18.) These uses, detailed in both Mr. Cole's and Mr. Meyer's written and oral testimony, include domestic use for residents and guests at the Ranch, hydropower generation, irrigation, stock watering, dust control, recreation, and fire protection. (Cole, Hearing Transcript Vol. 2, 178:1-17, 179:1-17; Meyer, Hearing Transcript Vol. 2, 137:1-21; Exhibit MMR-1, pg. 2-3; Exhibit MMR-18, pg. 2-3.)

The Coles have also implemented improvements at the Ranch during their over 20 years of ownership to improve the efficiency of their diversion and use of water. (Cole, Hearing Transcript Vol. 2, 175:22 – 176:4; 178:4-21; 179:1-17.) These improvements include replacing leaking conveyance infrastructure, improving storage capacity for domestic use water to allow for ditch maintenance and improvement projects, and upgrading the electrical system, including replacing the exiting Pelton wheel from the "gold rush era" that was used at the time the Coles purchased the Ranch. (Cole, Hearing Transcript Vol. 2, 175:22 – 176:4; 178:4-21, 179:1-17, 191:19-192:10; Anderson, Hearing Transcript Vol. 2, 31:6-19.) The replaced Pelton wheel both improved the amount of electricity the Coles could generate from their diversion of water and allows the Coles to vary the amount of water they divert to operate the Pelton wheel when their electrical demand is lower. (Cole, Hearing Transcript Vol. 2, 179:10-17;

180:21-181:19.) Therefore, the Coles are engaged in a beneficial use of the water they divert, have increased efficiency at the Ranch throughout their ownership of it, and are not engaged in waste, unreasonable use of water, unreasonable method of use, or an unreasonable method of diversion through their conveyance of water to the Ranch using earthen ditches.

b. The Coles maintenance and use of their diversion infrastructure ensures the diversion is not a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water

The Prosecution Team alleges that the Coles are engaged in a waste, unreasonable use, unreasonable method of use, or an unreasonable method of diversion through the buildup of sediment in the Coles' diversion ditch and the Stanshaw Creek system in general, as well as for failures of the earthen walls of the Coles' diversion ditch. (Exhibit WR-1, pg. 14-15, ¶¶ 28, 31, 32, 33.) Ditch failure is not an unusual event for old mining ditches such as the Coles' diversion, "especially in very wet winters." (Meyer, Hearing Transcript Vol. 2, 139:25-140:1.) Ditch failure events for these types of ditches can include "slides that fill the ditch and ... cause the ditch to be overtopped ... tress can fall and damage the ditch ... rockslides ... [a]nd occasionally there are just failures over time where the downstream-side berm will fail, and ... spill water down the hillside." (Meyer, Hearing Transcript Vol. 2, 140:6-12.) Old mining ditches like the Coles' diversion remain in place because replacing the earthen ditches with a piped or lined conveyance can be expensive and accessing the ditches on hillside such as those at the Ranch can be difficult. (Meyer, Hearing Transcript Vol. 2, 140:24-141:14.)

Because ditch failure is common for old mining ditches, the Coles regularly inspect the diversion to address ditch failure, sediment build up, overtopping, and seepage concerns and follow operational practices to avoid such events. (Cole, Hearing Transcript Vol. 2, 184:1-21; Exhibit MMR-1, pg. 8.) The Coles make a practice of inspecting the diversion, clearing sediment that has built up along the bottom of the ditch and use the sediment removed to reinforce the ditch berm. (Cole, Hearing Transcript

Vol. 2, 177:5-8; 185:11-17.) Additionally, to avoid the possibility of overtopping during storm events, the Coles rely on the storage capacity of their improved domestic water system and "shutdown the ditch". (Cole, Hearing Transcript Vol. 2, 184:15-18; Cole, Hearing Transcript Vol. 4, 277:16-278:5.)

The practice of shutting down the ditch was in place during the time the photographs the State Water Board provided as Exhibit WR-197 that were taken as part of a State Water Board staff visit to the area near the Coles' point of diversion on January 19, 2017. (Anderson, Hearing Transcript Vol. 4, 229:2-6; Exhibit WR-197.) The photos included in Exhibit WR-197 show the impact of storms on the Coles' diversion and the water present in the ditch is a consequence of runoff from the storm. (Cole, Hearing Transcript Vol. 4, 277:16-278:5.) Through the Coles' practice of shutting down the ditch while storm events occur, areas showing impacts from downed trees and other disturbances along the ditch berm do not result in discharge of water or sediment into waters of the state from the ditch because there is no water being diverted. (Cole, Hearing Transcript Vol. 4, 277:20-278:5.) The Coles' diversion management during the historically wet 2016-2017 winter season resulted in a fully functional diversion during the summer of 2017, as shown in Exhibit MMR-10. (Cole, Hearing Transcript Vol. 2, 194:12-15; Cole, Hearing Transcript Vol. 4, 274:9-275:8.) Exhibit MMR-10 shows that the Coles' diversion is maintained to a level that fire crews are able to rely upon the diversion and the water it transports to fight wildfires. (Cole, Hearing Transcript Vol. 2, 192:15-193:7; Cole, Hearing Transcript Vol. 4, 274:9-275:8.) The fires depicted in Exhibit MMR-10 occurred in the summer of 2017, just months after the photographs offered in Exhibit WR-197 were taken. (Cole, Hearing Transcript Vol. 2, 192:15-193:7, 196:13-19.) The fires in summer 2017 came within one quarter (1/4) to one half (1/2) mile of the Ranch, but the Ranch did not burn. (Cole, Hearing Transcript Vol. 2, 192:15-193:7.)

Finally, there is no clear source of the sediment in Stanshaw Creek, which contradicts the Prosecution Team's allegation that the Coles' diversion is a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion

based on the discharge of sediment from the Coles' diversion to Stanshaw Creek. Stanshaw Creek is a "high gradient stream" with steep slopes with the capacity to carry large amounts of sediment. (Cole, Hearing Transcript Vol. 2, 186:22-25; Cole, Hearing Transcript Vol. 3, 87:17-88:17; Anderson, Hearing Transcript Vol. 2, 39:17-20.) During winter storm events, Stanshaw Creek, like "all streams," including creeks near Stanshaw Creek, such as Ti Creek, during winter rains "transport[s] sediment." (Feiler, Hearing Transcript Vol.2, 42:9-10; Soto, Hearing Transcript Vol. 4, 63:15-17, 63:21-64:1.) The steep banks of Stanshaw Creek and its surrounding canyon walls contribute to this naturally occurring sediment transport, often failing and adding sediment to Stanshaw Creek. (Cole, Hearing Transcript Vol. 2, 187:2-6, 13-16; Cole, Hearing Transcript Vol. 3 87:17-88:17, Cole, Hearing Transcript Vol. 4, 273:19274:8.) Beyond the naturally occurring slide of sediment into Stanshaw Creek from surrounding canyon walls, Stanshaw Creek itself can carry and deposit large amounts of gravel and sediment. (Cole, Hearing Transcript Vol. 2, 187:18-24, Cole, Hearing Transcript Vol. 3, 23:7-9; Anderson, Hearing Transcript Vol. 2, 13-16.) Further, the State Water Board and Regional Water Board staff testified that they observed erosion at the Coles' diversion, but no discharge of sediment and they did not calculate a sediment budget for either Stanshaw Creek or the Coles' diversion to determine how much sediment occurs naturally in Stanshaw Creek. (Feiler, Hearing Transcript Vol. 2, 38:10-13, 43:18-24; Anderson, Hearing Transcript Vol. 2, 38:18.)

**2. The Coles' diversion and use of water at the Ranch does not constitute a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, particularly in light of any impacts to public trust resources.**

The Prosecution Team and the fishery agencies have failed to show that the Coles' diversion has any impact on public trust resources, specifically fishery resources. [1]

[1] The Prosecution Team acknowledges that they relied upon data from the Karuk Tribe and other agencies with regard to impacts to public trust resources from the Coles' diversion. (Feiler, Hearing Transcript Vol. 2 25:20-23, 45:16-19, 49:17-19; Anderson, Hearing Transcript Vol. 2, 26:9-25.)

Instead, the evidence shows that the refugia pool at Stanshaw Creek was producing larger fish than other habitats in the mid-Klamath Basin in the winter of 2012-2013 while the Coles were diverting their full pre-1914 three (3) cfs water right. The evidence also demonstrates that the refugia pool at Stanshaw Creek can provide both summer and winter refugia habitat that experiences similar impacts as other refugia pools across the Klamath Basin. Any requirements placed on the Coles with regard to their diversion and use of water enhances the habitat for fishery resources; it does not address harm to those fishery resources caused by the Coles. Finally, the refugia pool at the confluence of Stanshaw Creek and the Klamath River is a system that supported fish growth in 2012, but significant human intervention has taken place since that time. Thus, the Coles diversion is not the source of any impacts to the Stanshaw Creek refugia pool and their diversion and use of water does not constitute a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion in light of any impacts to public trust resources.

a. Direct observation of Stanshaw Creek shows healthy growth of Coho salmon

Direct observation of the Stanshaw Creek system occurred in 2012 as part of NMFS witness Shari Whitmore's research for her master's thesis. Her testimony of her observation of Stanshaw Creek in 2012 was that "the Stanshaw Creek habitat was supporting healthy growth of Coho salmon" and the Coho salmon that "overwintered and stayed in the [Stanshaw Creek] habitat through the winter ... had the highest growth rates of fish that [she] found in any other habitat in any other season" in the mid-Klamath Basin. (Whitmore, Hearing Transcript Vol. 3, 154:22-23; 155:3-4, 7-9.) Ms. Whitmore's observation of the Stanshaw Creek refugia pool occurred in the summer of 2012 through the spring of 2013, before NMFS issued its recommended bypass flow letter in 2016. (Whitmore, Hearing Transcript Vol. 3, 171:17-20; Exhibit NMFS-3; Exhibit NMFS-9, pg. 12.) Therefore, Ms. Whitmore's observations occurred while the Coles' diversion practice was to divert their full pre-1914 three (3) cfs right to allow them to operate their Pelton wheel and generate hydroelectric power year-round.

Ms. Whitmore's testimony indicates that the Stanshaw Creek system, while the Coles were diverting their full pre-1914 three (3) cfs right, benefits fishery resources in the mid-Klamath Basin because "the fish that are occupying [the Stanshaw Creek refugia pool] habitat [during winter] … have high rates of growth [and] … a higher value to the populations that they come from." (Whitmore, Hearing Transcript Vol. 3, 157:10-15.) "[S]molt, the fish that are out migrating into the ocean, … have a higher rate of survival in ocean conditions … when they are a larger size. And larger smolt produce larger adults. And larger adults are important to a population because they are more fecund and more successful at spawning and reproduction for the next generation." (Whitmore, Hearing Transcript Vol. 3, 157:15-22.)

Thus, Ms. Whitmore's testimony confirms that the Coles' diversion during winter months is not negatively impacting public trust resources of fisheries at the Stanshaw Creek refugia pool. The larger size and higher growth rates of Coho salmon that are overwintering at the Stanshaw Creek refugia pool are benefitting the population of the Coho salmon in the mid-Klamath Basin through greater fecundity and reproduction success rates. (Whitmore, Hearing Transcript Vol. 3, 157:15-22.) The larger size, higher growth rate, and greater fecundity occurred while the Coles were diverting their full pre-1914 three (3) cfs right throughout the year. The direct, recorded observation of the Stanshaw Creek system does not support a finding that the Coles' diversion and use of water from Stanshaw Creek impacts public trust resources in a manner that constitutes a waste, an unreasonable use, an unreasonable method of use, or a method of diversion.

Ms. Whitmore's testimony goes on to note that "in the event there was additional water in Stanshaw Creek, I don't know how many additional fish may be benefitted …". (Whitmore, Hearing Transcript Vol. 3, 205:16-19.) Witnesses from the fishery agencies and the Karuk Tribe echo Ms. Whitmore's testimony, indicating that fishery resources could be benefitted, **not** that fishery resources were being harmed and conditions are required to address that harm. (Tauzer, Hearing Transcript Vol. 3,182:17-21, 184:1-20; Soto, Hearing Transcript Vol. 4, 97:3-15; Cramer, Hearing Transcript Vol. 1, 91:17-20.)

Therefore, the Coles' diversion does not harm fishery resources is a manner that constitutes a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion.

b. Fishery resources in the refugia pool at Stanshaw Creek experience the same or lesser impacts as fishery resources throughout the Klamath Basin

The Stanshaw Creek refugia pool "provides both over winter and cold-water, summer refugia habitat." (Whitmore, Hearing Transcript Vol. 3, 153:4-6; Bean, Hearing Transcript Vol. 3, 226:9-10; Soto, Hearing Transcript Vol. 4, 19:24-20:5; Cramer, Hearing Transcript Vol. 1, 100:4-8.) As discussed above, the Stanshaw Creek refugia pool's winter habitat supports healthy growth of Coho salmon. (Whitmore, Hearing Transcript Vol. 3, 154:22-23.) Moreover, CDFW staff indicated that there is no evidence that the Stanshaw Creek refugia pool is impaired by the Cole's diversion during winter flows. (Bull, Hearing Transcript Vol. 3, 252:10-13.). During the winter, the refugia pool "is inundated by the mainstem Klamath River" which provides "flushing and refreshing of that habitat ... that brings nutrients from the mainstem in and provides ... food resources to the fish that are rearing" in the refugia pool during the winter. (Whitmore, Hearing Transcript Vol. 3, 155:16-25; 156:1-2.) Therefore, there is no harm to fishery resources during the winter.

In the low flow summer months that can extend into September and October, when the refugia pool is providing cold-water refugia, the impact on fishery resources in the refugia pool is no different than those that occur throughout the Klamath Basin. Increased summer temperatures and reduced flow in the Klamath River are basin-wide impacts. (Whitmore, Hearing Transcript Vol. 3, 151:6-9; Soto, Hearing Transcript Vol. 4, 16:10-16; 103:9-12; Cramer, Hearing Transcript Vol. 1, 100:15-21.) Many cold water refugia pools along the Klamath River as well as the mainstem Klamath River have been observed to include "diseased, dying or dead fish" during the summer months, as the Klamath River is known to have diseased fish. (Soto, Hearing Transcript Vol. 4, 70:18-25; 78:8-12; Whitmore, Hearing Transcript Vol. 3, 193:3-8.) The impacts from summer

temperature increases and reduction in flows in the Klamath River have resulted in "a lot of [rescue] efforts" to move juvenile salmon trapped in pools of water that were near going dry along the Klamath River to safer habitats. (Soto, Hearing Transcript Vol. 4, 79:12.) These rescue efforts include one Mr. Soto described in 2001 that was completed in cooperation with the Yurok Tribe. (Soto Hearing Transcript Vol. 4, 79:14-24.) The rescue effort was required at Independence Creek, a part of the Klamath River Basin, because Klamath River flows dropped. (Soto, Hearing Transcript Vol. 4, 79:14-24.) The rescue efforts establish that, as far back as 2001, there have been impacts to fisheries in the Klamath Basin beyond Stanshaw Creek that have resulted in dead fish in the Klamath Basin, including the 2002 fish kill that CDFW studied in the Lower Klamath River. (Soto, Hearing Transcript Vol. 4, 85:1-86:19.)

Ms. Whitmore's observation of Stanshaw Creek occurred in 2012, which she indicated was "a fairly good water year." (Whitmore, Hearing Transcript Vol. 3, 173:2-3.) During September and October 2012, while Ms. Whitmore was engaged in observing Stanshaw Creek for her research, flow measurements were taken at Stanshaw Creek. The measurement taken on September 20, 2012, above the Coles' point of diversion found that 2.5 cfs of flow was present in Stanshaw Creek. (Tauzer, Hearing Transcript Vol. 3, 172:5-14.) The measurement taken on October 4, 2012, again above the Coles' point of diversion, found that flow in Stanshaw Creek was 2.0 cfs. (Tauzer, Hearing Transcript Vol. 3, 172:15-19.) Ms. Whitmore also testified that during her observation of the Stanshaw Creek refugia pool, the Stanshaw Creek "habitat was functional in the sense that fish were growing at a high rate of growth and had, likely, an increased survival rate throughout the rest of their life." ( Whitmore, Hearing Transcript Vol. 3, 206:3-6.)

The flow measurements of 2.0 cfs and 2.5 cfs during a "fairly good water year" that supports a functional habitat with "fish ... growing at a high rate of growth" undermines NMFS' bypass flow recommendation and demonstrates that fishery resources at Stanshaw Creek are not being harmed as they are being harmed elsewhere

in the Klamath Basin. (Whitmore, Hearing Transcript Vol. 3, 173:2-3; 206:3-6.) NMFS' bypass flow is "based on a study by Richter in 2011 where a 90 percent bypass is recommended as a bypass flow that will preserve a high level of ecological function." (Tauzer, Hearing Transcript Vol. 3, 161:2-5.) Ms. Whitmore's study of the Stanshaw Creek refugia pool demonstrates that 2.0 to 2.5 cfs flow in Stanshaw Creek, above the Coles' point of diversion, is sufficient to provide functional habitat for fishery resources at Stanshaw Creek. Mr. Cramer concurs in this assessment, opining that the data suggests a bypass flow of 2.0 cfs is "much more than is necessary." (Cramer, Hearing Transcript Vol. 1, 112:9-22.) The NMFS recommendation requires a 90 percent bypass flow, with a floor of a 2.0 cfs being bypassed, along with a return of non-consumptively used water to Stanshaw Creek. (Tauzer, Hearing Transcript Vol. 3, 161:17-21; Exhibit NMFS-3.) The return of non-consumptively used water to Stanshaw Creek rather than discharging it to Irving Creek was originally suggested in 2001, and has just been included since that original recommendation with no justification or benefit. (Tauzer, Hearing Transcript Vol. 3, 181:24-182:5.) The recommendation has remained, but it is not necessary based on the already functioning habitat present at Stanshaw Creek without it and the fishery habitat that may be benefited in Irving Creek. (Cramer, Hearing Transcript Vol. 1, 85:4-86:21, 101:10-12.)

NMFS' recommendation is based on a study that "preserve[s] a high level of ecological function." (Tauzer, Hearing Transcript Vol. 3, 161:2-5.) Generally, a flow recommendation based on a study is used as a conservative approach, but "the right way to determine what a stream would need to have in its course in order to sustain fisheries' values" is to rely on site specific circumstances. (Cramer, Hearing Transcript Vol. 1, 77:20-78:4.) The site-specific data collected in 2012 establishes that high ecological function is already present at Stanshaw Creek without a bypass flow or a return of non-consumptively used water. Further, Stanshaw Creek is a dynamic system. (Soto, Hearing Transcript Vol. 4, 97:9; Cramer, Hearing Transcript Vol. 1, 100:15-21; Whitmore, Hearing Transcript Vol. 3, 174:2-5.) The system changes based on the

circumstances each season and, in some years, it can be "prudent ... to maximize the water flow into the [refugia] pond [at Stanshaw Creek] as an enhancement..." or to engage in other projects such as moving rocks to redirect flow to keep the habitat in good condition. (Soto, Hearing Transcript Vol.4, 64:3-11; 81:3-13; 97:12-13; Cramer, Hearing Transcript Vol. 1, 100:15-21.) Redirecting and adding additional flow from Stanshaw Creek to the refugia pool therefore enhances the habitat, it does not address harm to fishery resources that the data shows are already functional. Consequently, the Coles are not engaged in a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, specifically as it relates to public trust resources.

c. There has been and continues to be human intervention at the Stanshaw Creek refugia pool that impacts public trust fishery resources

In the fall of 2013, a grant funded restoration project was implemented at the Stanshaw Creek refugia pool that was identified as "heavily used." (Soto, Hearing Transcript Vol. 4, 62:11-15; Exhibit WR-184.) The project was undertaken to "expand the volume of the pool" to "make the pool more resilient" following a buildup of sediment at the refugia pool from several sources. (Soto, Hearing Transcript Vol. 4, 40:18-19; Cramer, Hearing Transcript Vol. 1, 93:6-20.) The final grant report submitted as Exhibit WR-184, indicates that the Karuk Tribe and the Mid-Klamath Watershed Council would be performing monitoring of the site that included fish counts, water quality, and structural monitoring. (Exhibit WR-184, pg. 5.) The Fish Presence/Absence data submitted by the Karuk Tribe do not include data that indicates the outcome of any monitoring of the refugia pool following the completion of the 2013 restoration project. (Exhibit KT-6.) Therefore, it is impossible to know what impact, if any, that project had on the fishery resources in the refugia pool at Stanshaw Creek. (Cramer, Hearing Transcript Vol. 1, 94:23-95:24.) This is especially relevant because the project postdates Ms. Whitmore's observations of the refugia pool at Stanshaw Creek in the summer of

2012 through the spring of 2013, showing beneficial habitat conditions for fishery resources at the Stanshaw Creek refugia pool.

In October 2017, Steven Cramer visited the refugia pool at Stanshaw Creek and observed further human intervention there. (Cramer, Hearing Transcript Vol. 1, 93:13-15; 100:11-21 Exhibit MMR-21, pg. 12.) He observed that "extensive berms of hand-stacked rocks" had been placed between the refugia pool and the Klamath River. (Cramer, Hearing Transcript Vol. 1, 91:15-16; Exhibit MMR-21, pg. 12.) The hand stacked rock berms had been moved in the Stanshaw Creek floodplain during the summer of 2017, through a grant from the National Fish and Wildlife Foundation for "creek mouth enhancement ... along the Mid Klamath River to enhance fish passage during the summer for these juvenile fish to easily access refuge." (Soto, Hearing Transcript Vol. 4, 64:8-21.) Mr. Soto testified that the hand stacked rocks that were placed near the confluence of the refugia pool and the Klamath River were there "to make step pools from the pond down to the Klamath River" and those rocks would not block fish passage out of the refugia pool. (Soto, Hearing Transcript Vol. 4, 68:24-69:6.) However, Mr. Cramer's evaluation of the hand stacked berms was that they blocked "any fish passage between the [refugia] pool and the Klamath River." (Exhibit MMR-21, pg. 12; Cramer, Hearing Transcript Vol.1, 93:14-16.)

There is no consistent monitoring data available to confirm either Mr. Soto's or Mr. Cramer's evaluation of the hand stacked rocks, making it impossible to tell if those structures have any impact on fishery resources in the refugia pool. The few estimates that have been made since Ms. Whitmore's study of the Stanshaw Creek refugia pool and the 2013 grant funded project indicate that the refugia pool is performing less well since the 2013 grant funded project and the Coles' voluntarily reduced diversions during the drought years of 2015 and 2016. (Cramer, Hearing Transcript Vol. 1, 95:8-96:11; Soto, Hearing Transcript Vol. 4 79:25-80:11.) Those impacts are separate from the Coles' diversion and use of water from Stanshaw Creek. These intervening human activities at the refugia pool are likely influencing the outcomes at Stanshaw Creek

without any impact from the Coles' diversion. (Cramer, Hearing Transcript Vol. 1, 100:11-21.) Consequently, there is no clear source of any impact to fishery resources at the refugia pool.

### 3. The State Water Board Lacks the Jurisdiction to Require the Coles to Change the Operation of the Diversion Based on Public Trust Resources.

In addition to the use of the public trust doctrine in Key Issue Number 1, with regard to the determination of waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion at the Ranch, the Draft Order relies upon the public trust doctrine as a basis for prohibiting discharges to Irving Creek, decreasing the diversion year-round, and for submitting plans for review and approval by the State Water Board, Regional Water Board, and other responsible agencies, to return flows to Stanshaw Creek by April 17, 2017. (Anderson, Hearing Transcript Vol. 1, 200:1-3, 9-11; Exhibit WR-1, pg. 16: ¶ 38; 18 ¶ 47.) The public trust doctrine, however, cannot be used to invoke the State Water Board's jurisdiction in this case.

The public trust doctrine requires the State Water Board to consider the effects of a proposed diversion on trust resources, including fish species and ecological values in connection with the issuance of post-1914 permits. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) To date, no California court has necessarily held that the public trust doctrine would allow the State Water Board to assert its jurisdiction and curtail rights held by pre-1914 appropriators.

To invoke the public trust doctrine, the State Water Board must also show that the diversion *clearly* harms the interests protected by the public trust. (*National Audubon Society, supra,* 33 Cal.3d 419; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82.) Potential impacts do not suffice, nor do unsupported allegations. In the present case, the Draft Order proposes corrective action based on NMFS' theoretical calculations of in-stream flow requirements. (Anderson, Hearing Transcript Vol. 1, 203:12-25; Exhibit WR-1, pg. 15-16 ¶ 34.) The State Water Board lacks substantial evidence of harm to trust resources in both its issuance of the Draft

Order and through the evidence presented during the public hearing. The evidence provided by the fishery agencies and the Prosecution Team, as discussed in Section II(A)(2), above, fails to show any harm from the Coles' diversion. This defect is compounded by the fact that the Coles have taken significant steps to eliminate the possibility of harm to trust resources by curtailing diversions during low flow periods and the intervening human activities at the refugia pool. (Soto, Hearing Transcript Vol.4, 64:3-11; 81:3-13; 97:12-13; Cramer, Hearing Transcript Vol. 1, 100:15-21.) Invoking the public trust doctrine in this context would require an extraordinary finding of harm to justify the extension of this principle to holders of pre-1914 rights. The evidence presented does not support this finding or the extension of established case law regarding the public trust doctrine. Consequently, a finding of waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion cannot be made in this matter.

B. Key Issue Number 2

**1. The Coles' Proposed Time Schedule to Address Projects in the CAO and Draft Order was based on Grant Funding that was No Longer Available upon Issuance of the CAO and Draft Order.**

The time schedules included in both the CAO and Draft Order were based on a time schedule the Coles submitted to both the State Water Board and Regional Water Board for activities they would undertake in response to a letter they received in December 2014, notifying the Coles of the potential for enforcement action to be taken against them. (Exhibit WR-115.) The proposed projects and the time schedule the Coles provided were based on a grant the Coles had secured "that was executed through the Mid Klamath Watershed Council". (Howard, Hearing Transcript Vol. 1, 44:16, 19-23.) Following issuance of the NMFS bypass flow recommendation for the Coles' diversion in the summer of 2016, the Coles proposed an interim measure of a 6-inch pipe being placed in the diversion ditch to convey water used for consumptive and domestic purposes

to the Ranch. (Howard, Hearing Transcript Vol. 1, 49:15 – 50:6; Cole, Hearing Transcript Vol. 2, 188:23-189:12.) The 6-inch pipe project was not initially contemplated under the grant, but an amendment to the grant would have allowed the project to be funded through the grant from the Mid Klamath Watershed Council. However, the grant was "pulled". (Howard, Hearing Transcript Vol. 1, 50:9-10.)

The grant was pulled as a consequence of the Coles not installing the 6-inch pipe and the issuance of the CAO and Draft Order. As part of using grant funding to implement the 6-inch pipe solution, the Coles would "have had to give up their right to divert additional water for power or install additional pipe". (Howard, Hearing Transcript Vol. 1, 50:9-10; 56:13-15; Cole, Hearing Transcript Vol. 2, 188:23-189:12; Cole, Hearing Transcript Vol. 4, 264:13-265:6.) Funding to install any additional pipe would likely have had to come from the Coles, without the financial assistance of a grant. In order to pursue the 6-inch pipe solution, the Coles would "no longer [be] diverting the amount [of water] that they were using for hydropower." (*Ibid.*)

The Coles were left with the impossible choice of implementing a project that would result in a de facto waiver of their established pre-1914 water right to divert three (3) cfs of water for among other things, consumptive, domestic and hydroelectric use, or to lose grant funding and proceed on their own with limited financial resources while facing the potential for enforcement actions against them. (Cole, Hearing Transcript Vol. 2, 188:23-189:12; Cole, Hearing Transcript Vol. 4, 264:13-265:6.) The Coles ended up losing the grant funding and the 6-inch pipe was never installed. (Cole, Hearing Transcript Vol. 4, 264:13-265:6.) The loss of the grant funding also made the time schedule and projects the Coles originally proposed, which were subsequently included in the CAO and Draft Order with a revised time schedule, impossible to achieve. (Howard, Hearing Transcript Vol. 1, 58:6-10.) With these changed circumstances, the Coles were

not able to comply with the time schedule in either the CAO or the Draft Order. Coordination of the CAO and the Draft Order, should one be issued, must take into account the Coles' changed circumstances with regard to their grant funding.

**2. The Projects proposed in the Draft Order are Prohibitively Expensive.**

The Draft Order requires that the Coles complete a number of improvements at the Ranch, including the return of flow from the hydroelectric plant to Stanshaw Creek. (Anderson, Hearing Transcript Vol. 1, 205:6-10; Exhibit WR-1, pg. 19.) The current system in place at the Ranch discharges the flow from the hydroelectric plant into Irving Creek, when the Coles divert water for that purpose. (Murano; Hearing Transcript Vol. 1, 185:6-9; Exhibit MMR-1, pg. 3-4.) Previous estimates of the costs associated with the return flow project have been "a minimum of $500,000." (Howard, Hearing Transcript Vol. 1, 57:13-14.) The permitting costs alone are likely to be a range of $196,000 to $235,000, using a Mitigated Negative Declaration, not a full Environmental Impact Report ("EIR") for the environmental analysis of the return flow project. (Meyer, Hearing Transcript Vol. 2, 141:24-25; Exhibit MMR 18, Attachment A.) Given that figure for permitting costs based on a Mitigated Negative Declaration, the project cost to return flow to Stanshaw Creek is likely in excess of $1 million. (Howard, Hearing Transcript Vol. 1, 57:17-19; Cole; Hearing Transcript Vol. 2, 199:3-15.) The return flow project is "quite expensive because it dealt with putting water down a Caltrans right-of-way that also had a fiber-optic line and had bedrock." (Howard, Hearing Transcript Vol. 1, 57: 9-11.) To implement that project in addition to the other projects contained in the Draft Order and CAO, the Coles would likely need to expend well into the millions of dollars. (Cole; Hearing Transcript Vol. 2, 199:3-15; Cole, Hearing Transcript Vol. 3, 91:6-10, 91:16-92:20, 93:4-24.) The Coles' financial resources are insufficient to address such a large capital outlay. (Cole, Hearing Transcript Vol. 2, 176:20-177:3 [discussing the need to approach projects

on a priority basis given sufficient capital to complete each project].)

The Coles' tax returns show an operating loss for their business, organized as an S type corporation. The Coles established their business as an S type corporation during the 2015 tax year. (Cole, Hearing Transcript Vol. 2, 244:2-12; Exhibit MMR-16, pg. 22.) As part of the move to that type of business organization, the amount of the capital expenditures that the Coles make each year are not fully included in the information for each tax year, but are instead depreciated over time. (Cole, Hearing Transcript Vol 3, 97:4-9.) There are several expenditures that are not fully included on the Coles' business tax returns, including livestock and vehicle costs, Ranch infrastructure improvements, loan payments on the Ranch mortgage and second mortgage, and medical expenses. (Cole, Hearing Transcript Vol. 3, 99:9-19, 100:9-19, 100:24-101:21.) The Coles' tax returns are a "partial picture" of their finances. (Cole, Hearing Transcript Vol. 3, 101:20; Elder, Hearing Transcript Vol. 4, 245:13-17.) The expense of the requirements under the Draft Order and the CAO, into the millions of dollars far exceed the resources included in the Coles' tax returns, and those tax returns do not include all of the Coles' outstanding liabilities, based on the use of depreciation of capital expenditures for an S Corp, outstanding loans, and other expenses. (Howard, Hearing Transcript Vol. 1, 57:13-15, 17-19; Meyer, Hearing Transcript Vol. 2, 141:24-25; Elder, Hearing Transcript Vol. 4, 242:1-19, 243:25-244:15, 250:21-25; Exhibit MMR 18, Attachment A.)

The State Water Board's Water Quality Enforcement Policy establishes the criteria the State Water Board uses to evaluate the ability of a diverter to pay a penalty or a business to continue in business as a consequence of enforcement activities. (Elder, Hearing Transcript Vol. 4, 211:1-4.) The State Water Board has been provided the Coles' financial information, but it has not addressed the cost of all of the requirements of the CAO and Draft Order in concert with the Coles' financial resources. (Elder, Hearing Transcript Vol. 4, 212:5-15, 250:12-20.) It is

both the lack of financial resources and the expense of the projects included in both the CAO and Draft Order that make the Coles' compliance cost prohibitive.

Therefore, any requirements for improvements at the Ranch, should an order be issued, must take into account the Coles' limited financial resources to fund those improvements and the cost of any required projects otherwise the Coles will be forced into bankruptcy. However, even if the Coles were in a position to finance the requirements under the CAO and Draft Order, the Prosecution Team has clearly failed to show any harm to public trust resources directly caused by the Coles use of their pre-1914 water right and the State Water Board lacks the jurisdiction under the public trust doctrine to require the Coles to implement the unnecessary projects.

## III. Conclusion

The Coles are not engaged in a waste, unreasonable use, unreasonable method of use, or an unreasonable method of diversion of water at the Ranch. All water diverted at the Ranch is put to beneficial use. The Prosecution Team, the fishery agencies and the Karuk Tribe have not presented evidence showing that the Coles' diversion is harming or impacting public trust resources. Instead, Stanshaw Creek provides functional habitat producing larger, more fecund fish. Further, the State Water Board lacks the jurisdiction to curtail the Coles' diversion and use of water under the public trust doctrine as established pre-1914 water right holders.

However, should the State Water Board issue an order, it should consider the following facts. The Coles were relying on an existing grant in their initial proposal and time schedule for resource improvements at the Ranch, but that grant was rescinded upon the issuance of the CAO and Draft Order. Implementing those projects, that will require in excess of $1 million on a time schedule similar to the one the Coles proposed is cost prohibitive. Their tax returns only provide a partial picture of the Coles' financial position. Therefore, an order should not be issued, but should the State Water Board issue an order, any required improvement should take into account the Coles' inability to

pay for the large projects contemplated in the Draft Order.

Finally, the Coles have been cooperative throughout this process and have voluntarily engaged in conservation activities throughout their over 20-year ownership of the Ranch. Even Mr. Soto noted the Coles' efforts, stating that in 2015 and 2016, years of severe drought, the Coles voluntarily reduced their diversions and he observed no fish kills at Stanshaw Creek during that time despite observing such kills at refugia at other creek confluences within the Klamath River. (Soto, Hearing Transcript Vol. 4, 79:25-80:11.) With the release of NMFS' bypass flow recommendation, the Coles reduced their diversions during low flow periods and did not divert water for hydroelectric power generation. (Cole, Hearing Transcript Vol. 2, 199:16:24.) With an ongoing lack of permit and resolution of the bypass flow issue through the public hearing process, the Coles have continued to not divert water for hydroelectric power use at significant cost to them.

Respectfully submitted.

Dated: March 29, 2018

CHURCHWELL WHITE LLP

By _____
BARBARA A. BRENNER
Attorneys for Douglas Cole and Heidi Cole and Marble Mountain Ranch

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

## DECLARATION OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am employed by Churchwell White LLP and my business address is 1414 K Street, 3rd Floor, Sacramento, CA 95814. On this day I caused to be served the following document(s):

**MARBLE MOUNTAIN RANCH CLOSING BRIEF**

☐ By United States Mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses set forth below.

☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepared.

☐ By personal delivery. I personally delivered the documents to the persons at the addresses set for the below. For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of 9:00 am and 5:00 pm. For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of 8:00 am and 6:00 pm.

☐ By Express Mail or another method of overnight delivery to the person and at the address set forth below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☒ By electronically transmitting a true copy [by agreement of the parties] to the persons at the electronic mail addresses set forth in the attached list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 29, 2017, at Sacramento, California.

CHRISTINA M. PRITCHARD

Douglas and Heidi Cole
Marble Mountain Ranch
Waste and Unreasonable Use
Hearing

List created July 14, 2017
Updated November 3, 2017

**SERVICE LIST OF PARTICIPANTS**
**Douglas and Heidi Cole and Marble Mountain Ranch**
**Waste and Unreasonable Use Hearing**
**Scheduled for November 13, 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**
**Waste and Unreasonable Use Hearing**
**Scheduled for November 13, 2017**

**PARTIES, CONT'D**

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