

1 CHRISTOPHER KEIFER  
2 NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
3 OFFICE OF GENERAL COUNSEL  
4 501 W. Ocean Blvd., Ste. 4470  
5 Long Beach, CA 90802  
6 Tel: (562) 980-4076  
7 Fax: (562) 980-4084  
8 Christopher.keifer@noaa.gov

9 Attorney for the National Marine Fisheries Service

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

12 In the matter of:

13 DOUGLAS AND HEIDI COLE and  
14 MARBLE MOUNTAIN RANCH  
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20 ) **CLOSING BRIEF OF THE**  
21 ) **NATIONAL MARINE FISHERIES**  
22 ) **SERVICE**  
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29 **I. INTRODUCTION**

30 The National Marine Fisheries Service (NMFS), a component agency of the National  
31 Oceanic and Atmospheric Administration (NOAA), administers the federal Endangered  
32 Species Act (ESA) with respect to marine and anadromous species. In the Klamath  
33 River basin, NMFS has ESA jurisdiction over the Southern Oregon/Northern California  
34 Coast Evolutionarily Significant Unit (SONCC ESU) of coho salmon, which were  
35 federally listed as threatened in 1997 (NMFS-32, p.4; 65 Fed. Reg. 42421).

36 "Threatened" is defined in Section 4 of the ESA to mean "likely to become [in danger of

1 extinction] within the foreseeable future in all or a significant portion of its range.” 16  
2 U.S.C. 1532(6), (20). Critical habitat was designated for SONCC coho in 1999, and the  
3 designation includes the accessible reaches of the Klamath River and its tributaries,  
4 including areas of Stanshaw Creek (NMFS-7; 64 Fed. Reg. 24049). “Critical habitat” is  
5 defined in relevant part in the ESA as “the specific areas within the geographical area  
6 occupied by the species at the time it is listed \* \* \* on which are found those physical or  
7 biological features (I) essential to the conservation of the species and (II) which may  
8 require special management considerations or protection.”

9  
10 Other anadromous species in the Klamath River basin not currently listed under the  
11 ESA include steelhead and Chinook salmon.

12  
13 NMFS has a long history of concern over the effects of the Coles’ diversion on SONCC  
14 coho (NMFS-1; NMFS-3; MMR-9; WR-35) and has appeared as a party in this hearing  
15 to address the two key issues identified by the Board: (1) does the past or current  
16 diversion or use of water by Douglas and Heidi Cole and Marble Mountain Ranch  
17 constitute a waste, unreasonable use, unreasonable method of use, or unreasonable  
18 method of diversion of water, particularly in light of any impacts to public trust  
19 resources; and (2) if the past or current diversion or use of water by Douglas and Heidi  
20 Cole and Marble Mountain Ranch constitutes a waste, unreasonable use, unreasonable  
21 method of use, or unreasonable method of diversion of water, what corrective actions, if  
22 any, should be implemented, and with what time schedule should they be implemented?  
23 How should the implementation time schedule for any corrective actions be coordinated  
24 with the requirements of the Cleanup and Abatement Order issued by the North Coast  
25 Regional Water Quality Control Board?

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1 **II. ARGUMENT**

2 NMFS has presented substantial evidence to the Board regarding the function and  
3 value of Stanshaw Creek habitat to the continued existence of coho in the Klamath  
4 River basin.

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6 Shari Witmore, who has extensive experience studying coho in the Klamath River and  
7 on Stanshaw Creek in particular, testified that Stanshaw Creek “forms a cold water  
8 pond on the floodplain of the Klamath River [which] provides excellent habitat for  
9 juvenile salmonids with cold water temperatures, significant cover and overhanging  
10 vegetation, and still water for velocity refuge.” (NMFS-7). On cross examination, counsel  
11 for the Coles asked a line of questions of Ms. Witmore which invited the inference that  
12 because the pool provided high quality habitat while the Coles were diverting, there was  
13 no ecological purpose in requiring the Coles to change their diversion practices. This  
14 inference is specious. As Ms. Witmore further testified, the refugia in Stanshaw Creek is  
15 only part of the story: Stanshaw Creek flows “will create a plume of cold water in the  
16 mainstem.” (Tr. 193). That cold water plume allows fish that are “tak[ing] advantage of  
17 the extensive food resources in the very productive Klamath River” to locate the cold  
18 water pool when mainstem temperatures become too hot. (Tr. 193; NMFS-3 p.3; MMR-  
19 9 p.3). That ecological function, which is impaired by diversion of water from Stanshaw  
20 Creek (Tr. 198, 205), is important not only to listed coho, but also to nonlisted  
21 anadromous species subject to the public trust doctrine. (NMFS-3, p.2; MMR-9, p.2; Tr.  
22 294).

23  
24 No party has offered any evidence contradicting either directly or indirectly Ms.  
25 Witmore's testimony or NMFS' documentary evidence. Mr. Cramer, the Coles' fisheries  
26 expert, spent almost his entire time on direct testifying about the lack of spawning  
27 habitat in Stanshaw Creek. Unfortunately, the lack of spawning habitat in Stanshaw  
28 Creek is a red herring; no party to the hearing presented any evidence suggesting that

1 any salmonid species, listed or not, spawned in Stanshaw Creek. When asked on cross  
2 examination about the actual issue at hand, Mr. Cramer testified that he agreed with  
3 NMFS' conclusion (NMFS-3 p.11; MMR-9 p. 11) that "Stanshaw Creek low flows  
4 provide critical cold water to the Klamath River and access to cold water, off-channel  
5 refugia and food supply during low flow months." (Tr. 125).

6  
7 NMFS has also provided to the Board substantial evidence (NMFS-1; NMFS-2)  
8 supporting the recommended flows contained in NMFS' August 2016 letter (NMFS-3;  
9 MMR-9) to the Board's Division of Water Rights. The Coles have presented no  
10 substantial evidence showing that the bypass flows recommended by NMFS are  
11 scientifically unsound, are unnecessary to reduce harm to valuable natural resources  
12 that are the property of the people of California, or unachievable in terms of eliminating  
13 the ranch's ability to generate electricity, irrigate gardens, or use water consumptively;  
14 their main objection is simply that changing their operations to comply with the law is too  
15 inconvenient and costly. (MMR-1).

### 16 17 **III. CONCLUSION**

18 In an unimpaired, pristine environment, the Coles' diversions and their adverse effects  
19 on fishery resources in the Klamath River may not merit the attention of the Board. But  
20 this is not the world in which we live. Coho in the Klamath River are listed as threatened  
21 under the ESA, and also protected under the law of the State of California. The Coles'  
22 diversions impair the ecological function of Stanshaw Creek, which provides the most  
23 important and productive refugia in the Mid Klamath River (Tr. 155), and also harm  
24 listed coho salmon as well as other salmonid species that would use the thermal refugia  
25 but for the truncated connectivity caused by the Coles. For the foregoing reasons,  
26 NMFS submits that the Coles' diversion activities constitute waste, unreasonable use,  
27 unreasonable method of use, or unreasonable method of diversion of water. NMFS  
28 further submits that the flow recommendations contained in NMFS-3 are the appropriate

1 corrective measures that should be implemented. NMFS takes no position on the  
2 precise timing that should be contained in an order from the Board; we note that this  
3 issue has been pending without appropriate resolution for 18 years and that earlier  
4 implementation of any solution is preferable to further delay.

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6 Respectfully submitted,

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9 Christopher Keifer,

10 Attorney, NOAA Office of General Counsel

