September 13, 2017

VIA ELECTRONIC MAIL

Steven Moore
Vice Chair
State Water Resources Control Board
1001 I St., 2nd Floor
Sacramento, CA 95814
wrhearing@waterboards.ca.gov

RE: DOUGLAS AND HEIDI COLE AND MARBLE MOUNTAIN RANCH REQUEST TO RESCHEDULE HEARING

Dear Board Member Moore:

On September 12, 2017, the Prosecution Team received a request from Douglas and Heidi Cole and Marble Mountain Ranch (collectively the "Diverter") to postpone the hearing until after the holiday season. This is the Diverter's third request for rescheduling and the Prosecution Team objects to any further postponement of the hearing. [1]

In support of their request, the Diverter references recent fires in the vicinity of Marble Mountain Ranch, as well as issues with their consultants. The Prosecution Team acknowledges that the location and timing of the fire is unfortunate, but disagrees that this event warrants rescheduling of the hearing. The issues of the Diverter's diversion and use of water have been continuing for over twenty years. (Decl. of Kenneth Petruzzelli in Support of Opposition to Request for Postponement by Douglas and Heidi Cole and Marble Mountain Ranch, at para. 3.) The Diverter's postponement request is merely the latest attempt in a repeated pattern of delay.

[1] The Diverter previously requested postponements in correspondence dated July 12, 2017 and July 27, 2017.

The Prosecution Team requested a hearing on this matter on August 30, 2016. (*Id*. at para. 4.) Notice of the hearing was issued on June 9, 2017, which identified a hearing date of August 22, 2017, and an initial evidence deadline of July 25, 2017. (*Id.*) Arguably, the Diverter should have begun preparing their defense at that time, prior to the fire posing any issue. The Hearing Team granted the Diverter's request to postpone the hearing and noticed a new hearing date of November 13, 2017, and new evidence deadline of October 2, 2017. The Diverter has ample time to prepare for a hearing.

The Diverter has requested time extensions since August 2016, when the North Coast Regional Water Quality Control Board (Regional Water Board) issued Cleanup and Abatement Order (CAO) No. R1-2016-0031. (*Id.* at paras. 6-7.) In petitioning for the State Water Board to review CAO No. R1-2016-0031, the Diverter asserted that complying with the CAO was impossible, because they had only recently retained a new consultant and could not meet the deadlines. (*Id.* at para. 8.) However, their new consultant had visited the property and drafted an initial report. (*Id.* at para. 7.) The Diverter retained additional consultants in October 2016 and January 2017. (*Id.* at paras. 10-11.) The Diverter has therefore had a team of consultants since at least the beginning of the year. The Diverter has nonetheless repeatedly raised issues regarding consultants and requested additional time on those grounds. The Diverter's delays and stated intent not to comply with corrective actions in the CAO have already led the Regional Water Board to issue three notices of violation. (*Id.* at paras. 13, 15.) The Diverter's justification for delay were insufficient for the Regional Water Board Executive Office to alter the deadlines specified in CAO No. R1-2016-0031, and should not be deemed sufficient to reschedule this hearing yet again and accede to the Diverter's pattern of delay. (*Id* at para. 14.)

Lastly, and as identified in my response to the Diverter's first request to reschedule the hearing, I am expecting my first child in early December. (*Id* at para. 16.) The current hearing date of November 13, 2017 is as late as I can confidently commit to before my child's due date. Due to ongoing discussions with my office's Human Resources Department, it is still unclear when I will be returning to work after my paternity leave. In addition to the potential conflict with my leave, delaying the hearing until after the holiday season would likely require additional time to prepare the Prosecution Team's witnesses, who may be less familiar with the facts of the case after a several-month delay. Delaying the hearing until after the holiday season would result in significant and unreasonable delay.

For these reasons, the Prosecution Team objects to the Diverter's request to reschedule the hearing.

Sincerely,

Kenneth Petruzzelli
Attorney III
State Water Resources Control Board
Office of Enforcement

Cc: Service List

Enclosures

cc: (via email only)

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

PARTIES

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

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SERVICE LIST OF PARTICIPANTS
Douglas and Heidi Cole and Marble Mountain Ranch
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.)

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Attorneys for the Prosecution Team

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

In the Matter of: DOUGLAS AND HEIDI COLE AND MARBLE MOUNTAIN RANCH	DECLARATION OF KENNETH PETRUZZELLI IN SUPPORT OF OPPOSITION TO REQUEST FOR POSTPONEMENT BY DOUGLAS AND HEIDI COLE AND MARBLE MOUNTAIN RANCH

I, Kenneth Petruzzelli, declare as follows:

1. I am an attorney for the State Water Resources Control Board (State Water Board), Office of Enforcement. I have been the lead attorney for the Division of Water Rights Prosecution Team in the above-entitled matter since November 2015. I have also acted for the lead attorney for the related and coordinated enforcement action by the North Coast Regional Water Quality Control Board (Regional Water Board). I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently under oath.

2. On August 30, 2016, the Assistant Deputy Director for the Division of Water Rights (Division) requested a hearing and the adoption of an order by the State Water Board finding that the Douglas and Heidi Cole and Marble Mountain Ranch (collectively the "Diverters") have engaged or continue to engage in waste, unreasonable method of use, and unreasonable methods of diverting water and ordering corrective actions. A true and correct copy of the hearing request is available on the hearing webpage at http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/marblemtn_dwrlet2cole_082316.pdf.

3. Disputes relating to the Diverters' use of water go back to at least 2000, when the

Department of Fish & Game (DFG), National Marine Fisheries Service (NMFS), and others protested a water right application originally filed by the Diverters' predecessors in interest. The majority of the protests were based on impacts to public trust resources. A discussion of the Diverters' water right history and the issues associated with that history begin on page 4 of the Division Report of Inspection, which was included with the hearing request filed by the Assistant Deputy Director. The report is available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/marblemtn_dwrinspectreport_011315.pdf.

4. The Hearing Team noticed a hearing in the above-captioned matter on June 9, 2017 – more than nine months after the Assistant Deputy Director's hearing request. The hearing date, initially set for August 22, 2017, has already been postponed at the Diverters' request.

5. On August 4, 2016, the Regional Water Board issued the Diverters Cleanup and Abatement Order (CAO) No. R1-2016-0031. CAO No. R1-2016-0031 includes deadlines for corrective actions. The Regional Water Board established the deadlines based on a timeline the Diverters proposed. A true and correct copy of CAO No. R1-2016-0031 was included with the August 30, hearing request and is available on the hearing page at issued Cleanup and Abatement Order (CAO) No. R1-2016-0031 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/marblemtn_rwqcb_cao_080416.pdf.

6. In correspondence dated August 26, 2016, the "Diverters requested additional time to meet deadlines. The Diverters stated that "The process of finding consultants and securing funding can be unpredictable and slow. This may delay compliance with the CAO even with the Coles best efforts." Required Action Number 1 in the CAO requires a water efficiency study and set a deadline of October 15, 2016. The Diverters requested that the CAO's deadline of October 15, 2016 be extended to October 29, 2016, because "A water quality analysis will require additional consultants and testing that was not previously contemplated at this juncture." A true and correct copy of the Diverters' August 26, 2016 letter, absent attachments, is attached to this declaration as **Exhibit 1**.

7. The Diverters' August 26, 2016 letter references and includes an attached report by a consultant, Rocco Fiori (Fiori) - one of the witnesses listed on the Diverters' Notice of Intent to Appear. Fiori states that he observed conditions at Marble Mountain Ranch, indicating he has had an opportunity to personally visit the site.

8. On September 6, 2016, the Diverters petitioned for review of CAO No. R1-2016-0031. In the petition for review, the Diverters alleged that meeting deadlines in the CAO was

impossible due to the need to hire and retain a new consultant. The State Water Board automatically dismissed the Diverters' petition for review through operation of law. A true and correct copy of the Diverters' September 6, 2016 petition for review is attached to this declaration as **Exhibit 2**.

9. In a letter dated September 30, 2016, the Diverters provided a progress report to enforcement staff and to the Division and Regional Water Board. In the letter, the Diverters stated they were in the process of recruiting a consultant or consultants qualified to address corrective actions. A true and correct copy of the September 30, 2016 letter, absent its exhibits, is attached to this declaration as **Exhibit 3**.

10. In a letter dated October 17, 2016, the Diverters stated

> The onerous conditions and short timelines contained in the Draft Order and CAO caused the Coles ' previous consultant team to resign from the project. Those consultants were unable to complete the water or energy efficiency study and have not provided the draft reports to the Coles. The Coles are now in the process of finding and retaining new consultants to assist them in implementing permanent physical solution at the Ranch.

The Diverters further state that the process of identifying and retaining new consultants had "further delayed their ability to comply with the CAO and the Draft Order." However, the Diverters stated they had retained a fish biologist and that the biologist had already conducted an initial review. A true and correct copy of the Diverters' October 17, 2016 letter is attached to this Declaration as **Exhibit 4.**

11. In a letter dated January 4, 2017, the Diverters stated they had added Michael Preszler with ECORP, Environmental Consulting, to their consultant team. A true and correct copy of the January 4, 2017 letter is attached to this declaration as **Exhibit 5**.

12. In a letter dated February 8, 2017, the Diverters, asserting they now had their team of consultants, proposed a new time schedule for corrective actions for CAO No. R1-2016-0031. A true and correct copy of the February 8, 2017 letter is attached to this declaration as **Exhibit 6**.

13. On March 17, 2017, the Regional Water Board issued the Diverters a second Notice of Violation (NOV). The NOV addressed many elements regarding the Diverters' noncompliance with the CAO. It also responded to the Diverters' requests for time extensions. For Directive 1, the water efficiency study and water delivery system design, the NOV stated that the Diverters had been aware of the requirements and repeatedly assured both the Regional Water Board and the Division that they were working on meeting the requirements. For Directive 2, the NOV stated that the Diverters, in previous meetings and discussions, had assured the Division and Regional Water Board that the Irving Creek outfall would be stabilized before winter 2016. In responding to the

Diverters' contention that the need to hire and retain consultants and the availability of consultants were sufficient reasons to grant extensions, the NOV stated "There are many consultants capable of this scope of work; the Discharger appears to be placing a limitation on compliance in terms of consultant availability, particularly when the Discharger has been aware of this requirement for at least several months." A true and correct copy of the March 17, 2017 NOV, absent attachments, is attached to this declaration as **Exhibit 7**.

14. On April 24, 2017, the Regional Water Board Executive Officer denied Diverters' requests to modify the time schedule for corrective actions in the CAO. In denying the Diverters' requests, the Regional Water Board Executive Officer noted that the CAO's original time schedule was based on a time schedule the Diverters proposed, an extensive timeline of delays, two NOVs that had thus far been issued, and the Diverters' stated intent to abandon some of the corrective actions in the CAO. A true and correct copy of the letter denying the Diverters' request is attached to this declaration as **Exhibit 8.**

15. The Regional Water Board issued a third NOV to the Diverters on June 27, 2017.

16. My wife and I are expecting our first child in early December. Due to the imprecision predicted delivery dates, the current hearing dates are as late as I believe I can confidently commit to a hearing without unreasonably risking a request for postponement due to childbirth. I plan on taking time off, but I am still discussing leave with Human Resources.

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

Date: **September 13, 2017**

Kenneth Petruzzelli
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August 26, 2016

VIA *US Mail and Email (kenneth.petruzzelli@waterboard.ca.gov)*

Kenneth Petruzzelli
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Re: Cleanup and Abatement Order R1-2016-0031

Dear Mr. Petruzzelli:

Following our telephone conversation on August 5, 2016 and receipt of Cleanup and Abatement Order R1-2016-0331 ("CAO"), regarding Douglas and Heidi Cole's (the "Coles") diversion at Marble Mountain Ranch, I am providing additional information on behalf of the Coles to propose amended deadlines for the deliverables contained in the CAO. The resource improvement team for Marble Mountain Ranch, including Will Harling at the Mid Klamath Watershed Council, Joey Howard of Cascade Stream Solutions, and Rocco Fiori of Fiori Geosciences have reviewed and discussed the CAO and its deadlines at length to determine how best to comply with its requirements. Each Required Action in the CAO is discussed below, detailing the reasons the Coles may not be able to comply with the CAO's requirements or providing reasons the Coles need additional time to provide the information required under the CAO.

Before receiving the CAO, the Coles and their resource improvement team have continued to diligently pursue resource improvements at Marble Mountain Ranch. Their most recent efforts have been focused on installing a six inch pipe in the diversion ditch to comply with the National Marine Fisheries Service ("NMFS") recommended bypass flow during low flow periods. That effort remains one the Coles are committed to implementing and continue to believe is the best alternative to improve ditch stability, reduce seepage and provide adequate consumptive use supply during low flow periods.

NMFS Bypass Flow Letter Dated August 3, 2016 Complication

A complication for the Coles in complying with the CAO is the August 3, 2016 NMFS bypass flow recommendation letter that indicates the Coles are unable to divert water for non-consumptive use unless that water is returned to Stanshaw Creek, including during high flow periods. (National Marines Fisheries Service, technical assistance letter (Aug. 3, 2016) pp. 8-11 (a true and correct copy of this letter is attached).) That recommendation limits the amount of water that the Coles can allow in their diversion which in turn

complicates several of the analyses required under the CAO. While further explored below, briefly, the ditch and slope evaluation required under the CAO will demand water in the diversion system in excess of the amounts that would be allowed under the NMFS bypass flow recommendation. Therefore, the Coles cannot comply with the directives from both NMFS and the North Coast Regional Water Quality Control Board unless there is a phased approach to the NMFS non-consumptive bypass flow recommendation.

Beyond the difficulty of complying with both NMFS recommended bypass flow and the North Coast Regional Water Quality Control Board's directives in the CAO, the NMFS bypass flow recommendation's requirement that the Coles return flow to Stanshaw Creek in order to divert non-consumptive water prohibits the Coles from exercising their full pre-1914 water right to divert 3 cfs for consumptive and non-consumptive use. In recent months, the Coles have foregone diverting the full extent of their 3 cfs water right during low flow periods, limiting their diversion to consumptive use only, to benefit the fisheries in Stanshaw Creek. That effort has proven successful. Continuing to reduce the Coles diversion during upcoming high flow periods imposes heavy costs on the Coles for electricity generation. These costs are in excess of $50,000 and the environmental benefit of the 10% bypass flow recommendation is unclear.[1] The Coles request further clarification from both NMFS and the North Coast Regional Water Quality Control Board to successfully approach implementing both directives and exercising their pre-1914 water right.

CAO Compliance

The Required Actions section of the CAO contains four main action items with various subtasks outlined within each of the four main tasks and then provides for quarterly progress reports and final implementation deadlines. Before discussing the CAO's requirements individually, the Coles and their resource improvement team have some general concerns about the requirements in the CAO.

First, the level of detail and the assurances of no failure required under the CAO may be impractical on several fronts. The Coles are committed to the diversion's sustainable management, but best and prudent effort in many cases is all anyone can guarantee when factors beyond the Coles control such as large herds of elk or other large animals migrating through the area are involved.

Secondly, the Coles are small business owners with limited funds to address all of the demands under the CAO. Implementation of several of the items contained in the CAO may require new consultants and additional funding. The process of finding consultants

[1] The Coles and their resource improvement team are reviewing the studies cited in the NMFS technical assistance letter to justify the return flow requirement.

and securing funding can be unpredictable and slow. This may delay compliance with the CAO even with the Coles best efforts.

Finally, the CAO goes beyond the scope of the stakeholder group's discussion to date. For example, the CAO requires water quality monitoring if flow is returned to waters of the state from the Coles diversion. This further limits the Coles' ability to develop, implement, and fund improvements that would reroute any return flow to Stanshaw Creek. Funds and efforts that could be used to return flow to Stanshaw Creek must be realigned to address the water quality monitoring required under the CAO. Thus, compliance with all of the deadlines in the CAO will be difficult if not impossible.

Required Action No. 1 – Water Efficiency Study and Water Delivery System Design

The current deadline under the CAO requires submitting all information outlined under this action item on or before October 15, 2016 at 5:00 pm. A water efficiency study is a study the Coles have been engaged in and pursuing for quite some time, but the requirements under the CAO are more expansive than what has been previously discussed by all stakeholders. The CAO's addition of water quality review to the water efficiency study will complicate the focus of the study, and requires additional time and funding to include in the scope of work. A water quality analysis will require additional consultants and testing that was not previously contemplated at this juncture. Funding for such a study is not part of currently existing grants and it is not practical to seek grant funding opportunities for this type of evaluation at this time. The Coles will have to determine how to address these costs and find a consultant to do the testing required for such a study. Therefore, the Coles propose a revised deadline of **October 29, 2016** for this item.

Required Action No. 2 – Restoration and Monitoring Plan

Several subtasks contained within Required Action Item number 2 regarding a restoration and monitoring plan for the Irving Creek outlet go beyond the scope of the discussions with stakeholders to date and the level of scrutiny and detail required under the CAO may make compliance prohibitively expensive. The CAO requires an 85% success rate for replanting, but does not allow for the time required to properly evaluate the outfall point to ensure that success rate. The 85% success rate would require extensive inspections, soil testing, and it is likely that a physical process that could impact the success of revegetation could be missed even with extensive testing if conditions are not ideal for study.

Rocco Fiori previously provided a sedimentation study for the Coles diversion. (See the attached Fiori GeoSciences Technical Memorandum dated May 14, 2016.) To further evaluate sedimentation and erosion along the Coles diversion and at the Irving Creek outlet, the ditch and the Irving Creek outfall point must have more water in the system and leaf off conditions. The success of the restoration and monitoring plan depends on proper inspections and identification of any difficulties associated with slope stabilization and revegetation at Irving Creek. Specifically, the current headcut at the Irving Creek outfall

point may have additional seepage points below the outfall not readily observed in dry conditions. Making the evaluations of Irving Creek during leaf off, wet conditions will ensure that the proper solution for addressing any impacts to the waters of the state at the outfall point are identified.

Additionally if fill of areas of erosion at the outfall point is identified as the correct solution following study, properly identifying all points of seepage will be integral for successful resource improvement. Fill placed without identifying all points of seepage will not remain in place under wet conditions with additional seepage points. This will result in sediment being discharged to Irving Creek. To further complicate the matter, as previously discussed above, the NMFS bypass flow recommendation make it impossible for the Coles to provide fully wet conditions for study unless the NMFS bypass flow is phased in over time. Thus, creation of the restoration and monitoring plan requires conditions that are not available before Required Action Item number 2's current September 10, 2016 deadline and those conditions may never be available under the Coles current regulatory circumstances.

Beyond the physical limitations associated with the conditions required for successfully drafting and implementing a restoration and monitoring plan, the Coles face a secondary difficulty in complying with this Required Action Item. Rocco Fiori, who authored the original sedimentation study, is not available to begin the study of the Coles diversion until November of this year, which coincides with the onset of the physical conditions needed to conduct inspections of the outfall. Once Mr. Fiori can begin his inspection and study of the outfall, he will require three to four months to run tests and take soil samples on the diversion and outfall point and then draft the technical reports to comply with the CAO. Delaying the inspections is necessary to ensure high quality reports and save existing funds for resource improvement efforts. Mr. Fiori has already engaged in a preliminary evaluation of the system and is familiar with the difficulties and opportunities for resource improvement at Marble Mountain Ranch. His services will be more informed and less costly than if the Coles have to start over and find a new hydrogeologist to evaluate their diversion. His familiarity with the system means that he will provide a more thorough and expansive evaluation of the system as a whole.

Finally, the costs of such an expanded inspection and testing regime is unlikely to be funded through grant money. This leave the Coles without an avenue to comply with the CAO if they must provide testing that ensures there will be no failures of the restoration implemented at the Irving Creek outfall point. The Coles request further clarification regarding the scope of the required monitoring plan. Tentatively, based on the intent of the monitoring plan, the Coles believe a revised compliance date of **March 31, 2017** for submission of the restoration and monitoring plan will provide the Coles with the time to allow Rocco Fiori to evaluate the Irving Creek outfall point and to establish a successful restoration and monitoring plan.

Required Action No. 3 – Ditch Evaluation and Operations and Monitoring Plan

Required Action Item number 3 requires a ditch evaluation and an operations and monitoring plan if the Coles intend on continuing to operate the diversion ditch to convey water to Marble Mountain Ranch. This requirement carries with it many of the same issues previously discussed for the Irving Creek outfall point. The continued operation of the diversion ditch and the related reports require: (1) the clarification of the requirements under the NMFS bypass flow; (2) leaf off, wet conditions to properly evaluate seepage, fill saturation, and stability; (3) additional time to allow for Mr. Fiori's proper conditions and time to do the required study and to draft the reports from the studies; and (4) additional funding as the requirements go beyond the scope of any previously discussed requirements for the study of the ditch system.

Beyond these issues, the level of evaluation for ditch stability in the CAO requires the identification and analysis of *ANY* physical process and mechanism that may be influencing sedimentation discharge or erosion along the ditch. That level of evaluation will be nearly impossible to achieve without a huge investment in just studies of the diversion. Those are resources that could be better used in addressing issues along the diversion to avoid erosion. Therefore, the Coles request clarification of the level of study required under Required Action Item number 3 before proceeding with the study. Based on a reading of the CAO's requirements that make them achievable, the Coles can provide a ditch evaluation by **March 31, 2017**.

While the Coles require additional time for the ditch evaluation, they will provide a ditch monitoring and operation plan for this coming wet season within the deadline contained in the CAO. The Coles will provide formalized protocols for ditch inspection and management to the North Coast Regional Water Quality Control Board for review in compliance with the CAO's deadline on **October 15, 2016**.

Required Action No. 4 – Slope Assessment and Water Quality Sampling

Once again, the extent of the slope assessment and water quality sampling required under Required Action Item number 4 has not been previously discussed among the stakeholders. It also carries with it a number of issues discussed previously, including: (1) requiring leaf off, wet conditions to properly evaluate sediment deposits and erosional sources; (2) additional time to allow for Mr. Fiori to do the required study and then the additional time to draft the required reports; and (3) additional funding as the requirements go beyond the scope of any previously discussed requirements for the study of the ditch system. To allow for the required time to provide the slope assessment, the Coles propose a revised deadline of **March 31, 2017** for that portion of Required Action Item number 4.

Moreover, according to Mr. Fiori, based on his previous evaluation of the Coles diversion, a slope stability study will not provide any additional information for implementing resource improvements at Marble Mountain Ranch. Mr. Fiori's technical memorandum

dated May 14, 2016 indicates laying a six inch pipe in the diversion ditch is the optimal approach to avoiding any release of sediment to the waters of the state from the Coles diversion during low flow periods.[2] Any additional slope stability study will find that the optimal solution for addressing the diversion of greater rates of flow will be to lay pipe in the ditch to carry that flow. Thus, a sedimentation study will not provide additional information to address any impacts to waters of the state and will delay implementation of the solution to the issue.

The water quality sampling element of Required Action Item number 4 we interpret to be required only if the Coles are discharging water from the diversion after use at Marble Mountain Ranch. Therefore, this requirement is dependent on the clarification regarding the NMFS bypass flow recommendation letter. Provided the Coles are able to divert and discharge water over the next few wet seasons, water quality sampling will require that the Coles hire additional consultants to test the water and implement systems for the chain of custody of the samples. Further, finding funding for the water quality monitoring is unlikely. Therefore, the Coles will have to divert resources to this monitoring effort as well. Please confirm that the water quality sampling is only required during high flow periods when there is return flow to waters of the state. Based on this interpretation, the Coles request until **December 1, 2016** to develop the monitoring plan once it is clear that they will be allowed to discharge return flow in the high flow season.

Required Action Item No. 5 – Quarterly Progress Reports

The Coles will provide quarterly progress reports beginning on **October 1, 2016**. These progress reports will comply with the requirements under the CAO to provide an "update on project development and permitting, a description of steps taken to develop and implement the required plans, and any unforeseen circumstances that may affect the progress on meeting the deadlines and requirements of [the CAO]." Please confirm that the CAO does not require that these reports be submitted by "an appropriately qualified and experienced California-licensed professional." In order to focus the funds available on the resource improvement efforts, the current plan is to have Doug Cole with some assistance from his resource team submit these reports.

Required Action Items No. 6 and 7 – Complete all Restoration and Mitigation Measures and Submit Completion Report

The Coles will endeavor to meet the October 15, 2018 and December 15, 2018 deadlines for the completion of the restoration and mitigation measure implementation and related completion report. However, based on the currently needed additional time for the initial

[2] Mr. Fiori's technical memorandum has been submitted to North Coast Regional Water Quality Board staff and all stakeholders in the Marble Mountain Ranch discussion along with a number of other documents regarding the proposed six inch pipe project. The Coles and their resource improvement team have not received any feedback regarding Mr. Fiori's study or its findings.

reports, the Coles may have difficulty meeting these targets. Once Rocco Fiori has completed all the required studies and reports, the Coles will be able to provide a revised deadline for these final two items.

Summary of Deadlines and Funding

To streamline the discussion of proposed deadlines among all stakeholders, the table below summarizes the items required under the CAO, the current deadlines for those items, the deadlines proposed in this letter for those items, and the funding status of each of those items.

CAO Required Action Item Number	Deliverable	CAO Deadline	Proposed Deadline	Funding Status
1.	Water Efficiency Study	October 15, 2016	October 29, 2016	Currently grant funded without the water quality study. Water quality study will require the Coles personally fund the effort.
2.	Restoration and Monitoring Plan	September 10, 2016	March 31, 2017	Funded on a much smaller scope. The 85% revegetation success rate and required study will require additional grant funding.
2.	Final Restoration and Monitoring Report	January 1, 2021	Pending Rocco Fiori studies	CAO requirements are beyond the scope of current funding.
3.	Ditch Monitoring and Operations Plan	October 15, 2016	October 15, 2016	Scope of monitoring plan is currently beyond funding.

3.	Ditch Evaluation	October 15, 2016	March 31, 2017	Funded on a much smaller scale. Level of assurance of ditch operation beyond the scope of current funding.
4.	Slope Assessment	September 10, 2016	March 31, 2017	Funded on a much smaller scale. Level of assurance of ditch operation beyond the scope of current funding.
4.	Water Quality Assessment Plan	September 10, 2016	December 1, 2016	Not funded.
5.	Progress Reports	October 1, 2016 and ongoing quarterly	October 1, 2016 and ongoing quarterly	Not funded.
6.	Restoration and Monitoring Measures Completed	October 15, 2018	Pending study completion	Not funded at level of CAO's requirements.
7.	Restoration and Monitoring Measures Completion Report	December 15, 2018	Pending study completion	Not funded at level of CAO's requirements.

Please contact me at your earliest convenience to discuss the deadlines and other matters contained herein. Submittal of this request for additional time does not waive the Coles right to appeal the CAO within "30 days after the date of [the CAO]".

Regards,

Churchwell White LLP

for Barbara A. Brenner
BAB/kaf

cc: Douglas and Heidi Cole
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TECHNICAL MEMORANDUM

Sediment Delivery Potential from Failures on the Stanshaw Creek Diversion Ditch
Prepared for: Will Harling, Mid-Klamath Watershed Council and Douglas and Heidi Cole, Marble Mountain Ranch.
Prepared by: Rocco Fiori, Engineering Geologist, PG8066.
May 14, 2016

1.0 Introduction

This memorandum provides my preliminary findings of a survey to assess the sediment delivery potential from failures on the Stanshaw Creek diversion ditch. The Marble Mountain Ranch has a patented water right to divert water from Stanshaw Creek for consumptive and non-consumptive uses. The North Coast Regional Water Quality Control Board (NCRWQCB) and National Marine Fisheries Service (NMFS) are concerned operation of the diversion ditch constitutes a threat to downstream beneficial uses including water quality, and fish and wildlife habitat. This assessment was conducted at the request of Douglas and Heidi Cole, owners of the Marbled Mountain Ranch, and Will Harling, Director of the Mid-Klamath Watershed Council (MKWC).

2.0 Approach

The purpose of the survey was to assess the relative potential for ditch failures to deliver sediment to Stanshaw Creek and other waters of the State of California. The assessment was comprised of the following activities:

1. Review of a recent ditch inspection report prepared by NCRWCB staff (Feiler 2015).
2. Rapid field reconnaissance of the site on April 20, 2016, with Douglas Cole, Will Harling, and Joey Howard (Cascade Stream Solutions).
3. Desktop analysis, including qualitative assessment of site conditions using a 1-meter resolution LiDAR DEM, Digital Ortho-Photographs, and the Regional Geologic Map (Wagner and Saucedo 1987) with ArcGIS.

3.0 Findings

3.1 Ditch Failure Modes

I observed many of the erosion points described in the NCRWCB ditch inspection report and concur with the general characterization of the types of failure modes operating along at the ditch line by Feiler (2015). Based on my observations it appears the failure modes and frequency of occurrence can the ranked in the following order, (with type 1 modes having the greatest likelihood of occurring):

1. Water seepage through the outboard embankment fill material. This failure mode has two likely outcomes: a) slow slump failure of the fill with the potential for ditch flow to overtop the embankment and discharge downslope; or b) rapid slump failure of the fill, leading to the near instantaneous discharge of ditch flow downslope. Type 1b failures are most likely to lead to onsite erosion and possibly contribute to offsite sedimentation.
2. Cutbank failure. The outcome of this failure mode depends on the volume of the failed material. For a) small cutbank failures, the failed material will likely displace some of the ditch flow onto the outboard edge of the embankment and not lead to any onsite erosion; or for b)

larger cutbank failures, the failed material can cause the ditch flow to overtop the embankment. Type 2b failures are the most likely to lead to onsite erosion and possibly contribute to offsite sedimentation.

3. Tree Windthrow. Windthrow from the cutbank or embankment fillslope can lead to either a) slow, or b) rapid failure of the embankment fill, or c) slow and d) rapid displacement of ditch flow on to or over the embankment fill. The magnitude of onsite erosion and possibility of offsite sedimentation is dependant on the size of the tree and duration of uncontrolled ditch flow through the failure.

3.2 Sediment Delivery Potential

Based on my preliminary field observations and desktop analysis it appears the first 1100 feet (starting at the Point of Diversion) of the ditch has the greatest potential to deliver sediment to Stanshaw Creek in the event of a ditch failure. This is primarily because the ditch is located directly above the stream channel, and secondarily because the ditch is partially within the fluvial corridor of Stanshaw Creek (Figure 1). The remaining sections of the ditch have a low to moderate sediment delivery potential (Figure 1 and Table 1). The lower delivery ratings are due to the capacity of large topographic benches and dense vegetation to intercept and store a majority of sediment before it can be delivered to the receiving waters of the State (Figure 1).

Table 1. Relative sediment delivery potential of the Stanshaw Creek Diversion Ditch.

Distance from POD (feet)	Relative Sediment Delivery Potential	Percent of Ditch Length	Receiving Waters	Rationale
0 to 1100	High	24	Stanshaw Creek	Ditch is directly above stream
1100 to 2100	Low	22	Stanshaw Creek	Topographic bench likely to store most sediment and attenuate turbid runoff
2100 to 2800	Moderate	15	Stanshaw Creek	Reduced effect of the topographic bench to store most sediment and attenuate turbid runoff.
2800 to 4600	Low to Moderate	39	Klamath River	Topographic bench likely to store most sediment and attenuate turbid runoff

3.3 Other Sediment Sources

There is approximately 6,400 feet of streambank (2 X 3,200 ft.) on Stanshaw Creek between the Point of Diversion and the Highway 96 Culvert (Figure 1). A preliminary slope stability analysis indicates these slopes are marginally to highly un-stable. Wagner and Saucedo (1987) mapped the landform in this area as Qls (Quaternary Landslide), which also indicates a higher potential for slope instability. Slope failures along the lower reach of Stanshaw Creek are likely a greater source of sediment delivery compared to the features along the ditch described by Feiler (2015), and could create background sedimentation and turbidity levels that would likely overprint inputs emanating from a ditch related failure.

3.4 Recommendations

1. During the field review, Mr. Cole described that his inspection and maintenance efforts target repairs to seepage and other minor failure problems before they evolve into larger or catastrophic failures. Similar inspection and maintenance efforts are recommended moving forward.
2. The use of a pipeline would avoid or minimize the likelihood of sediment delivery related to conveyance of the Cole's water right from the Point of Diversion to the points of consumptive and non-consumptive use.
3. If a pipeline is the selected alternative, consider retaining the existing ditch alignment as an inspection and maintenance travel way. Mild outsloping and appropriately spaced rolling dips along the travel way could be used to effectively improve the stability and drainage of the travel way, and to provide a route for rapid response in the event of a pipeline failure.
4. Slope stability analysis could be used to identify potential areas of concern and develop mitigation strategies.
5. A sediment budget could be used to obtain an accurate assessment of sediment contributions from past ditch failures and other sources.

References

Wagner, D.L., and G.J. Saucedo. 1987. Geologic Map of the Weed Quadragle, California, 1:250,000. State of California, Department of Conservation. Regional Geologic Map Series. Weed Quadrangle – Map No, 4A (Geology), Sheet 1 of 4.

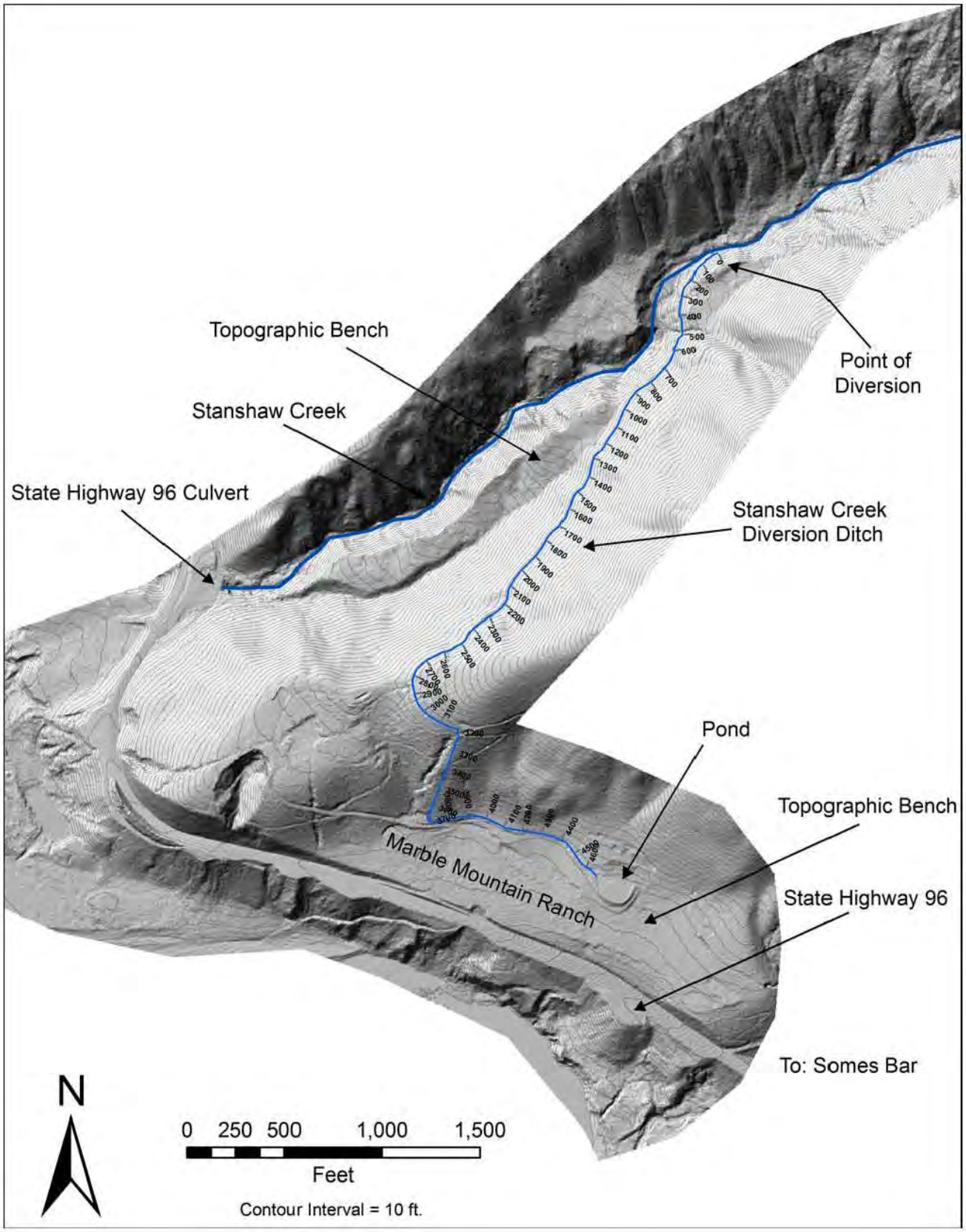

Figure 1. Project Location Map. Marble Mountain Ranch and the Stanshaw Creek Diversion Ditch. Base image is a 2010 1-meter LiDAR DEM Hillshade, provided by the Mid-Klamath Watershed Council.

EXHIBIT 1

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

August 3, 2016

Refer to NMFS No: 150307WCR2016AR00269

Barbara Evoy, Deputy Director
Enforcement Unit 5, Division of Water Rights
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, California 95814

Dear Ms. Evoy:

Thank you for requesting technical assistance from NOAA's National Marine Fisheries Service (NMFS) to develop a flow recommendation for Stanshaw Creek that will protect listed coho salmon and their habitat and other important aquatic ecosystem functions. Stanshaw Creek, a tributary to the Lower Klamath River, supports Southern Oregon/Northern California Coast (SONCC) coho salmon (*Oncorhynchus kisutch*) evolutionarily significant unit (ESU) (70 FR 37160, June 28, 2005) and SONCC coho salmon ESU critical habitat (64 FR 24049, May 5, 1999) designated under the Endangered Species Act (ESA) (Figure 1). Stanshaw Creek is a critical cold water tributary to the Klamath River. Protecting low flow has been identified in the SONCC coho salmon recovery plan as a priority in the Klamath River for coho salmon recovery (NMFS 2014). In addition to listed coho salmon, Stanshaw Creek also supports amphibians and other aquatic life.

In 2001, NMFS submitted a water right protest to the California State Water Resources Control Board, Division of Water Rights (Division of Water Rights) in response to the Marble Mountain Ranch application for an appropriative water right from Stanshaw Creek. The NMFS protest letter identified a minimum bypass flow protective of coho salmon and their critical habitat. Since the original application and NMFS protest, the Division of Water Rights completed the *Division of Water Right Report of Inspection, Registration: D030945*. The inspections occurred on December 17, 2014 and February 12, 2015. The Division of Water Rights investigated the water right and found that the Marble Mountain Ranch has a pre-1914 right to divert up to 3.0 cubic feet per second (cfs). In addition to this finding, the Division of Water Rights also described the Marble Ranch diversion as "a potential waste and unreasonable use of water, an unreasonable method of withdrawal, and a harm to public resources." The Division of Water Rights requested assistance from the California Department of Fish and Wildlife and NMFS to establish a bypass flow on Stanshaw Creek that is protective of listed coho salmon and riparian ecology, both of which are considered Public Trust Resources.

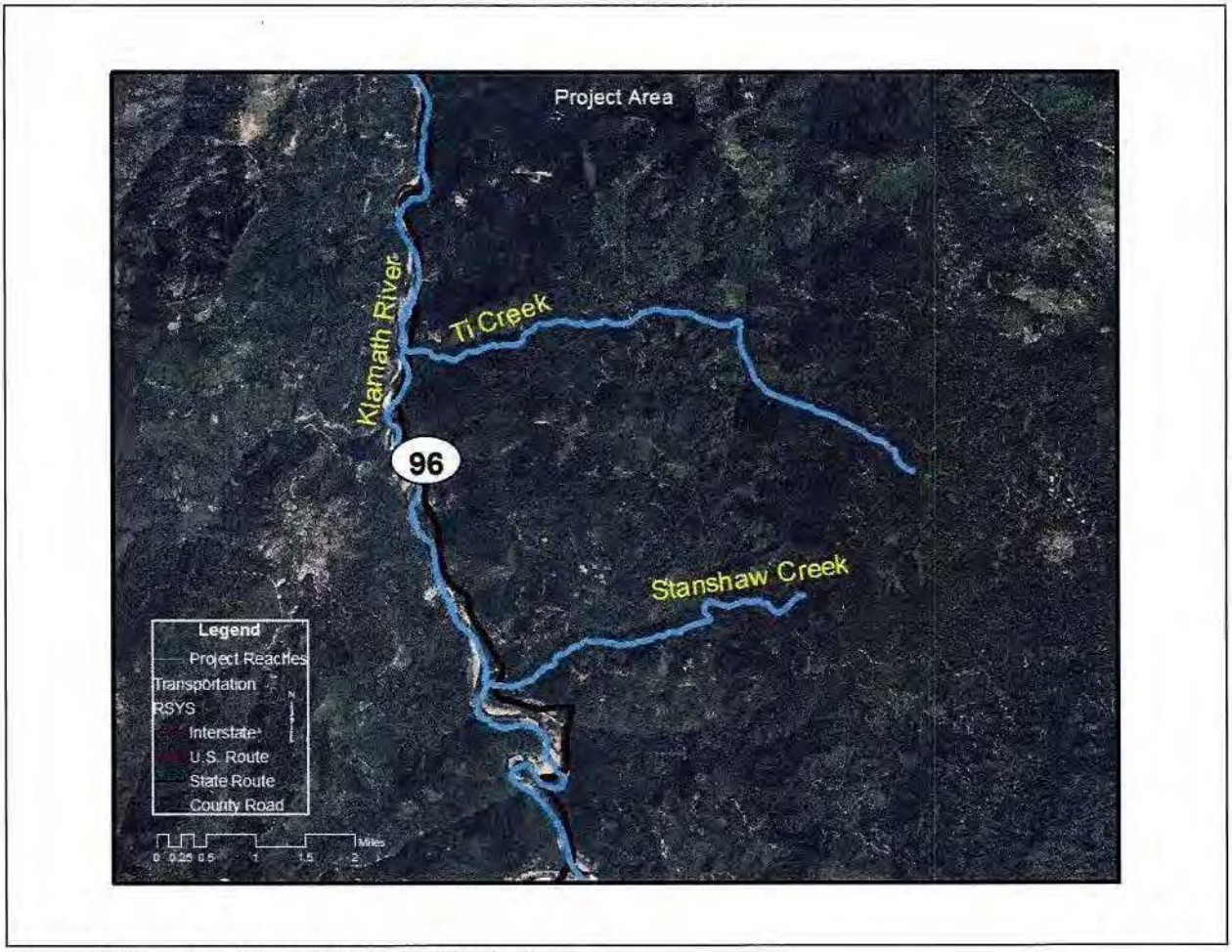

Figure 1 Stanshaw Creek Diversion Project Area.

Importance of Stanshaw Creek Flows to Coho Salmon and Stream Ecology

Juvenile coho salmon and other salmonids in the Klamath River rely on the cold water refugia provided by off channel habitat and tributaries such as Stanshaw Creek (NMFS 2014). When the mainstem Klamath River temperatures rise and flows recede, juvenile coho salmon seek cooler off-channel habitat where they may remain throughout the warm season (May through October). The off-channel pond at the Stanshaw Creek confluence with the Klamath River provides important rearing habitat for juvenile coho salmon, as well as for Chinook salmon and steelhead. In the Klamath River, mainstem temperatures can range from 21 – 27 °C in July and August with daily extremes as high as 29.5 °C (Belchick 1997, Bartholow 2005). Preferred temperature ranges for juvenile coho salmon rearing have been reported from 11.4 - 14.6 °C (Brett 1952, Coutant 1977, Beschta *et al.* 1987) with lethal temperatures occurring at 25.8 °C (Beschta *et al.* 1987) and cessation of growth at a temperature of 20.3 °C (Brett 1952, Reiser and Bjornn 1979). Besides directly causing physiological stress, elevated water temperatures in the Klamath River are correlated with an increased prevalence of diseases, including *Ceratonova shasta,* that cause mortality in Klamath River coho salmon (Hallett *et al.* 2012, Ray *et al.* 2012)

The flow volume in Stanshaw Creek is important during the late spring and summer to provide attraction flow and access for juvenile coho salmon and other salmonids to cold water refugia. Access to tributaries becomes increasingly important as water temperatures in the Klamath River begin to reach levels that cause stress and limit juvenile coho salmon growth, typically starting in mid-May and continuing through October (Bartholow 2005, Belchik 1997). Water temperatures lethal to coho salmon and other salmonids occur in the mainstem Klamath River in July and August, reaching exceedence levels of over 50 percent (Asarian 2013). As such, coho salmon and other salmonids need access to cold water tributaries before the mainstem water temperature reaches stressful or lethal levels if they are to survive in the Klamath River.

The connectivity between the Klamath River and the off-channel pond and stream is most important to coho salmon in this warm transition period, but coho salmon may continue to use the mainstem Klamath River for feeding opportunities even as the mainstem reaches lethal levels during some portions of the day. Witmore (2014) documented a daily migration pattern of juvenile coho salmon from Tom Martin Creek (a coldwater tributary) into the mainstem Klamath River, presumably to access food resources. This migration pattern continued throughout the summer as flows from Tom Martin Creek created a cold water plume in the mainstem Klamath River.

In addition to access to Stanshaw Creek, streamflow from Stanshaw Creek is important for coho salmon after flows recede below the point of connectivity to the Klamath River. The low flow in Stanshaw Creek maintains the off-channel pool water quality and provides a source of food supply to the pool.

Stanshaw Creek Stream Flow Estimate

The Stanshaw Creek watershed is almost 100% forested and flows in a westerly direction to its confluence with the Klamath River. The watershed area is 4.3 square miles above the confluence with the Klamath River and approximately 4.0 square miles above the point of diversion (POD). A diversion ditch runs from the POD on Six Rivers National Forest land to the Marble Mountain Ranch. Stanshaw Creek is ungagged, therefore, the low flow hydrograph was estimated by correlation with USGS hydrographic data for Ti Creek, located in a 9.46 square mile watershed to the east of Stanshaw Creek. The streams are expected to have a similar hydrologic response because of their similar size, elevations, vegetation, geology, soil type, and both flow in a westerly direction into to the Klamath River.

Daily average stream flow for Stanshaw Creek was estimated by prorating the Ti Creek flow data with the proportional watershed area (*i.e.*, $Q_{Stanshaw} = Q_{Ti} \times \frac{Area\ Stanshaw}{Area\ Ti}$). Table 1 lists the estimated minimum 7-day average flow for each low flow month and year. Based on this calculation, Stanshaw Creek has an estimated average annual flow of 10.1 cfs and an average 7-day minimum low flow of 2.6 cfs at the point of the Marble Mountain Ranch diversion. The lowest flow typically occurs in October though the estimates show that streamflow begins to recede toward low flow as early as May and the lowest flow may occur as late as November.

Table 1 Stanshaw Creek annual minimum 7-day average streamflow estimates based on prorating the Ti Creek flow data by proportional watershed area.

Minimum of 7-day average per year						
month	1960	1961	1962	1963	1964	Min. for month
May		11.3	4.7	14.1	7.6	4.7
June		6.3	4.6	8.9	5.2	4.6
July		4.2	3.2	5.7	3.9	3.2
August		3.5	2.8	4.3	3.3	2.8
September		3.2	2.5	3.9	2.7	2.5
October	2.4	3.2	1.5	3.5		1.5
November	2.7	3.7	1.3	4.9		1.3
December	5.1	4.7	9.1	8.0		4.7
Min. for year	2.4	3.2	1.3	3.5	2.7	1960-1964 Overall min. = 1.3 cfs Average annual min. =2.6 cfs

The Ti Creek daily streamflow record used for these estimates spans only four years (WY 1961-1964). Therefore, the Ti Creek data was further assessed to ensure that the period of record for Ti Creek did not represent an abnormal period of record for stream flow.

The water year type during the 1960 through 1964 period was evaluated by comparing to the full record of nearby longer term gages that included the many years before and after the 1960-1964 period. The gages used for comparison and their period of record are listed in Table 2.

Table 2 Period of record of long term gages near Stanshaw and Ti Creek.

USGS Stream gage	Period of record evaluated
# USGS 11521500 INDIAN C NR HAPPY CAMP CA	1957-2014
# USGS 11523000 KLAMATH R A ORLEANS	1927-2015
# USGS 11522500 SALMON R A SOMES BAR CA	1929-2015

Figure 2 shows the annual minimum 7-day average flow per square mile for the available stations. The figure includes the Stanshaw Creek estimates for 1960-1964. The data indicate that watershed area is negatively correlated with low-flow per square mile where there is a higher minimum flow per square mile in the smaller watersheds. The watershed area of Ti Creek is two orders of magnitude smaller than Indian Creek, which is reflected in the much higher minimum flows per square mile. Despite the differences in minimum low flow based on watershed size, the low flow for the all gages follow a similar pattern from year to year which helps verify that the streams have a similar hydrologic response based on the water year type. Redwood Creek, which is located on the coast of Northern California near Orick, is included on the figure to show that inland Klamath River streams have a higher and more constant low flow per square mile than the coastal streams.

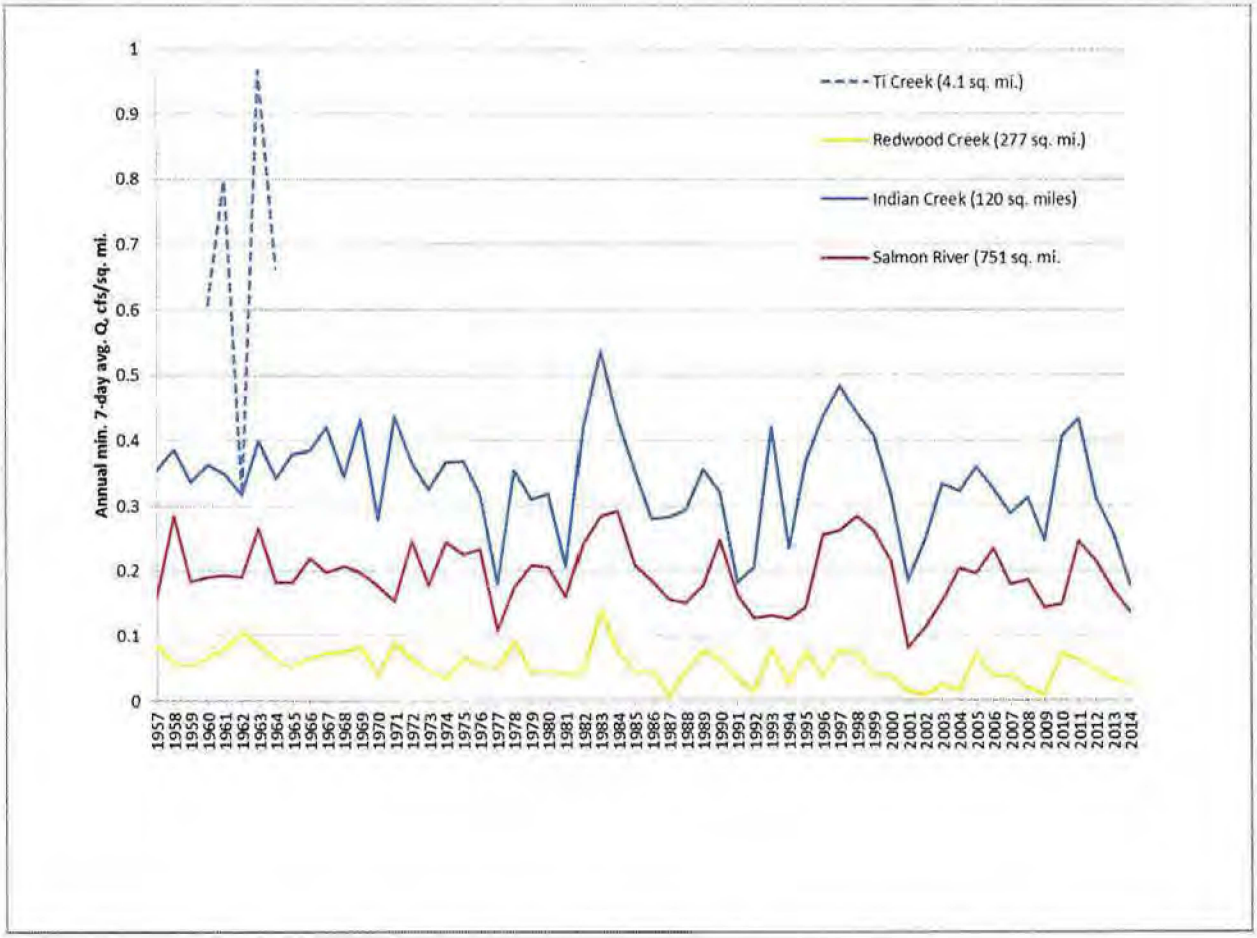

Figure 2 Comparison of annual minimum of 7-day average flow per square mile.

Flow duration curves were developed for the annual minimum 7-day average flow for each of the gages (Figure 3). The annual minimum 7-day average stream flows for 1960 through 1964 period are highlighted on each duration curve, and show the 1960 through 1964 period represents a range of moderate years in the low flow season. A flow duration curve for Redwood Creek is included on

Figure 3. Redwood Creek is located in the coastal range where snow has a much smaller effect on the hydrology and the geology is different. The figure helps verify that the hydrologic response of the inland streams is relatively similar, while the coastal Redwood Creek is different. The inland gages tend to have less variation at low flow from year to year. Figure 2 and Figure 3 work together to demonstrate that Stanshaw Creek has a similar hydrologic response as the other Klamath River watershed gages and that the 1960-1964 period represent moderate flow years and not an abnormal period of record.

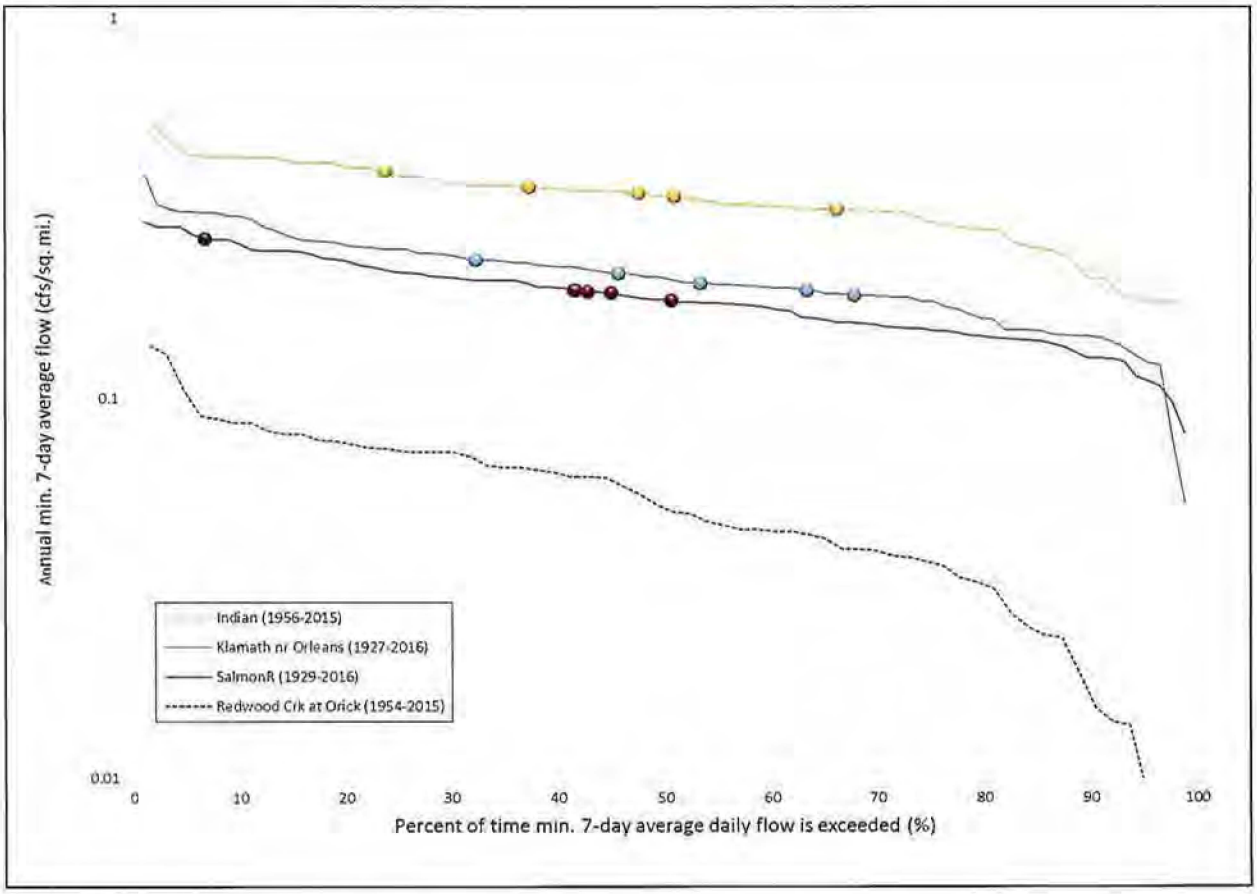

Figure 3 Annual Minimum 7-day average exceedence curves for long-term stream flow gages near Stanshaw and Ti Creek with years 1960-1964 marked.

Streamflow was measured in Stanshaw Creek several times from 2001-2014 above the POD (Table 3). Flow measurements were taken during low flow, but not necessarily at the lowest flow of the year. Two measurements were taken in 2012 showing a 0.5 cfs recession from September to October. Assuming recession at this rate from September to October, the lowest annual minimum flow for Stanshaw Creek in 2003 would have receded to 1.9 cfs, and the average of the years measured would have been 2.2 cfs. The average and minimum of the measured values are similar to the calculated average of 2.6 cfs and minimum of 1.3 cfs for Stanshaw Creek shown in Table 1 when using Ti Creek as a reference stream. The minimum flows of Salmon River and Indian Creek for each year from 2001 through 2014 are shown in Figure 4. From the Indian Creek and Salmon River

comparison in Figure 4, the measured flows from 2001-2014 likely span a full range of water year types. Therefore, NMFS is confident that using Ti Creek hydrologic data prorated by proportional watershed area provides a viable surrogate to estimate low flows for Stanshaw Creek for wet through dry years.

Table 3 Stanshaw Creek flow measurements at the POD

Date	Stanshaw Creek flow above POD (cfs)	Measured by
9/4/2003	2.4	Orleans RD
9/13/2011	3.2	Karuk
9/20/2012	2.5	NMFS
10/4/2012	2.0	Orleans RD

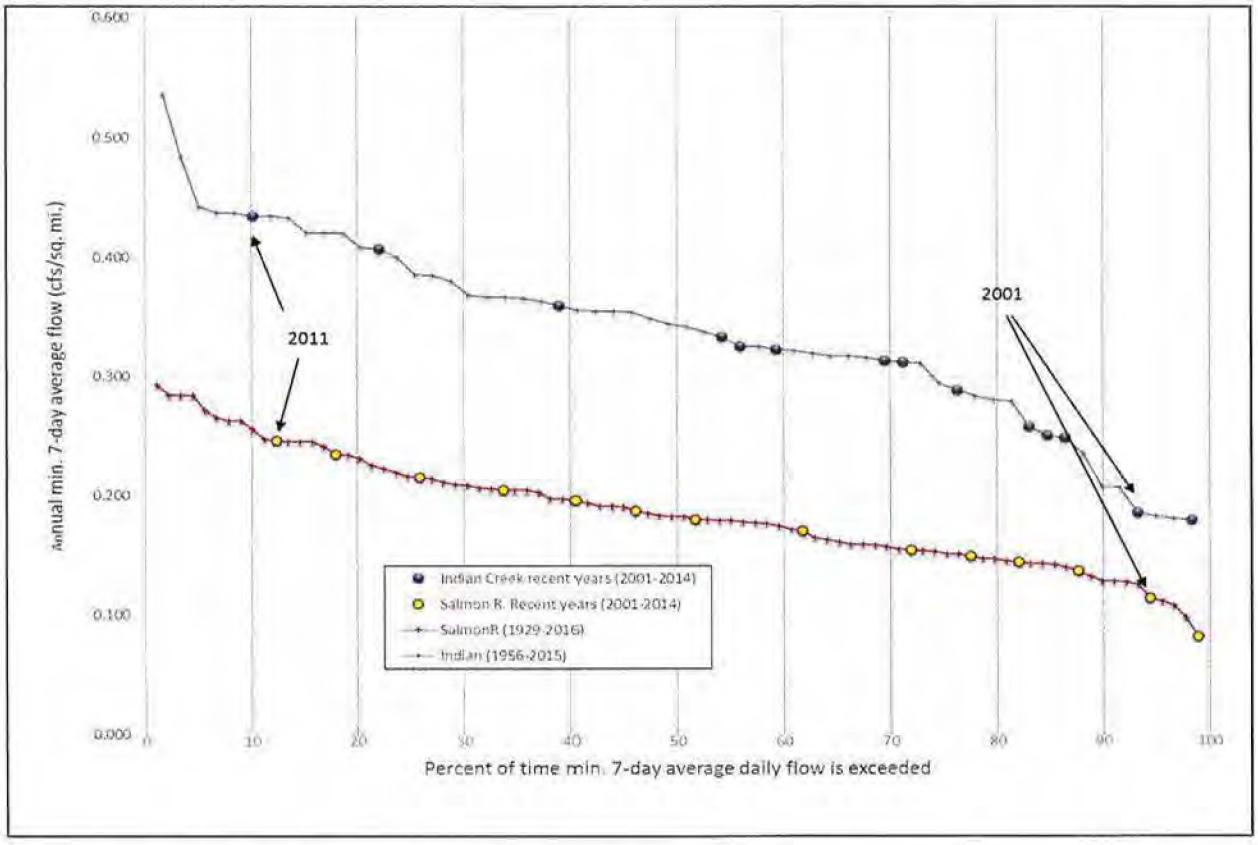

Figure 4 Data points for recent years are highlighted on the Salmon River and Indian Creek annual minimum 7-day average flow duration curve. The data show that 2001-2015 contained a full range of summer low flow from above average in 2011 to very dry in 2001.

Instream flow recommendation

The Marble Mountain Ranch diversion from Stanshaw Creek consists of both consumptive and non-consumptive use. The consumptive diversion is used to provide domestic and irrigation water for the Marble Mountain Ranch owners and business. The non-consumptive diversion is used to generate hydroelectric power. Currently, the diversion for hydroelectric generation is routed out of Stanshaw Creek watershed and discharged into Irving Creek, a tributary to the Klamath River to the west of Stanshaw Creek.

NMFS recommended bypass stream flow for the Marble Mountain Ranch diversion on Stanshaw Creek is based on an unimpaired hydrograph and includes rerouting the non-consumptive use back to Stanshaw Creek. Stanshaw Creek watershed is almost 100% forested with two small upstream diversions that State Water Board determined to be insignificant for this analysis. Based on this assumption, Stanshaw Creek streamflow just above the point of diversion is considered unimpaired for this bypass flow recommendation.

"Unimpaired hydrograph" is the term used to represent the hydrograph that should exist without diversions. The distinction between the term "unimpaired hydrograph" and the "natural hydrograph" (with no human caused alterations) is made to acknowledge that there may be human caused watershed-wide changes (*e.g.*, roads, vegetation changes, human caused climate change) that have also altered the natural hydrograph, but are not in direct control by the water users.

Reductions in the various components of the unimpaired hydrograph are assumed to correspond to reductions in stream habitat (Richter *et al.* 1996, Poff 1997). While any diversion may have an impact, a diversion of only a small percentage of unimpaired flow will maintain the natural variability of the hydrograph. A variable diversion rate that maintains the natural shape of the hydrograph is preferred over a minimum bypass flow recommendation that would flatten the receding part of the annual hydrograph. Diversions that "flatline" the receding part of the hydrograph, as is the case with a single bypass flow recommendation, will negatively affect juvenile fish outmigration as well as the quality of juvenile rearing habitat when their growth rate is high. Fish size is a critical factor in coho salmon smolt survival when migrating into the ocean (*Holtby et al.* 1990).

By analyzing case studies where ecologic goals were used to set the magnitude of water diversions, Richter *et al.* (2011) found that diversions limited to 6-20% of the unimpaired flow provided protection to the riverine ecology. For a high level of protection, the study suggested a presumptive standard of no more than a 10% diversion. A high level of protection is defined as minimal change to the natural structure and function of the riverine ecosystem. Klamath River SONCC coho salmon have a critical need for the cold water refugia provided by Klamath River tributaries such as Stanshaw Creek throughout the low flow season. Any loss of cold water during this time would decrease the quality and function of habitat. Because of the critically high summer Klamath River water temperatures, NMFS recommends a bypass flow that maintains at least 90% of the unimpaired flow. In addition to the critical need for cold water refugia in the Klamath, other considerations in setting this high standard for a bypass flow is that the actual flows at the point of diversion may already be somewhat impaired by existing and past land use, unaccounted diversions, and changing

climate. Also, streamflow measurements used to direct the diversion could have measurement errors which may result in unintentionally diverting a higher percentage of flow.

Since the POD is above the anadromous reach, an additional non-consumptive diversion for hydropower generation may occur in the reach between the POD and upper limit of anadromy provided that a minimum bypass flow is maintained in this reach to protect the low flow channel and edgewater important for macro-invertebrate production. An additional requirement is that the non-consumptive portion of the diversion is returned to Stanshaw Creek at the upper limit of anadromy and that the stream water temperature remains consistent with the stream temperature above the diversion to maintain the low temperature benefit of the cold water refugia.

There is no single flow identified as the flow that maintains connectivity of Stanshaw Creek and the Klamath River since the connection depends on site features that vary with each water year (*e.g.*, groundwater flow, water level in both the Klamath and Stanshaw Creek, and the size of the sediment berm at the confluence). Taylor (2015) estimated a Stanshaw Creek flow of 1.3 cfs when the pond was not connected to the mainstem on November 17, 2014. The lowest flow in Stanshaw Creek that ensures connectivity is probably between 2.0 and 3.0 cfs considering the annual variation in the groundwater and berm configuration. Depending on the water year type and associated timing of the spring recession period, there is a large range of the annual 7-day low flow minimum and maximum from May through October which is the beginning and end of the warm season. For the moderate water year types analyzed, the pond may become disconnected by late July or the flow may stay connected to the Klamath throughout the low flow season during a wet year. Although connection to the pond would be beneficial at all times, it is most important at flows that occur in May and June as the Klamath River temperatures begin to rise when juvenile coho salmon are seeking refuge in the cooler water. Based on the flow analysis, an unimpaired Stanshaw Creek should stay connected to the Klamath River throughout May and June in all but the driest years.

Each component of the receding hydrograph has an important biological role to provide good water quality to the Klamath River, to provide an attractive flow and access for juvenile coho salmon to Stanshaw Creek and the off channel pond before temperatures rise in the mainstem, and to maintain good water quality and food supply to the pond and Stanshaw Creek throughout the low flow period. Flows need to be conserved on wet years to provide the tributary connection, improved water quality, and cold water attractive flow into the Klamath. Flows need to be conserved on dry years to maximize the water quality and food supply to the off-channel pond and cold water seep to the Klamath. Because of the thermal sensitivity and connectivity needed throughout the summer, the Marble Mountain Ranch diversion should be limited to zero or a small fraction of the flow as the flows recede and water temperatures rise. NMFS recommends that no more than 10% of the estimated unimpaired flow be diverted from Stanshaw Creek up to the limits of anadromy, throughout the low flow season, regardless of the water year to ensure water quality and food supply is maintained for the over-summering coho salmon in the pond. By design, a 10% diversion will decrease in size as the flow decreases. For example, as the flow drops from 3 cfs to 2 cfs the allowable diversion would decrease from 0.3 cfs to 0.2 cfs. As discussed previously, diversions of 10% or less of the unimpaired flow are considered to be protective of stream ecology (Richter *et al.* 2011).

The upper reaches of Stanshaw Creek provide important macro-invertebrate production and a food source to the Klamath River, the off-channel pond, and the anadromous reach of Stanshaw Creek. The topography of five cross sections were surveyed in 2002 in the reach above the Highway 96 culvert, above the assumed upper limit of anadromy. Hydraulic analyses of the five cross sections demonstrate the changing channel width as the flows recede. Figure 5, Figure 6, and Figure 7 show an inflection in the water surface width as the flows drop between about 1.5 to 2.0 cfs for three representative cross sections (the other two cross sections are more affected by assumed boundary conditions in the hydraulic analysis). The inflection on the curve represents the point where the wetted channel width drops off relatively quickly with flow. Maintaining a flow above the inflection point is important to protect macro-invertebrate production and to provide a minimum level of edge water rearing area. Based on this analysis, a two cubic feet per second bypass flow should protect the edge water in the reach between the POD and the upper limit of anadromy. The minimum bypass of 2.0 cfs at the POD assumes a that the non-consumptive diversion of up to 3.0 cfs will be returned to Stanshaw Creek above the upper limit of anadromy. Even with 2.0 cfs minimum bypass flow, NMFS anticipates natural variation in the bypass flow at the POD as demonstrated on the example diversion shown in Figure 8.

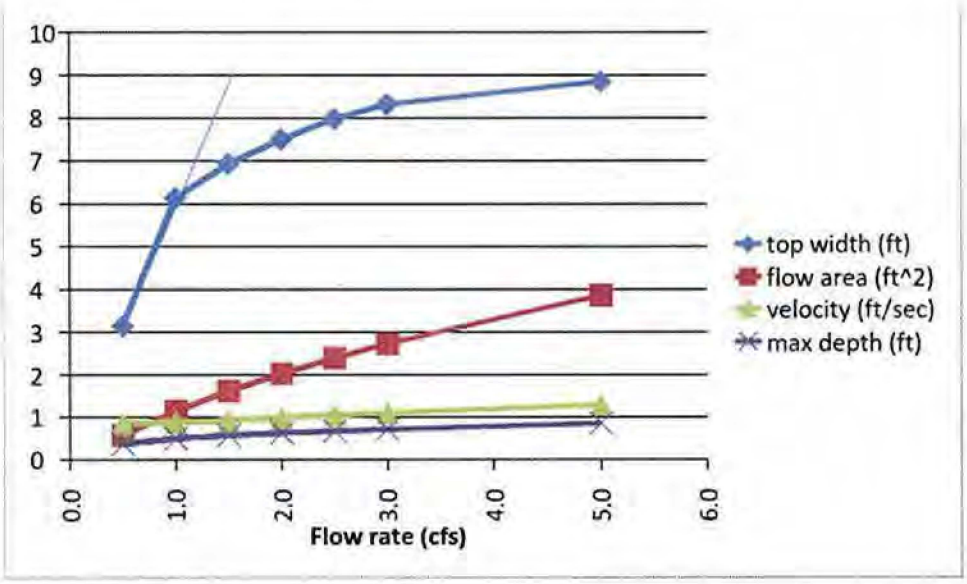

Figure 5 Cross Section 2 of Stanshaw Creek.

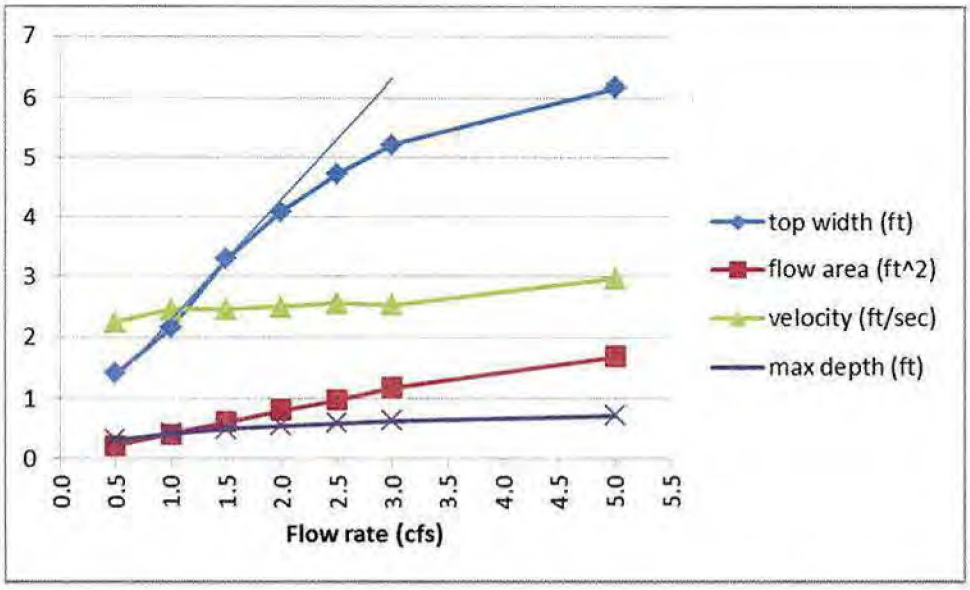

Figure 6 Cross Section 3 of Stanshaw Creek.

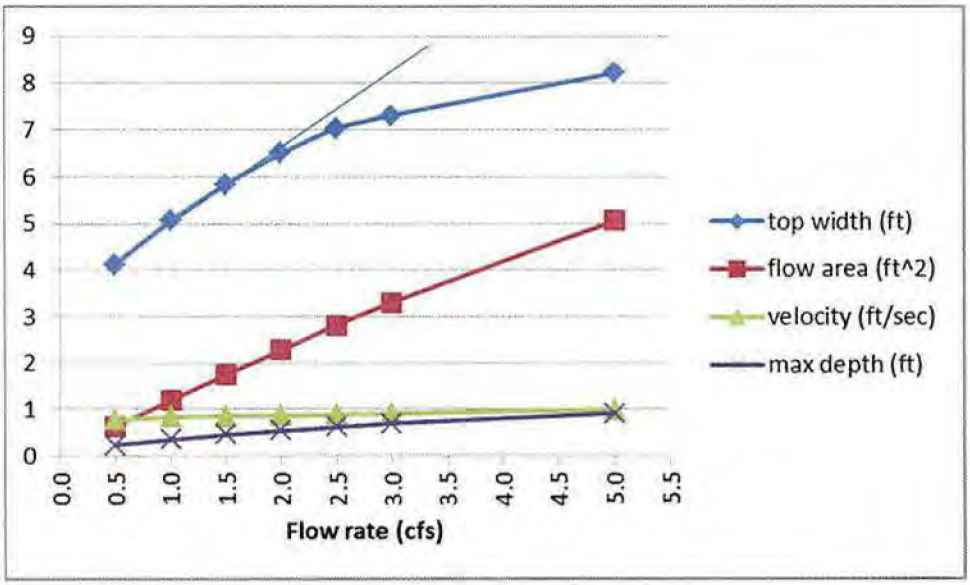

Figure 7 Cross Section 4 of Stanshaw Creek.

In summary, Stanshaw Creek low flows provide critical cold water to the Klamath River and access to cold water, off-channel refugia and food supply during low flow months. A maximum 3.3 cfs diversion that bypasses at least 90% of the unimpaired streamflow into the anadromous reach throughout the year will provide habitat to help conserve and protect listed coho salmon. In reaches above anadromy, a 2 cfs minimum bypass flow will be protective of listed salmonid habitat provided the non-consumptive diversion is returned to Stanshaw Creek with a negligible increase in water

temperature. The non-consumptive (*i.e.*, hydropower) diversion is expected to only occur when streamflow is relatively high prior to the low flow season. The non-consumptive diversion is dependent on the ability to use the water and return it to Stanshaw Creek above the anadromous reach while maintaining a minimum of 2 cfs in the stream to maintain important ecosystem functions. The non-consumptive diversion used for hydropower would be limited to the minimum operating threshold of the turbine. After the threshold is reached, the non-consumptive diversion would cease, so the diversion would be limited to consumptive use and a 90% bypass would occur at the POD.

Figure 8 shows an example of the bypass flow recommendation using the Stanshaw Creek daily average stream flow estimates. The figure shows the estimated unimpaired hydrograph for the 1962 recession period and throughout the low flow season, along with the 90% bypass flow after the non-consumptive diversion is returned and the bypass at the POD with a minimum of 2 cfs. Also, shown are the diversions for consumptive and non-consumptive use. Under this bypass flow recommendation, at least 90% of the unimpaired hydrograph is preserved in the anadromous reach. This bypass flow recommendation has a daily variation as the flows naturally recede. If methods to control diversion on a real-time basis cannot be developed, further analysis could be done to establish seasonal diversions that would cover all water year type on a weekly or biweekly or monthly basis to allow manual control of the diversion.

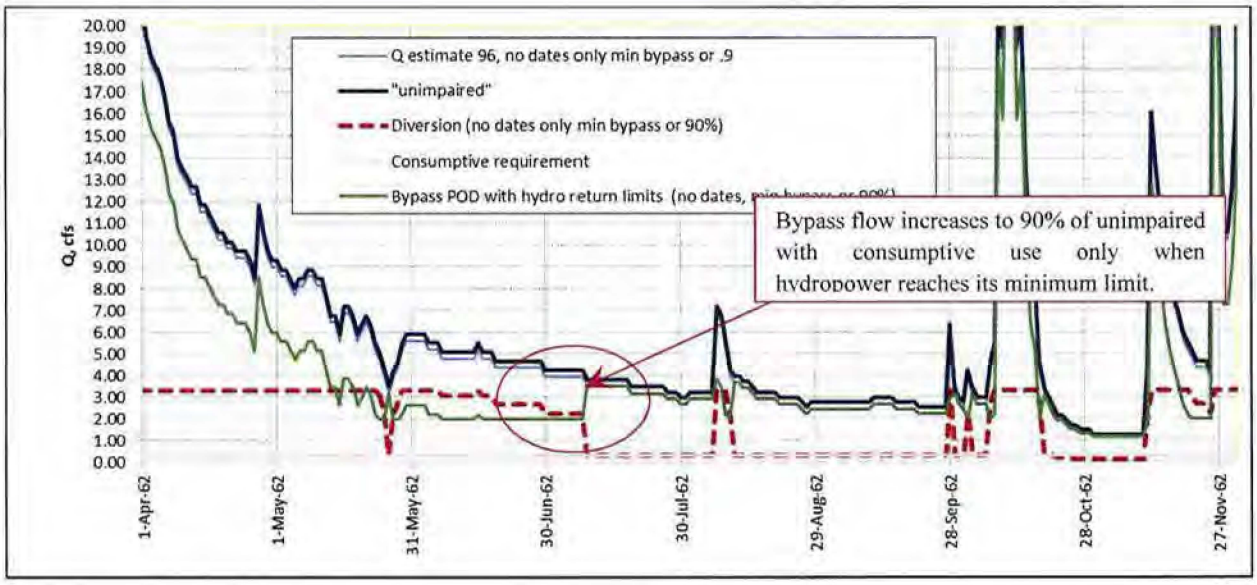

Figure 8 Example of bypass flow recommendation with assumed 0.3 cfs consumptive use and maximum 3.0 cfs non-consumptive use.

Please contact Margaret Tauzer, NMFS hydrologist/hydraulic engineer in Arcata, California at (707) 825-5174 for any additional questions concerning this flow recommendation.

Sincerely,

Alecia Van Atta
Assistant Regional Administrator
California Coastal Office

cc: Jennifer Bull, CDFW, Yreka, CA
Neil Manji, CDFW, Redding, CA

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Attorneys for Petitioners
DOUGLAS COLE AND HEIDI COLE

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of Douglas Cole and Heidi Cole for Review and Stay of the North Coast Regional Water Quality Control Board Issuance of Cleanup and Abatement Order No. R1-2016-0331.	PETITION FOR REVIEW AND STAY OF CLEANUP AND ABATEMENT ORDER NO. R1-2016-0031

Pursuant to Sections 13320 and 13321 of the California Water Code and Sections 2050 and 2053 of Title 23 of the California Code of Regulations, Douglas and Heidi Cole (the "Coles"), hereby petition the State Water Resources Control Board ("State Water Board") for review and stay of the North Coast Regional Water Quality Control Board's ("Regional Board") decision to issue Cleanup and Abatement Order No. R1-2016-0031 ("CAO") to the Coles regarding their pre-1914 diversion at their property commonly referred to as Marble Mountain Ranch, located at 92520 Highway 96 in Siskiyou County. Each of the required elements for the review and stay request is discussed in turn below.

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A. Request for Review

1. Name, address, telephone number and e-mail address (if available) of the petitioner.

Name of Petitioner	Address	Telephone Number	Email Address
Douglas and Heidi Cole	92520 Highway 96 Somes Bar, CA 95568	(530) 469-3322	guestranch@marblemountainranch.com
Barbara A. Brenner, as counsel to the Coles	1414 K Street 3rd Floor Sacramento, CA 95814	(916) 468-0625	barbara@churchwellwhite.com

2. The action or inaction of the Regional Water Board being petitioned, including a copy of the action being challenged or any refusal to act, if available. If a copy of the regional board action is not available, the petitioner must explain why it is not included.

The Coles are petitioning for review of the Regional Board's action to issue Cleanup and Abatement Order No. R1-2016-0331. A true and correct copy of the CAO is attached to this petition as **Exhibit A**.

3. The date the Regional Water Board acted, refused to act, or was requested to act.

The Regional Board acted on August 4, 2016. That is the date affixed to Matthias St. John's digital signature on the CAO, deeming the CAO effective.

4. A statement of the reasons the action or inaction was inappropriate or improper.

a. It is impossible to comply with the CAO's deadlines.

It is impossible to comply with the deadlines provided in the CAO. The deadlines provided in the CAO include: (1) an energy efficiency evaluation with a water quality review of water entering and exiting the Coles electricity generation system due on October 15, 2016; (2) a Restoration and Monitoring Plan regarding the "head cut and slope at the outlet of the Stanshaw Creek diversion to the unnamed tributary of Irving Creek" due on September 10, 2016; (3) an evaluation of sedimentation and erosion impacts related to the entire ditch system due on October 15, 2016; and (4) a slope assessment of the entire diversion due on September 10, 2016. (CAO, p. 8 ¶ 1, pp. 8-9 ¶ 2, p. 10 ¶ 3 & p. 11 ¶ 4.) Each of these studies require physical conditions that are not currently available at Marble Mountain Ranch.

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The energy efficiency study required under paragraph 1 of page 8 of the CAO is a study the Coles have been pursuing over the last several months. However, they have not contemplated including a water quality analysis of the system within that effort. (CAO, p. 8 ¶ 1.) During the current low flow periods in Stanshaw Creek, the Coles forbear exercising their full pre-1914 water right to divert 3 cfs of water for both consumptive use and non-consumptive hydropower use to comply with a National Marine Fisheries Service bypass flow recommendation for fish habitat in Stanshaw Creek. Stanshaw Creek is currently in a low flow period. Therefore, the Coles are not diverting water for non-consumptive hydropower use. Consequently, there is no water entering or leaving the hydropower system to test for water quality purposes.

Further, the water quality analysis will require consultants that the Coles have not retained nor worked with before. Because the Coles have not retained or worked with a consultant for a water quality analysis of the hydroelectric power generating system, there is no historical data to rely upon for water quality information. In addition, there is not adequate time to engage a new consultant, perform the analysis and prepare the water quality analysis report. Thus, the Coles lack the information and the conditions to gather such information required to complete this element of the energy efficiency study by the October 15, 2016 deadline in the CAO.

The three remaining deliverables with looming deadlines: (1) the study required to draft the Restoration and Monitoring Plan regarding the outlet at Irving Creek due on September 10, 2016; (2) the ditch evaluation due on October 15, 2016; and (3) the slope assessment due on September 10, 2016 under the CAO require a hydrogeologist's review of the Cole's diversion. (CAO, pp. 8-9 ¶ 2, p. 10 ¶ 3 & p. 11 ¶ 4.) Rocco Fiori, of Fiori Geosciences, who has previously studied the sedimentation and erosion impacts at the Coles diversion, has reviewed the CAO and its requirements. (Declaration of Rocco Fiori in Support of Petition for Review and Stay of Cleanup and Abatement Order No. R1-2016-031 ("Fiori Declaration"), p. 2 ¶ 6.) After his review of the CAO, Mr. Fiori determined that he cannot complete any of the three studies and provide additional information regarding the Coles diversion, without more water in the diversion system with leaf off, wet conditions along the diversion ditch and at the Irving Creek outlet point. (*Ibid.*)

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As detailed above, the Coles are currently limiting their diversion to consumptive use flows only to comply with a National Marine Fisheries Services bypass flow recommendation for fish habitat in Stanshaw Creek. With this limitation on their diversion, the Coles cannot provide Mr. Fiori with more water in the system for the studies required under the CAO. The current dry conditions with full vegetation further complicate the matter as current conditions will obscure Mr. Fiori's evaluation of any erosion or sedimentation that may exist along the ditch or at the Irving Creek outlet during wet season conditions. Therefore, it is impossible to comply with the CAO's deadlines as the studies cannot be accurately completed based on the current conditions at Marble Mountain Ranch.

b. The ditch assessment and slope stability studies are unnecessary

The CAO requires that Coles provide "an evaluation of the entire ditch system, identifying all features and locations susceptible to failure" and "assess slopes between the upper ditch and Stanshaw creek [sic] and the streambed of Stanshaw Creek and Irving Creek and the unnamed tributary to Irving Creek for stored sediment deposits and erosional sources associated with the past and current failures of the ditch." (CAO, p. 10 ¶ 3(a) & p. 11 ¶ 4(a).) Based on the evaluation of the entire ditch system and the slope assessment, the Coles are to identify corrective measures to avoid erosion and sedimentation impacts on waters of the state from their diversion. (*Ibid.)*

The Coles have previously provided the Regional Board, the State Water Board, and all stakeholders that have been involved in discussions regarding the Coles diversion a study addressing these issues. That study, conducted by Rocco Fiori of Fiori Geosciences addresses both the ditch system and slope of the diversion and makes recommendations to address the identified sedimentation and erosion issues related to the diversion. A copy of that study with recommended actions is attached to this request as part of Mr. Fiori's declaration as **Exhibit B**. The Coles have received no feedback regarding this study or any indication the State Water Board or Regional Board staff have reviewed it.

One of the recommendations included in the Fiori Geosciences study suggests that the Coles pipe the diversion "retaining the existing ditch alignment as an inspection and maintenance

travel way" to address sedimentation and erosion concerns. (Rocco Fiori, Fiori Geosciences, Technical Memorandum (May 14, 2016) p. 3 § 3.4 Recommendations #3., attached hereto as **Exhibit C**) The Coles have been actively pursuing the recommendation to pipe the diversion to transport water for consumptive use to Marble Mountain Ranch and have submitted plans to the Regional Board, the United States Army Corps of Engineers, and the Department of Fish and Wildlife for review. Those agencies have reviewed the plans and affirmed that permitting under each of their jurisdictions is not required for placing a six inch pipe with a headgate in the diversion ditch. The Coles are also pursuing funding opportunities to pipe the conveyance to transport non-consumptive use water to Marble Mountain Ranch. Additional studies to make the recommendation that the conveyance system should be piped to avoid sedimentation and erosion are not required when that solution has already been identified and the Coles are in the process of implementing that solution.

c. The recommendation to remove the berm if the conveyance is piped is not necessary.

In addition to the required energy efficiency study, paragraph 1 on page 8 of the CAO provides:

> In the event that this evaluation [the energy efficiency study] concludes that a piped delivery system is appropriate, develop a plan to decommission the ditch by removing the outboard berm and restoring all affected watercourses. In addition, provide design standards for slope restoration and outsloping to ensure evenly distributed surface flows. All bare soil shall be stabilized with erosion controls and replanted with native vegetation.

In Mr. Fiori's technical memorandum, his third recommendation on page 3 of his report under, Section 3.4 Recommendations states:

> If a pipeline is the selected alternative, consider retaining the existing ditch alignment as an inspection and maintenance travel way. Mild outsloping and appropriately spaced rolling dips along the travel way could be used to effectively improve the stability and drainage of the travel way, and to provide a route for rapid response in the event of a pipeline failure. (Rocco Fiori, Fiori Geosciences, Technical Memorandum (May 14, 2016) p. 3 § 3.4 Recommendations #3.)

Mr. Fiori's recommendation provides the Coles with a route to address any ditch failures that may occur even with a piping of the conveyance. Retaining the berm and existing ditch ensures that any potential future impacts to waters of the state from sedimentation or erosion can be addressed quickly and effectively.

d. The Coles will not be able to determine whether the diversion was the result of stored sediment deposits and erosion and study of those features will not provide additional information for resource improvements

Paragraph 4(a) on page 11 of the CAO requires that the Coles "[a]ssess slopes between the upper ditch and Stanshaw creek [sic] and the streambed of Stanshaw Creek and Irving Creek and the unnamed tributary to Irving Creek for stored sediment deposits and erosional sources associated with the past and current failures of the ditch." Determining whether the source of sediment deposits and erosion is a result of a natural process in the forested land surrounding the diversion, a legacy of historical ditch failures dating back to the 1800s or a modern ditch failure that occurred during the Coles ownership of Marble Mountain Ranch is difficult at best. (Fiori Declaration, p. 2 ¶ 7.) Further, that determination will not provide clear evidence of an impact to waters of the state unless an actual discharge, or flow path and deposit can be traced from the point of origin to the discharge location. (*Ibid.*) Thus, this study will not provide the Coles or the Regional Board with any additional information regarding the diversion or the ditch slope to avoid any potential future impacts to waters of the state. Instead, it will add additional delay and take resources away from the Coles efforts to implement solutions.

5. How the petitioner is aggrieved.

To comply with the requirements under the CAO, the Coles must direct funding and time to studies that could be otherwise used to implement already identified solutions. Additional study of the problem, after it has already been studied and a solution has been identified, delays implementation of the identified solutions. Instead of applying time and resources to measures to correct the sedimentation and erosion issues at the diversion, the CAO requires that the Coles redirect those resources to further study. This achieves nothing and only further delays solutions that can avoid potential future impacts to waters of the state.

Additionally, the Coles are unable to comply with the requirements of the CAO under the deadlines given. The Coles have been pursuing solutions to address the issues identified in the CAO for years.[1] Despite those efforts, the Coles are faced with either complying with the CAO's

[1] For many years the State Water Board has challenged the Coles' right to divert water under their pre-1914 claim. Until that challenged was resolved, the State Water Board and, subsequently, the Regional Water Board's other issues with the diversion works could not be addressed. The Coles have been responsive to both Board's concerns

deadlines or having to face enforcement action that will take resources away from improving the diversion and likely place them in financial jeopardy as small business owners.

6. The action the petitioner requests the State Water Board to take.

The Coles seek an Order from the State Water Board overturning the CAO, as the studies required under the CAO that are unnecessary or impossible to provide. In the alternative, the Coles request additional time to provide the studies based on the need for leaf off, wet conditions. The ditch evaluation and slope stability study are duplicative of previous studies and unnecessary to address the Regional Water Board's concerns to find solutions to sedimentation and erosion impacts to waters of the state that may results from the Coles diversion. In the alternative, allowing the Coles more time to provide the studies will ensure the correct solutions to avoid potential future sedimentation and erosion impacts to waters of the state.

7. A statement of points and authorities for any legal issues raised in the petition, including citations to documents or hearing transcripts that are referred to.

Water Code section 13267(b)(1) provides that the Regional Board may require a discharger to produce technical reports as required under the CAO. However, that section goes on to state that the "burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." (Water Code § 13267(b)(1).) The State Water Board's Resolution No. 92-49, Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code section 13304, underscores the requirement under Water Code section 13267(b)(1), requiring the Regional Board to "consider whether the burden, including costs, of reports required of the discharger ... bears a reasonable relationship to the need for the reports and the benefits to be obtained from the reports." This provision is part of a section of Resolution 92-49 that ensures "that dischargers shall have the opportunity to select cost-effective methods for detecting discharges or threatened discharges and methods for cleaning up and abating the effects" of discharges or threatened discharges.

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over this multiple year period, allowing inspections, implementing conservation measures, decreasing diversions for fishery resources, investigating alternative power sources (solar, grid connection, wind) and participating in stakeholder meetings.

The CAO states the technical reports "are necessary to assure compliance with this Order and to protect the waters of the state. The technical reports are further necessary to demonstrate that appropriate methods will be used to clean up waste discharged to surface waters and watercourses and to ensure that clean up complies with Basin Plan requirements." (CAO, p. 7 ¶ 12.)

As discussed above, the Coles have already completed a study of the diversion and proposed the solution of piping the diversion to avoid erosion or sedimentation impacts to waters of the state from their diversion by submitting construction and implementation plans to all permitting agencies for review. The Fiori Geosciences report suggests a solution that will protect waters of the state and the Coles have already provided plans for the six inch pipe solution to implement it. Thus, the Coles have confirmed that "appropriate methods" are being used to implement the six inch pipe solution and are working on a design for a secondary pipe design to convey water to generate electricity for Marble Mountain Ranch. Those designs will also be submitted to all regulatory agencies for review and approval. Conducting further study of the diversion ditch and slope will not result in protection of waters of the state nor will it provide further appropriate methods for a solution for the sedimentation and erosion concerns. Therefore, the costs of the technical reports required under the CAO do not bear a "reasonable relationship to the need for the reports and the benefits to be obtained from" them. (Water Code § 13267(b)(1).)

8. A statement that copies of the petition have been sent to the Regional Water Board and to the discharger, if different from the petitioner.

This petition and its exhibits have been sent to the Regional Board as required under this element of the petition to review.

9. A statement that the issues raised in the petition were presented to the regional board before the regional board acted, or an explanation of why the petitioner could not raise those objections before the regional board.

The CAO was issued following extensive conversations with both Regional Board and State Water Board staff as well as many other stakeholders in the Stanshaw Creek system. The actions outlined in the CAO have been part of those conversations throughout this process and the Coles have provided materials addressing the issues contained in the CAO, including the Fiori

Geosciences report and construction design and implementation plans to pipe the diversion to transport water for consumptive use to Marble Mountain Ranch. During all of those conversations, the Coles have continued to propose solutions to address the Regional Board and the State Water Board's concerns and have continued to engage with the Regional Board and the State Water Board to implement those solutions. The CAO was issued following discussion that indicated all stakeholders, including the State Water Board and the Regional Board agreed to a proposed solution of installing a six inch pipe in the Coles diversion to carry consumptive use flow and subsequently will install a larger pipe to carry their pre-1914 right of 3 cfs of water during high flow periods. That solution, once implemented will address the sediment and erosion concerns in the CAO relative to the Coles' pre-1914 water right conveyed through their diversion ditch.

B. Stay Request

The stay request requires that the Coles allege facts that demonstrate the following three elements:

a. There will be substantial harm to the petitioner or to the public interest if a stay is not granted;

b. There will be no substantial harm to other interested persons and to the public interest if a stay is granted; and

c. There are substantial questions of fact or law regarding the disputed action.

The stay request must be accompanied by a declaration of a person having knowledge of the facts alleged. Attached are declarations from Rocco Fiori, of Fiori Geosciences and Douglas Cole, the discharger, asserting under penalty of perjury the facts alleged herein demonstrate the need for a stay, attached as **Exhibit B** and **Exhibit D**, respectively. Each of the three required elements of the factual circumstances required for the issuance of a stay are discussed in turn below.

1. <u>There will be substantial harm to the petitioner if a stay is not granted.</u>

The Coles are small business owners with limited resources to address the concerns associated with the diversion. They rely on a combination of their own personal finances and

grant funding to implement improvements to the diversion at Marble Mountain Ranch. The additional studies required under the CAO, with their existing scope would be prohibitively expensive for the Coles to personally fund. The studies required under the CAO are unlikely to be grant funded and with the looming deadlines associated with those reports, September 10, 2016 and October 15, 2016, there is no time to seek grant funding.

Further, the report required under the CAO must be completed and submitted to the Regional Board by either September 10, 2016 or October 15, 2016. Both of these dates fall well before the Coles will be able to complete the studies required. The studies require physical conditions not currently available at Marble Mountain Ranch. Mr. Fiori requires more water in the diversion system and leaf off, wet conditions to complete the studies. These conditions will not be available until the wet season which can begin as late as early December in a dry year.

Moreover, the current deadlines contained in the CAO fall well before the State Water Board will have time to review and consider the Coles request for review of the CAO. Therefore, the Coles will have to either comply with the CAO's requirements and provide studies that do not provide any additional information regarding sedimentation and erosion at Marble Mountain Ranch, or not comply with the deadlines contained in the CAO and face enforcement action while the State Water Board's review of the CAO is pending.

2. There will be no substantial harm to other interested persons and to the public interest if a stay is granted.

Granting the stay will result in no substantial harm to other interested persons and to the public interest. During low flow periods in Stanshaw Creek, which are currently occurring, the Coles reduce the amount of water they divert to consumptive use water only instead of exercising their full pre-1914 water right to divert 3 cfs of water. This reduced flow means that concerns of overtopping are reduced to negligible levels as there is less water in the ditch at all times during low flow periods. The low flow conditions coincide with dry conditions in the ground that serves as the diversion's base. Thus, seepage and other factors that contribute to erosion are at a minimum during this time. The Water Board has ninety (90) days to decide if it will review the CAO, meaning the stay need only remain in place until sometime in early December, during the

early part of the wet season. (California Code of Regulations, tit. 23, § 2050.5(e).) Seepage impacts to erosion will not be fully developed until much later in the winter wet season.

The Coles are also preparing to install the six inch pipe to convey consumptive use water. Once that pipe is in place, even during wetter, high flow conditions, the concerns about overtopping and seepage resulting in sedimentation and erosion impacts to waters of the state will be reduced. The Coles will be submitting a ditch operation and monitoring plan for the Regional Board's approval before the wet season commences. This monitoring plan will provide for regular inspections and repair to the diversion system during the wet season, avoiding substantial harm to other interested persons and to the public interest.

3. There are substantial questions of fact or law regarding the disputed action.

As discussed above, the Coles cannot comply with the deadlines contained in the CAO and the studies required under the CAO do not comply with the requirements under Water Code section 13267(b)(1) and State Water Board Resolution No. 92-49 that the burdens of the technical reports, including their costs, must be rationally related to the need for the reports and the benefits to be obtained from the reports. Based on current conditions in Stanshaw Creek and along the Coles' diversion, they lack the natural conditions to further study the sedimentation and erosion impacts to waters of the state from the diversion ditch.

The Coles have completed a ditch analysis and a slope study regarding sedimentation and erosion impacts from their diversion to waters of the state. They have identified the solution of piping the diversion to address these potential impacts. The methods for implementing that solution have been reviewed. The Coles require time and funds to actually put the six inch pipe in place. The additional studies required under the CAO will not provide any addition information that will be useful in determining what resource improvements to pursue at Marble Mountain Ranch, especially if the Coles complete the studies before the required leaf off, wet conditions exist.

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The State Water Board must review these facts and how they relate to the law in order to overturn the Regional Board's decision to issue the CAO.

DATED: September 6, 2016

CHURCHWELL WHITE LLP

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

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):

PETITION FOR REVIEW AND STAY

☒ 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 to the persons at the electronic mail addresses set forth below.

State Water Resources Control Board
Office of Chief Counsel
Attn: Adrianna M. Crowl
P.O. Box 100
Sacramento, CA 95814
wataerqualitypetitions@waterboards.ca.gov

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

Executed on September 6, 2016, at Sacramento, California.

CHRISTINA M. PRITCHARD

EXHIBIT A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION

CLEANUP AND ABATEMENT

AND

WATER CODE SECTION 13267(b) ORDER NO. R1-2016-0031
DOUGLAS AND HEIDI COLE, ASSESSOR PARCEL NUMBER 026-290-200
WDID 1A15024NSI

SISKIYOU COUNTY

This Order is issued to Douglas and Heidi Cole (hereinafter referred to as Dischargers) based on provisions of Water Code section 13304, which authorizes the North Coast Regional Water Quality Control Board (Regional Water Board) to issue a Cleanup and Abatement Order ("Order"), and Water Code section 13267, which authorizes the Regional Water Board to require the preparation and submittal of technical and monitoring reports.

The Executive Officer finds, with respect to the Dischargers' acts, or failure to act, the following:

1. **Purpose of the Order:** This Order requires the Dischargers to eliminate the threat of future discharges and to clean up and abate the effects of discharges of soil, rock and miscellaneous debris into Irving Creek, Stanshaw Creek, and the Klamath River. These watercourses are considered waters of the state, as well as waters of the United States. (References hereinafter to waters of the United States are inclusive of waters of the state.)[1] The Dischargers maintain a diversion ditch from Stanshaw Creek to Irving Creek. The Dischargers operate the ditch to provide water to the Marble Mountain Ranch (Ranch), for domestic uses, as well as to generate electricity, and to fill and maintain a small pond for recreational use and potentially fire protection. The upper segment of the ditch carries water from Stanshaw Creek to the Marble Mountain Ranch. Tailwater from the Pelton wheel used for power generation flows through the property to the pond. Overflows from the pond flow to a discharge point where they enter Irving Creek. Water in the upper segment of the ditch periodically overtops or breaches portions of its outboard containment berm, eroding slopes below the ditch.

[1] The Regional Water Board administers and enforces the Clean Water Act (CWA). The CWA regulates what it refers to as "navigable waters" and defines those waters as "waters of the United States." Waters of the United States have been interpreted broadly by the agencies responsible for implementing the CWA to include all traditionally navigable waters and their tributaries. (40 C.FR. § 122.2) The Porter-Cologne Water Quality Control Act (Porter Cologne) provides the Regional Water Board additional authority to regulate discharges of waste into "waters of the state." (Water Code § 13260.) The term "water of the state" is defined as "any surface water or groundwater, including saline waters, within the boundaries of the state." (Water Code § 13050(3).) All waters of the United States that are within the boundaries of California are also waters of the state for purposes of Porter-Cologne.

In some cases, water escaping from the ditch flows to and transports earthen material into downslope watercourses, including Stanshaw Creek and, potentially, the Klamath River.

Outflows to Irving Creek have created a significant active erosional feature, representing a chronic source of sediment discharges into Irving Creek. Point source discharges of sediment-laden waters associated with ditch containment failures and chronic sediment discharges from the Irving Creek outfall occur without authorization from applicable federal, state, and local agencies, including the Regional Water Board. This Order requires investigation and cleanup in compliance with the Water Code, the Water Quality Control Plan for the North Coast Region (Basin Plan), and other applicable Regional Water Board plans, policies, and regulations.

2. **Responsible Parties:** The Dischargers, as the property owners and operators of the ditch are discharging or creating a threat of discharge, and are responsible parties for purposes of this Order.

   a. Per records from the Siskiyou County Assessor-Recorder's Office, Douglas and Heidi Cole are the owners of record for the property identified as Assessor Parcel 026-290-200.

   b. The Regional Water Board reserves the right to amend this CAO to add additional responsible parties when/if those parties are identified.

3. **Location and Description:** The Marble Mountain Ranch is located approximately 8 miles north of Somes Bar, in Siskiyou County at 92520 Highway 96. The ditch supplying water to the Ranch originates in Stanshaw Creek (tributary to Klamath River at river mile 76.1) and discharges into Irving Creek (tributary to Klamath River at river mile 75). The Point of Diversion (POD) is located on Stanshaw Creek, about 0.68 miles upstream of the Highway 96 crossing.

4. **History:** According to records from the Siskiyou County Assessor-Recorder's Office, Douglas and Heidi Cole purchased the Ranch in March of 2007. There is no record of the Ranch or the diversion ditch having prior regulatory oversight or history with the Regional Water Board. The diversion has reportedly been in place since the 1800s, supplying a variety of uses to landowners over the years with the most recent landowners being the Dischargers.

5. **Basis of Order:** Periodic failure of the ditch, and the Dischargers' activities to operate and maintain the ditch, as detailed below, created and/or threaten to create, conditions of pollution or nuisance in waters of the state by unreasonably impacting water quality and beneficial uses.

a. During an inspection of the diversion ditch and the Ranch on February 12, 2015, Regional Water Board staff identified 19 locations along the upper ditch where the ditch has failed or has the potential to fail.

b. The primary failure mechanisms were identified as: 1) cut bank slumps that block the ditch and cause flows to overtop the berm; 2) water infiltrates into and seeps through the berm, and causes the berm to fail eroding underlying soils and hillslopes; and 3) as noted above, cumulative sediment inputs reduce the ditch capacity and increase the risk of overtopping as ditch capacity is diminished, particularly increasing the potential for failure in areas where the berm is low or has been damaged. Due to the operation and maintenance of the ditch, failures and repairs constitute an annual and chronic discharge of sediment to waters of the state, including Stanshaw and Irving Creeks, and potentially directly to the Klamath River.

c. The diversion ditch outfall discharges onto a steep slope with an abrupt drop into a short unnamed tributary to Irving Creek. This discharge causes significant slope erosion and chronic delivery of substantial volumes of sediment into Irving Creek and the Klamath River.

6. **Beneficial Uses and Water Quality Objectives:** The Basin Plan designates beneficial uses, establishes water quality objectives, contains implementation programs for achieving objectives, and incorporates by reference, plans and policies adopted by the State Water Resources Control Board. Stanshaw and Irving creeks are tributaries of the Klamath River within the Middle Klamath River Hydrologic Area, which under section 303(d) of the federal CWA is listed as impaired for sediment, temperature, microcystin, organic enrichment/low dissolved oxygen, and nutrients. On September 7, 2010, the State Water Resources Control Board adopted a Resolution approving amendments to the Water Quality Control Plan for the North Coast Region to establish: (1) Site Specific Dissolved Oxygen Objectives for the Klamath River; (2) an Action Plan for the Klamath River Total Maximum Daily Loads (TMDLs) Addressing Temperature, Dissolved Oxygen, Nutrient, and Microcystin impairments in the Klamath River; and (3) an Implementation Plan for the Klamath and Lost River basins. On December 28, 2010, the United States Environmental Protection Agency approved the TMDLs for the Klamath River in California pursuant to CWA section 303(d)(2). The Action Plan indicates that temperature impairments in the Klamath are attributable in part to excess sediment loads from anthropogenic sources, and encourages parties responsible for existing sediment sources to take steps to inventory and address those sources. Existing and potential beneficial uses for the Ukonom Hydrologic Subarea of the Middle Klamath River Hydrologic Area potentially affected by the activities described herein include the following: Municipal and Domestic Supply (MUN); Agricultural Supply (AGR); Industrial Service Supply (IND); Industrial Process Supply (PRO); Ground Water Recharge (GWR); Freshwater Replenishment Groundwater Recharge (GWR); Freshwater Replenishment (FRSH); Navigation (NAV); Hydropower Generation (POW);

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Water Contact Recreation (REC-1); Non-contact Water Recreation (REC-2); Commercial and Sport Fishing (COMM); Warm Freshwater Habitat (WARM); Cold Freshwater Habitat (COLD); Wildlife Habitat (WILD); Rare Threatened or Endangered Species (RARE); Migration of Aquatic Organisms (MIGR); Spawning, reproduction, and/or Early Development (SPWN); and Aquaculture (AQUA) and Native American Culture (CUL). Beneficial uses of any specifically identified water body generally apply to all of its tributaries. These include Stanshaw Creek, Irving Creek, and any tributaries thereto.

Section 3 of the Basin Plan contains water quality objectives that specify limitations on certain water quality parameters not to be exceeded as a result of waste discharges. These include, but are not limited to the following:

a. **Suspended Material**: Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.

b. **Settleable Material**: Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or adversely affect beneficial uses.

c. **Sediment**: The suspended sediment load and suspended discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.

d. **Turbidity**: Turbidity shall not be increased more than 20 percent above naturally occurring background levels. Allowable zones within which higher percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waiver thereof.

7. **Failure to Obtain Necessary Permits:** Regional Water Board staff determined that discharges of waste earthen material associated with ditch operation, maintenance, and failure, including point source discharges of sediment-laden water to waters of the state has occurred without coverage under either a National Pollutant Discharge Elimination System (NPDES) permit, waste discharge requirements, or a waiver thereof.

8. **Clean Water Act Violations:** Section 301(a) of the CWA provides certain exceptions to "the discharge of any pollutant by any person shall be unlawful." (33 U.S.C. § 1311(a).) One of the exceptions allowed for under the CWA is the discharge from a point source as authorized by a permit granted pursuant to the National Pollutant Discharge Elimination System (NPDES) under section 402 of the CWA. (33 U.S.C. § 1342.) The CWA prohibits the discharge of any pollutant from a point source into waters of the United States without an NPDES permit. Evidence observed by staff along the upper ditch indicated that the ditch had overtopped or caused the berm to fail at several locations.

While staff did not follow the erosion path below each failure point to confirm that flows reached downstream surface waters, staff did observe a number of points where the flows reached Stanshaw Creek. In each case, such a flow, carrying sediment and/or other mobilized materials and delivering them into a surface water represents a point source discharge of waste, requiring an NPDES permit.

9. Water Code Violations:

a. Water Code section 13376 requires any person discharging or proposing to discharge pollutants to waters of the United States to file a report of waste discharge. Each case where the ditch has failed and flows have discharged into Stanshaw Creek or the Klamath River represents a violation of Water Code section 13376 due to the discharge of sediment-laden water into waters of the United States without first filing a report of waste discharge. In addition, the chronic discharge of sediment into Irving Creek associated with the erosion feature at the ditch outfall represents an ongoing violation, and a discharge of waste without a report of waste discharge and/or waste discharge requirements.

b. Water Code section 13304(a) states, in relevant part:

"Any person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirements or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and causes, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts....Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant."

c. Sediment, when discharged to waters of the state, is a "waste" as defined in Water Code section 13050. The Dischargers have discharged waste directly into surface waters of Stanshaw Creek, an unnamed tributary to Irving Creek, and to Irving Creeks, which are tributaries of the Klamath River.

d. The beneficial uses of the Klamath River discussed above in Finding 6 also apply to Stanshaw and Irving creeks.

e. "Pollution" is defined by Water Code section 13050, subdivision (l)(1) as, an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:
   i. The waters for beneficial uses; or
   ii. Facilities which serve these beneficial uses.

f. "Nuisance" is defined by Water Code section 13050, subdivision (m) as, anything which meets all of the following requirements:
   i. Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
   ii. Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.
   iii. Occurs during, or as a result of, the treatment or disposal of wastes.

g. The Dischargers' ditch operations and maintenance activities, and chronic ditch failures result in the relatively continuous unauthorized discharge of waste into surface waters and have created, and threaten to create, a condition of pollution by unreasonably affecting the beneficial uses of waters of the state.

10. **Basin Plan Violations:** The Water Quality Control Plan for the North Coast Region (Basin Plan) contains specific standards and provisions for maintaining high quality waters of the state that provide protection to the beneficial uses listed above. The Basin Plan's Action Plan for Logging, Construction and Associated Activities (Action Plan) includes two prohibitions (Page 4-29.00 of the 2011 Basin Plan):

a. **Prohibition 1** - "The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited."
b. **Prohibition 2** - "The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited."

Evidence observed by staff during the inspection suggests that flows in the ditch chronically overtop portions of the ditch and, at times, cause the ditch berm to fail, and potentially transport that material into Stanshaw Creek or the Klamath River.

Ditch maintenance/repair includes rebuilding or reinforcing the berm, in effect placing additional material at locations where it can transported into watercourses in the event of a ditch failure.

11. Cleanup and Abatement Action Necessary: Sediment discharges associated with improperly constructed and maintained ditches and chronic erosion and sedimentation at the Irving Creek outfall, operated by the Dischargers have occurred, and have the potential to continue to occur. Restoration, cleanup, and mitigation action is required on the part of the Dischargers to ensure that the existing conditions of pollution or nuisance are addressed, that threatened unauthorized discharges from the ditch are prevented, and that any impacts to beneficial uses are mitigated. The current conditions represent priority violations and the issuance of a cleanup and abatement order pursuant to Water Code section 13304 is appropriate and consistent with policies of the Regional Water Board.

12. Technical Reports Required: Water Code section 13267(a) provides that the Regional Water Board may investigate the quality of any water of the state within its region in connection with any action relating to the Basin Plan. Water Code section 13267 (b) provides that the Regional Water Board, in conducting an investigation, may require Dischargers to furnish, under penalty of perjury, technical or monitoring program reports. The technical reports required by this Order are necessary to assure compliance with this Order and to protect the waters of the state. The technical reports are further necessary to demonstrate that appropriate methods will be used to clean up waste discharged to surface waters and watercourses and to ensure that cleanup complies with Basin Plan requirements. In accordance with Water Code section 13267(b), the findings in this Order provide the Dischargers with a written explanation and evidence with regard to the need to implement cleanup, abatement and restoration actions and submit reports. The Dischargers named in this Order own and/or operate the feature from which waste was discharged, and thus are appropriately responsible for providing the reports.

13. California Environmental Quality Act: Issuance of this Order is being taken for the protection of the environment and to enforce the laws and regulations administered by the Regional Water Board and as such is exempt from provisions of the California Environmental Quality Act (CEQA) (Public Resources Code § 21000 et seq.) in accordance with California Code of Regulations, title 14, sections 15061 (b) (3), 15306, 15307, 15308, and 15321. This Order generally requires the Dischargers to submit plans for approval prior to implementation of cleanup and restoration activities at the Site. CEQA exempts mere submittal of plans as submittal will not cause a direct or indirect physical change in the environment and/or cannot possibly have a significant effect on the environment. CEQA review at this time is premature and speculative, as there is simply not enough information concerning the Discharger's proposed remedial activities and possible associated environmental impacts.

If the Regional Water Board determines that implementing any plan required by this Order will have a significant effect on the environment that is not otherwise exempt from CEQA, the Regional Water Board will conduct the necessary and appropriate

environmental review prior to approval of the applicable plan. The Dischargers will bear the costs, including the Regional Water Board's costs, of determining whether implementing any plan required by this Order will have a significant effect on the environment and, if so, in preparing and handling any documents necessary for environmental review. If necessary, the Dischargers and a consultant acceptable to the Regional Water Board shall enter into a memorandum of understanding with the Regional Water Board regarding such costs prior to undertaking any environmental review.

REQUIRED ACTIONS

IT IS HEREBY ORDERED that, pursuant to Water Code sections 13304 and 13267, Douglas and Heidi Cole (Dischargers) shall clean up and abate the impacts to water quality in accordance with the scope and schedule set forth below and provide the following information. The Dischargers shall obtain all necessary permits for the activities required in this Order.

1. Retain an appropriately licensed and experienced California Licensed Professional(s) to evaluate, and provide recommendations on the following:

   Evaluate the operation of the Pelton wheel to determine if there are methods of diversion operation that would increase efficiency and reduce the required volume of the diversion, such as piping the diversion flow for example. Provide a report including recommendations based upon this evaluation. The evaluation shall consider the following:

   a. Water balance – in vs. out;
   b. Water quality review – in vs. out;
   c. Review onsite water needs and usage, and hydropower generation;
   d. Review opportunities to optimize water needs and usage for power generation;
   e. Review opportunities to reduce water loss or head loss; and
   f. Design a delivery system that optimizes water conservation.

   In the event that this evaluation concludes that a piped delivery system is appropriate, develop a plan to decommission the ditch by removing the outboard berm and restoring all affected watercourses. In addition, provide design standards for slope restoration and outsloping to ensure evenly distributed surface flows. All bare soils shall be stabilized with erosion controls and replanted with native vegetation. **Submit all information and recommendations as described above on or before 5:00 pm October 15, 2016.**

2. Retain an appropriately licensed and experienced California- licensed professional to evaluate, assess, and develop a Restoration and Monitoring Plan (RMP) to restore and stabilize the head cut and slope at the outlet of the Stanshaw Creek diversion to the unnamed tributary of Irving Creek. Submit

the plan by **September 10, 2016** to the Executive Officer for review and approval.

a. The RMP shall (1) restore the vegetative and hydrological functions of the damaged streams to ensure the long term recovery of the affected streams; and (2) replant the slopes and streamside areas with native vegetation to prevent erosion and sediment delivery to streams.
b. The RMP shall include and apply best management practices for all current and planned work associated with construction activities affecting, or having the potential to impact, the ditch outfall, unnamed tributary and Irving Creek. The RMP shall contain, at a minimum, design and construction standards, specifications, and designs for stream restoration, surface drainage controls, erosion control methods and standards for unanticipated precipitation during restoration, compaction standards, an implementation schedule, a monitoring and reporting plan, and success criteria meeting the requirements specified herein.
c. The RMP shall include map(s) and/or project designs at 1:12000 or larger scale (e.g., 1:6000) that delineate existing site conditions including existing channels, the projected restored slopes and stream channels, illustrating all restoration plan work points, spoil disposal sites, re- planting areas, and any other factor that requires mapping or site construction details to complete the scope of work.
d. The RMP shall include a time schedule for completing the work including receiving any necessary permits from State, County and/or federal agencies that may be required. The time schedule must adhere to any regulatory deadlines prescribed by the State Water Resource Control Board or North Coast Regional Water Quality Control Board.
e. To ensure a successful re-vegetation/earthen stabilization effort, site restoration and mitigation, the Discharger shall monitor and report for five years. All tree and shrub plantings must have a minimum of 85% success of thriving growth at the end of five years with a minimum of two consecutive years (two growing seasons) of monitoring after the removal of irrigation. Planting shall be adequately spaced to ensure adequate vegetative cover to control surface erosion and increase soil stability. In the event the re-planting fails, re-planting is required and the monitoring shall be extended for another five years until the 85% success rate of vegetation re-establishment is accomplished. The Dischargers are responsible for replacement planting, additional watering, weeding, invasive/exotic eradication, or any other practice to achieve the success criteria.
f. The RMP must include a time schedule for completing the work, including receiving any necessary permits from State, County and/or federal agencies that may be required. The time schedule must describe and include installing temporary erosion control measures prior to October 15, 2016 and completion of slope and ditch outlet restoration by October 15, 2017.
g. A monitoring plan is required for all site restoration and replanting to determine the success of stream restoration efforts and re-vegetation. The monitoring plan

must include regularly scheduled inspections, and established monitoring photo points of sufficient number to document the site recovery for five years or until the Site is restored, mitigation is complete, vegetation is reestablished, erosion is no longer ongoing and meets the success criteria in the approved RMP. These photo-documentation points shall be selected to document the stability of the tributaries. The Dischargers shall prepare a site map with the photo-documentation points clearly marked. Prior to and immediately after implementing the restoration and/or mitigation, the Dischargers shall photographically document the pre- and post-conditions of the tributaries at the pre-selected photo-documentation points. The Dischargers shall submit the pre-restoration photographs, the post-restoration photographs, and the map with the locations of the photo-documentation points to the Water Board as part of the as-built report as defined below.;

h. The monitoring plan must include regularly scheduled inspection dates. We recommend October 15, January 5, and March 1 of each year, and a monitoring report is required within 30 days of each inspection. Monitoring Reports shall summarize monitoring results; describe any corrective actions made or proposed to address any failures of the Site and restoration measures (features to be assessed for performance and potential failure include, but are not limited to, erosion controls, stream bed and bank erosion, sediment discharges, work, and re-vegetation); and include narrative and photo documentation of any necessary mitigation and evidence of successful restoration and Site recovery for five years, or until Site recovery meets the approved success criteria. At the conclusion of restoration work, when the site is stable and the monitoring program has been fulfilled, submit a Summary report by **January 1, 2021 or the year that site remediation and replanting meets the approved success criteria**. The Executive Officer or designee will review the report and determine if the site meets all the requirements and the Order can be terminated.

3. In the event that the delivery system will require continued operation of all or a portion of the diversion ditch, retain an appropriately qualified and experienced California-licensed professional to evaluate and submit a report to the Executive Officer for review and approval by **October 15, 2016.** The report shall include the following:

a. Evaluation of the entire ditch system, identifying all features and locations susceptible to failure by any of the physical processes and mechanisms described herein, (including but not limited to ditch seepage, berm fill saturation, upslope cutbank stability), and identifying where there is potential for sediment delivery to receiving waters in the event of a failure.

Specify appropriate corrective action measures or steps to take, including design and construction standards and an implementation schedule to complete the

EXHIBIT 2

defined scope of work. In addition, assess all areas of past failures to determine if the features reach Stanshaw Creek and deliver sediment and represent future delivery routes that require mitigation, propose mitigation as necessary to control sediment delivery and surface flows in the event of future failures or during annual rainfall events.

b. A ditch operation and maintenance plan that includes an inspection and maintenance schedule and identifies any permits required for the scope of work anticipated. The plan should include proposed measures to ensure that the slopes above the ditch do not collapse into or block the ditch, that water seepage from the ditch does not saturate underlying materials and result in failure, that the ditch does not overtop the berm, that the berm does not fail, and that sediment does not deliver from the ditch to waters of the state. The plan must also include specifications for measures to be constructed and/or incorporated to prevent further erosion and sediment delivery from the discharge point to Irving Creek, and to restore and stabilize the channel between the discharge point and Irving Creek.

4. Regardless of the ultimate water delivery system, the following additional measures shall be taken by **September 10, 2016** to protect water quality:

a. Assess slopes between the upper ditch and Stanshaw creek and the streambed of Stanshaw Creek and Irving Creek and the unnamed tributary to Irving Creek for stored sediment deposits and erosional sources associated with the past and current failures of the ditch. Identify all erosional issues and those that should be corrected, propose corrective measures and provide a schedule for implementing corrective measures.
b. Ensure that water used onsite, conveyed in the ditch and discharged does not adversely impact waters of the state. Develop a sampling plan to assess the quality of water in the ditch as it passes through the ranch property for potential sources of fecal coliform, total coliform, total petroleum hydrocarbons, temperature, and nutrients. The sampling plan shall assess water quality above the diversion and ranch complex, and below the ranch complex to evaluate if there are any pollutants entering the surface waters from the ditch or pond. Submit the Sampling Plan for approval by the Executive Officer by **September 10, 2016**. Upon approval implement the sampling plan and provide results of the sampling by **November 1, 2016**. In the event that sampling identifies inputs of constituents of concern, then develop a plan to remedy the discharges and submit the plan by **December 1, 2016** to the Executive Officer for review and approval.

5. Progress reports are due quarterly the first of the month starting on **October 1, 2016**. Quarterly progress report deadlines shall be January 1, April 1, July 1, and October 1 through January 1, 2022. Progress reports should include an update on project development and permitting, a description of steps taken to develop and

implement the required plans, and any unforeseen circumstances that may affect progress on meeting the deadlines and requirements of this Order. Progress reports will continue until the RMP is fully implemented.

6. **By October 15, 2018,** complete all approved restoration and mitigation measures.

7. **By December 15, 2018**, submit a Completion Report for the Restoration, and Monitoring Plan including an as built report. The Completion Report shall accurately depict all restoration and/or mitigation measures and document that the above plan(s) to restore, compensate for, avoid and minimize any further impacts to waters of the state and United States have been fully implemented.

GENERAL REQUIREMENTS AND NOTICES

8. **Duty to Use Qualified Professionals:** The Dischargers shall have the documentation, plans, and reports required under this Order prepared under the direction of appropriately qualified professionals. As required by the California Business and Professions Code sections 6735, 7835, and 7835.1, engineering and geologic evaluations and judgments shall be performed by or under the direction of registered professionals competent and proficient in the fields pertinent to the required activities. The Dischargers shall include a statement of qualification and registration numbers, if applicable, of the responsible lead professionals in all plans and reports required under this Order. The lead professional shall sign and affix their registration stamp, as applicable, to the report, plan, or document.

9. **Signatory Requirements:** All technical reports submitted by the Discharger shall include a cover letter signed by the Discharger, or a duly authorized representative, certifying under penalty of law that the signer has examined and is familiar with the report and that to his or her knowledge, the report is true, complete, and accurate. The Discharger shall also state if they agree with any recommendations/ proposals and whether they approve implementation of said proposals. Any person signing a document submitted under this Order shall make the following certification:

   I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my knowledge and on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

10. **Notice of Change in Ownership or Occupancy:** The Discharger shall file a written report on any changes in the Site's ownership or occupancy and/or any changes in responsible party or parties operating the ditch. This report shall be filed with the

Regional Water Board no later than 30 days prior to a planned change and shall reference the number of this Order.

11. **Submissions:** All monitoring reports, technical reports or notices required under this Order shall be submitted to: the Assistant Executive Officer and Stormer Feiler:

    Assistant Executive Officer - Shin-Roei Lee
    Shin-Roei.Lee@waterboards.ca.gov
    Stormer.Feiler@waterboards.ca.gov

    By mail to: North Coast Regional Water Quality Control Board, 5550 Skylane Blvd. Suite A, Santa Rosa, CA 95403

12. **Other Regulatory Requirements:** The Dischargers shall obtain all applicable local, state, and federal permits necessary to fulfill the requirements of this Order prior to beginning the work.

13. **Cost Recovery:** Pursuant to Water Code section 13304, the Regional Water Board is entitled to, and may seek reimbursement for, all reasonable costs it actually incurs to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order.

14. **Delayed Compliance:** If for any reason, the Dischargers are unable to perform any activity or submit any document in compliance with the schedule set forth herein, or in compliance with any work schedule submitted pursuant to this Order and approved by the Assistant Executive Officer, the Dischargers may request, in writing, an extension of the time specified. The extension request shall include justification for the delay. Any extension request shall be submitted as soon as a delay is recognized and prior to the compliance date. An extension may be granted by revision of this Order or by a letter from the Assistant Executive Officer.

15. **Potential Liability:** If the Dischargers fail to comply with the requirements of this Order, this matter may be referred to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability. Failure to comply with this Order may result in the assessment of an administrative civil liability up to $10,000 per violation per day, pursuant to California Water Code sections 13268, 13350, and/or 13385. The Regional Water Board reserves its right to take any enforcement actions authorized by law, including but not limited to, violation of the terms and condition of this Order.

16. **No Limitation of Water Board Authority.** This Order in no way limits the authority of the Regional Water Board to institute additional enforcement actions or to require additional investigation and cleanup of the Site consistent with the Water Code. This Order may be revised as additional information becomes available.

17. **Modifications.** Any modification to this Order shall be in writing and approved by the Executive Officer of the Regional Water Board, including any potential extension requests.

18. **Requesting Review by the State Water Board:** Any person aggrieved by this or any final action of the Regional Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and Title 23, California Code of Regulations, section 2050 et al. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the State Water Board must receive the petition on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at:

    http://www.waterboards.ca.gov/public_notices/petitions/water_quality

    or will be provided upon request.

This Order is effective upon the date of signature.

Matthias St.John Digitally signed by Matthias St.John
Date: 2016.08.04 18:06:55 -07'00'

Matthias St. John
Executive Officer

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EXHIBIT B

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DOUGLAS COLE AND HEIDI COLE

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of Douglas Cole and Heidi Cole for Review and Stay of the North Coast Regional Water Quality Control Board Issuance of Cleanup and Abatement Order No. R1-2016-0331.	DECLARATION OF ROCCO FIORI IN SUPPORT OF PETITION FOR REVIEW AND STAY OF CLEANUP AND ABATEMENT ORDER NO. R1-2016-0331

I, ROCCO FIORI, declare as follows:

1. I am the Principle at Fiori Geosciences, a position I have held for 10 years, a Licensed Geologist (PG 8066), and have 30 years of experience assessing and mitigating anthropogenic erosion and sedimentation problems. I make this declaration in support of the accompanying Petition for Review and Stay of Cleanup and Abatement Order No. R1-2016-0331. I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. I am the author of the Fiori Geosciences Technical Memorandum dated May 14, 2016.

3. I evaluated the Coles diversion at Marble Mountain Ranch on April 20, 2016, reviewed the North Coast Regional Water Quality Control Board inspection report by Stormer Feiler dated March 9, 2015, and used desktop analysis, including qualitative assessment of site conditions using a 1-meter resolution LiDAR DEM, Digital Ortho-Photographs, and the Regional

Geologic Map to reach my conclusions in my Technical Memorandum dated May 14, 2016.

4. The May 14, 2016 Technical Memorandum accurately reflects my opinion of the causes of sedimentation and erosion that results from the Coles diversion at Marble Mountain Ranch.

5. The May 14, 2016 Technical Memorandum accurately reflects my recommendations for addressing the sedimentation and erosion impacts to waters of the state from the Coles diversion at Marble Mountain Ranch

6. I have reviewed all of the required reports and deliverables contained in Cleanup and Abatement Order No. R1-2016-0031 and determined that leaf off, wet conditions are necessary to accurately complete the required reports and deliverables in Cleanup and Abatement Order No. R1-2016-0031.

7. The requirements in paragraph 4(a) on page 11 of Cleanup and Abatement Order No. R1-2016-0031 requires that the Coles "[a]ssess slopes between the upper ditch and Stanshaw creek and the streambed of Stanshaw Creek and Irving Creek and the unnamed tributary to Irving Creek for stored sediment deposits and erosional sources associated with the past and current failures of the ditch" cannot be fully implemented as it would be difficult to deconvolve natural, and legacy ditch related sediment deposits from those that are a result of modern ditch failures. Furthermore, an assessment of the cause of the erosion and sediment deposits cannot provide unequivocal evidence that a nuisance impact to the waters of the State had occurred unless the actual discharge, or flow path and deposit can be traced from the point of origin to the discharge location.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on this 6 day of September, 2016, at Klamath, California.

ROCCO FIORI
Engineering Geologist, PG 8066
Fiori GeoSciences

EXHIBIT C

TECHNICAL MEMORANDUM

Sediment Delivery Potential from Failures on the Stanshaw Creek Diversion Ditch
Prepared for: Will Harling, Mid-Klamath Watershed Council and Douglas and Heidi Cole, Marble Mountain Ranch.
Prepared by: Rocco Fiori, Engineering Geologist, PG8066.
May 14, 2016

1.0 Introduction

This memorandum provides my preliminary findings of a survey to assess the sediment delivery potential from failures on the Stanshaw Creek diversion ditch. The Marble Mountain Ranch has a patented water right to divert water from Stanshaw Creek for consumptive and non-consumptive uses. The North Coast Regional Water Quality Control Board (NCRWQCB) and National Marine Fisheries Service (NMFS) are concerned operation of the diversion ditch constitutes a threat to downstream beneficial uses including water quality, and fish and wildlife habitat. This assessment was conducted at the request of Douglas and Heidi Cole, owners of the Marbled Mountain Ranch, and Will Harling, Director of the Mid-Klamath Watershed Council (MKWC).

2.0 Approach

The purpose of the survey was to assess the relative potential for ditch failures to deliver sediment to Stanshaw Creek and other waters of the State of California. The assessment was comprised of the following activities:

1. Review of a recent ditch inspection report prepared by NCRWCB staff (Feiler 2015).
2. Rapid field reconnaissance of the site on April 20, 2016, with Douglas Cole, Will Harling, and Joey Howard (Cascade Stream Solutions).
3. Desktop analysis, including qualitative assessment of site conditions using a 1-meter resolution LiDAR DEM, Digital Ortho-Photographs, and the Regional Geologic Map (Wagner and Saucedo 1987) with ArcGIS.

3.0 Findings

3.1 Ditch Failure Modes

I observed many of the erosion points described in the NCRWCB ditch inspection report and concur with the general characterization of the types of failure modes operating along at the ditch line by Feiler (2015). Based on my observations it appears the failure modes and frequency of occurrence can the ranked in the following order, (with type 1 modes having the greatest likelihood of occurring):

1. Water seepage through the outboard embankment fill material. This failure mode has two likely outcomes: a) slow slump failure of the fill with the potential for ditch flow to overtop the embankment and discharge downslope; or b) rapid slump failure of the fill, leading to the near instantaneous discharge of ditch flow downslope. Type 1b failures are most likely to lead to onsite erosion and possibly contribute to offsite sedimentation.
2. Cutbank failure. The outcome of this failure mode depends on the volume of the failed material. For a) small cutbank failures, the failed material will likely displace some of the ditch flow onto the outboard edge of the embankment and not lead to any onsite erosion; or for b)

larger cutbank failures, the failed material can cause the ditch flow to overtop the embankment. Type 2b failures are the most likely to lead to onsite erosion and possibly contribute to offsite sedimentation.

3. Tree Windthrow. Windthrow from the cutbank or embankment fillslope can lead to either a) slow, or b) rapid failure of the embankment fill, or c) slow and d) rapid displacement of ditch flow on to or over the embankment fill. The magnitude of onsite erosion and possibility of offsite sedimentation is dependant on the size of the tree and duration of uncontrolled ditch flow through the failure.

3.2 Sediment Delivery Potential

Based on my preliminary field observations and desktop analysis it appears the first 1100 feet (starting at the Point of Diversion) of the ditch has the greatest potential to deliver sediment to Stanshaw Creek in the event of a ditch failure. This is primarily because the ditch is located directly above the stream channel, and secondarily because the ditch is partially within the fluvial corridor of Stanshaw Creek (Figure 1). The remaining sections of the ditch have a low to moderate sediment delivery potential (Figure 1 and Table 1). The lower delivery ratings are due to the capacity of large topographic benches and dense vegetation to intercept and store a majority of sediment before it can be delivered to the receiving waters of the State (Figure 1).

Table 1. Relative sediment delivery potential of the Stanshaw Creek Diversion Ditch.

Distance from POD (feet)	Relative Sediment Delivery Potential	Percent of Ditch Length	Receiving Waters	Rationale
0 to 1100	High	24	Stanshaw Creek	Ditch is directly above stream
1100 to 2100	Low	22	Stanshaw Creek	Topographic bench likely to store most sediment and attenuate turbid runoff
2100 to 2800	Moderate	15	Stanshaw Creek	Reduced effect of the topographic bench to store most sediment and attenuate turbid runoff.
2800 to 4600	Low to Moderate	39	Klamath River	Topographic bench likely to store most sediment and attenuate turbid runoff

3.3 Other Sediment Sources

There is approximately 6,400 feet of streambank (2 X 3,200 ft.) on Stanshaw Creek between the Point of Diversion and the Highway 96 Culvert (Figure 1). A preliminary slope stability analysis indicates these slopes are marginally to highly un-stable. Wagner and Saucedo (1987) mapped the landform in this area as Qls (Quaternary Landslide), which also indicates a higher potential for slope instability. Slope failures along the lower reach of Stanshaw Creek are likely a greater source of sediment delivery compared to the features along the ditch described by Feiler (2015), and could create background sedimentation and turbidity levels that would likely overprint inputs emanating from a ditch related failure.

3.4 Recommendations

1. During the field review, Mr. Cole described that his inspection and maintenance efforts target repairs to seepage and other minor failure problems before they evolve into larger or catastrophic failures. Similar inspection and maintenance efforts are recommended moving forward.
2. The use of a pipeline would avoid or minimize the likelihood of sediment delivery related to conveyance of the Cole's water right from the Point of Diversion to the points of consumptive and non-consumptive use.
3. If a pipeline is the selected alternative, consider retaining the existing ditch alignment as an inspection and maintenance travel way. Mild outsloping and appropriately spaced rolling dips along the travel way could be used to effectively improve the stability and drainage of the travel way, and to provide a route for rapid response in the event of a pipeline failure.
4. Slope stability analysis could be used to identify potential areas of concern and develop mitigation strategies.
5. A sediment budget could be used to obtain an accurate assessment of sediment contributions from past ditch failures and other sources.

References

Wagner, D.L., and G.J. Saucedo. 1987. Geologic Map of the Weed Quadragle, California, 1:250,000. State of California, Department of Conservation. Regional Geologic Map Series. Weed Quadrangle – Map No, 4A (Geology), Sheet 1 of 4.

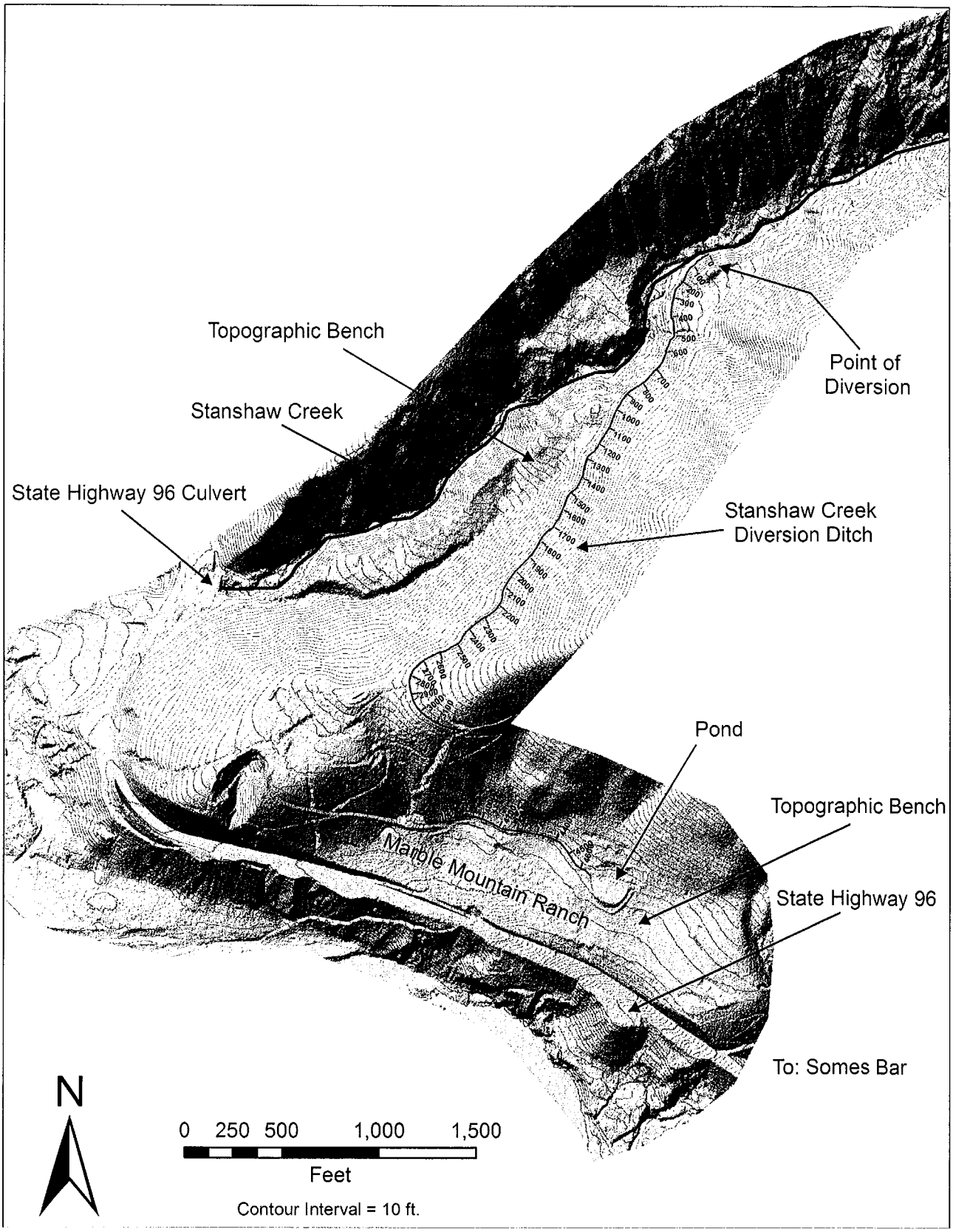

Figure 1. Project Location Map. Marble Mountain Ranch and the Stanshaw Creek Diversion Ditch. Base image is a 2010 1-meter LiDAR DEM Hillshade, provided by the Mid-Klamath Watershed Council.

EXHIBIT D

Barbara A. Brenner (SBN 142222)
Kerry A. Fuller (SBN 292466)
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Attorneys for Petitioners
DOUGLAS COLE AND HEIDI COLE

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of Douglas Cole and Heidi Cole for Review and Stay of the North Coast Regional Water Quality Control Board Issuance of Cleanup and Abatement Order No. R1-2016-0331.	DECLARATION OF DOUGLAS COLE IN SUPPORT OF PETITION FOR REVIEW AND STAY OF CLEANUP AND ABATEMENT ORDER NO. R1-2016-0331

I, DOUGLAS COLE, declare as follows:

1. I am the Petitioner in the above-captioned matter. I make this declaration in support of the accompanying Petition for Review and Stay of Cleanup and Abatement Order No. R1-2016-0331. I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. I am the owner and operator of Marble Mountain Ranch.

3. Marble Mountain Ranch is a small business that operates as a dude ranch seasonally from April 1 through December 1, where guests stay in guest cottages and are taken on expeditions in the National Forest that abuts my property and engage in other nature related activities.

4. Marble Mountain serves as a home for me, my wife and family, and several of my staff members.

5. I must personally fund all improvements at Marble Mountain Ranch or seek out

grant funding for those improvements.

6. During low flow periods in Stanshaw Creek, such as the current conditions, I forbear exercising my full pre-1914 right to divert up to 3 cfs of water and reduce the amount of water I divert to comply with the National Marine Fisheries Service's recommended bypass flow to protect fishery resources in the Klamath River.

7. I have worked with a resource improvement team to propose construction and implementation plans to install a six inch pipe in the diversion ditch for Marble Mountain Ranch to transport consumptive use water to Marble Mountain Ranch.

8. I am prepared to implement a North Coast Regional Water Quality Control Board approved ditch operation and monitoring program during high flow periods to avoid any overtopping or erosion impacts to water of the state.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on this 2nd day of September, 2016, at Somes Bar, California.

Douglas Cole

DOUGLAS COLE

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September 30, 2016

VIA U.S. Mail and Email
John O'Hagan (John.O'Hagan@waterboards.ca.gov)
Taro Murano (Taro.Murano@waterboards.ca.gov)
Kenneth Petruzzelli (Kenneth.Petruzzelli@waterboards.ca.gov)
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Shin-Roei Lee (Shin-Roei.Lee@waterboards.ca.gov)
Stormer Feiler (Stormer.Feiler@waterboards.ca.gov)
North Coast Regional Water Quality Control Board
5550 Skylane Blvd.
Suite A
Santa Rosa, CA 95403

Re: October 1, 2016 Progress Report for Marble Mountain Ranch required under Cleanup and Abatement Order R1-2016-0031 and Draft Order WR 2017-00XX-DWR, issued on August 30, 2016

Dear Messrs. O'Hagan, Murano, Petruzzelli, and Feiler and Ms. Lee:

Douglas and Heidi Cole, (the "Coles") own and operate Marble Mountain Ranch in Siskiyou County. They have received both the North Coast Regional Water Quality Control Board's ("Regional Water Board") Cleanup and Abatement Order R1-2016-0031 ("CAO") and the State Water Resources Control Board's ("State Water Board") Draft Order WR 2017-00XX-DWR ("Draft Order"). The Coles have responded to the CAO and will be responding to the Draft Order (collectively, the "Orders") in detail by October 7, 2016. The Coles have also appealed the Regional Water Board's CAO to the State Water Board. While the State Water Board and the Regional Water Board review the Coles responses to the Orders, the Coles continue to make efforts to comply. In furtherance of those efforts, the Coles provide the following status update on their progress to implement resource improvements at Marble Mountain Ranch, as required under the Orders.

Historical Background

The Coles have been engaged with stakeholders, including the State Water Board and the Regional Water Board for over 20 years relevant to their diversion at Marble

Mountain Ranch. The resource improvements that are the focus of the Orders were identified and agreed upon by all stakeholders in the Stanshaw Creek system early on in this process. Throughout these 20 or more years, the Coles have continued to cooperate and seek a collaborative approach to improving the diversion at Marble Mountain Ranch.

However, resource improvement efforts were sidetracked for most of these 20 plus years while the Coles and the State Water Board were reviewing the Coles now established pre-1914 3 cfs water right. Following the determination of the Coles water right, the Coles turned their attention to seeking grant funding to implement the previously identified resource improvements. The grant funding process has proven slow and arduous. They have secured one grant to study the best approach to potential improvements to their diversion and water system, but no additional grant funding to implement those improvements. Despite this lack of funding, the Coles have begun taking steps to improve both their diversion and the Stanshaw Creek system generally. Those activities are discussed below.

Low Flow Periods

The Coles have forgone diverting their full pre-1914 right to divert 3 cfs of water during low flow periods in Stanshaw Creek to benefit fishery resources in that creek system. As a consequence of this effort, the Coles have experienced water shortages during their busy summer tourist season. Evidence of this shortage can be seen in the Coles recreational and storage pond at Marble Mountain Ranch. The level of the pond has been decreased to levels lower than normal during dry periods. This in turn has increased the presence of algae in and decreased the uses of the pond, which negatively impacts Marble Mountain Ranch's guest experience, the focus of the Coles business as dude ranch owners. Pictures of the pond are attached to this progress report as **Exhibit A**.

In addition to water shortages, the reduced amount of water diverted during low flow periods has significantly increased operational costs at Marble Mountain Ranch. The reduction in the amount of water diverted means that the Coles are unable to operate their hydroelectric facilities. Instead, the Coles must use their diesel generator to provide electricity for refrigeration, lights, and related electrical needs of the guests and residents at Marble Mountain Ranch. The Coles have sought solutions to address this issue by engaging alternative energy experts. To date, those experts have determined that it is impractical to either expand the conventional electricity grid to Marble Mountain Ranch or to rely on alternative sources, such as solar or wind. Hydroelectric power generation remains the most efficient source of power.

Impacts to Waters of the State

The reduced diversion amount during low flow periods mean that the Coles are only diverting water for consumptive use at Marble Mountain Ranch and are not operating their hydroelectric generation facility. Consequently, they are not discharging water to waters of the state at this time and they are electing to forgo exercising their full water right to benefit public trust interests. This election to decrease their diversion is not an election to abandon any portion of the Coles vested pre-1914 water right to divert 3 cfs year round.

The Coles have submitted a report from Rocco Fiori demonstrating that sedimentation impacts to waters of the state from the Coles diversion are not significant threats requiring further study and investigation at this time. That report is attached to this progress report as **Exhibit B**. Thus, any impacts to waters of the state or fishery resources during low flow periods have been addressed through the Coles recent management of the diversion.

Once high flows commence on Stanshaw Creek, the Coles could increase the flow of water into their diversion up to their full pre-1914 3 cfs right. Upon such increase, the Coles will implement a more intensive ditch management plan than the one currently in place. This plan will include regular ditch inspections and steps for diversion management during storm activity. The Coles will be submitting their ditch management plan to the Regional Water Board for their review and approval, as required under the CAO. These efforts will ensure that there are no impacts to waters of the state from the Coles diversion.

Implemented Improvements

The Coles have begun a number of projects at Marble Mountain Ranch to further improve their conveyance. Each of these projects and their status is discussed below.

1. Drinking water filtration and storage

The Coles have installed new water storage tanks and continue to manage their water filtration system to provide Marble Mountain Ranch's residents and guests with potable water more efficiently. They have also increased the number of storage tanks which significantly increases storage capacity. This improvement alone has cost the Coles over $60,000. The system involves a staged filtration process with several tanks to treat and hold consumptively used water at Marble Mountain Ranch. The water is then conveyed to the residences and guest quarters for use. Marble Mountain Ranch's water quality is monitored by the Siskiyou County Public Health Department, with quarterly bacteriological sampling and annual inspections. Pictures of the new storage tanks are attached as **Exhibit C**.

2. Piping of the diversion for consumptive use water

The Coles have submitted plans and permit applications to all permitting agencies to install a six inch pipe in their diversion ditch to convey consumptive use water to Marble Mountain Ranch. Those plans and permit applications have been previously submitted to both the State Water Board and the Regional Water Board during stakeholder discussions. Permit applications were submitted at the behest of State Board staff which delayed the Coles ability to install the pipe and obtain funding for the project.

Each of the permitting agencies have determined that the proposed project does not require permitting under their authority. The United States Army Corps of Engineers confirmed that the project is exempt from 404 jurisdiction. The Coles also submitted a 401 permit application to the Regional Water Board. However, based on the United State Army Corps of Engineer's determination, the project is also exempt under the Regional Water Board's 401 jurisdiction. Finally, the California Department of Fish and Wildlife confirmed that a 1602 permit is not required. All of the work to install the six inch pipe will occur within the diversion ditch.

While the Coles have confirmed that no regulatory approvals are required for this project, they are faced with an additional barrier before they can actually install the pipe. The Coles require funding. They are small business owners that support themselves through the income to Marble Mountain Ranch. This income does not provide them with enough funds to independently implement any large scale resource improvements at Marble Mountain Ranch such as installing the six inch pipe in the diversion ditch. The Coles have sought funding for the six inch pipe installation, but have learned that the grant funding decisions will not be made until October 19, 2016. If the Coles receive funding through that grant, they will move forward with the plan to install the six inch pipe at that time, weather permitting.

3. Water Quality Monitoring Plan

The CAO required that if the Coles discharge water from their diversion into waters of the state, they must submit a water quality monitoring plan to the Regional Water Board by September 10, 2016. The Coles complied with this directive, despite their appeal of the CAO, and submitted a water quality monitoring plan to Shin-Roei Lee and Stormer Feiler of the Regional Water Board on September 9, 2016 via email and U.S. mail. A copy of the water quality monitoring plan is attached to this progress report as **Exhibit D**.

4. Retain Additional Consultants

As indicated above, the Coles have been engaged in over 20 years of effort to reach consensus amongst a large number of stakeholders relevant to what resource

improvements those stakeholders would like to see implemented. Because much of that time was spent contesting the Coles pre-1914 water right, not much progress has been made on the resource improvements that the Coles thought the stakeholders had agreed upon, including the State and Regional Water Boards. The CAO and Draft Order require a number of tasks that were not discussed or raised during the stakeholder collaboration process. As a result, the current consultant team does not have the requisite expertise to address all of the requested directives. In an effort to address the varied tasks, the Coles have reached out to other consultants and have, or are in the process of, engaging other consultants as necessary and as funds allow.

If you have any questions regarding this progress report, please contact me at barbara@churchwellwhite.com or (916) 468-0625.

Regards,

Churchwell White LLP

for:

Barbara A. Brenner
KAF

Enc: **Exhibit A:** September 21, 2016 Photos of Marble Mountain Ranch Pond
Exhibit B: Fiori Geosciences Technical Memorandum
Exhibit C: September 21, 2016 Photos of Marble Mountain Ranch Water Storage Tanks
Exhibit D: Water Quality Monitoring Plan

K. PETRUZZELLI
EXHIBIT 4

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October 17, 2016

ORIGINAL

2016 OCT 20 A 11:25

VIA US MAIL AND EMAIL
(kenneth.petruzzelli@waterboards.ca.gov)

Kenneth Petruzzelli
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, CA 95814

Re: Draft Order 2017-00XX-DWR issued August 30, 2016

Dear Mr. Petruzzelli:

On August 30, 2016, the State Water Resources Control Board ("State Water Board"), Division of Water Rights ("Division") issued Draft Order 2017-00XX-DWR ("Draft Order") to my clients, Douglas and Heidi Cole (the "Coles") regarding their diversion at Marble Mountain Ranch ("Ranch") located near Somes Bar in Siskiyou County. The Draft Order alleges that the Coles are engaged in waste, unreasonable method of use and an unreasonable method of diversion of water. As discussed below, the Coles' diversion does not constitute waste, an unreasonable method of use or an unreasonable method of diversion of water. This letter outlines the Coles' concerns with the Draft Order to frame further discussions with the State Water Board.

The Draft Order asserts jurisdiction under the public trust doctrine to require that the Coles reroute their diversion outfall point to Stanshaw Creek and decrease diversions to no more than 10% of the natural flow year round. In this case, however, the State Water Board does not have jurisdiction to regulate pre-1914 appropriative rights, beyond the prevention of an illegal diversion, waste or unreasonable use of water. (*Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 404 [as modified (Sept. 20, 2013)].) The Coles' operational adjustments during low flow periods have eliminated the possibility that their diversions will harm salmonids or any other public trust resources. The State Water Board therefore lacks jurisdiction to require rerouting of the diversion outfall point to Stanshaw Creek and restrict the amount of water diverted.

The Coles have been cooperative participants in the effort to implement improvements at the Ranch for over 20 years. This more than 20-year period of collaborative effort has sought to provide a permanent physical solution for the diversion that benefits all

stakeholders within the Stanshaw Creek system. The Coles' voluntary efforts have been met with agency resistance that has further complicated and delayed implementation of any improvements or a permanent solution. A recent example of the regulator caused complication and delay is the State and Regional Water Boards' insistence that the Coles seek 1600, 401, and 404 permitting for the installation of a six-inch pipe within their diversion ditch to convey consumptive-use water to the Ranch. The Coles sought these permits as requested. Upon submitting applications to the responsible agencies, each of the agencies confirmed that the project was outside their jurisdiction and did not require permitting. This delayed the Coles' ability to seek funding for this project. Consequently, the project remains unfunded and unfinished.

With the issuance of the Draft Order and the related Cleanup and Abatement Order ("CAO") from the North Coast Regional Water Quality Board ("Regional Water Board"), the State and Regional Water Boards have changed the tone of the over 20-year collaborative effort. The Coles entered into this process voluntarily as a stakeholder within the Stanshaw Creek system seeking a permanent physical solution at the Ranch. The Draft Order and CAO now mandate studies and specific physical improvements within a timeline with which the Coles are unable to comply.

Despite the Coles' inability to comply with the deadlines under the Draft Order and the CAO, they have continued to make efforts to provide the information required under the Draft Order and the CAO. Their consultants have been in the process of completing water and energy efficiency studies and securing grant funding to implement the six inch pipe project. However, the onerous conditions and short timelines contained in the Draft Order and CAO caused the Coles' previous consultant team to resign from the project. Those consultants were unable to complete the water or energy efficiency study and have not provided the draft reports to the Coles. The Coles are now in the process of finding and retaining new consultants to assist them in implementing a permanent physical solution at the Ranch. They remain committed to working with the State and Regional Water Boards in that effort.

To ensure that the Coles are able to implement a permanent physical solution at the Ranch and avoid potential liability under the Draft Order and the CAO, the Coles request a meeting with State and Regional Water Board staff to discuss both the Draft Order and the CAO, as well as the information provided in this correspondence. They seek a long term agreement with the State Water Board in regard to physical improvements at the Ranch that will allow the Coles to continue to operate a successful business.

A. Historical Background

The historical information included in the Draft Order begins in 1989 and notes the transfer of ownership of the Ranch and its water rights to the Coles in 1994. The Draft Order continues with historical information through a meeting between the Coles and

stakeholders, including the State Water Board, on May 14, 2016. The majority of the time from the Coles taking ownership of the Ranch in 1994 to the May 14, 2016, meeting was spent demonstrating to the State Water Board that the Coles had their now established pre-1914 right to appropriate 3 cfs of water year round. Following extensive study and review by an outside consultant, the Coles pre-1914 right was finally confirmed in 2014. While the Coles were focusing on establishing their pre-1914 right, they were still engaged with stakeholders to identify improvements to the diversion. However, they were unable to move forward with those improvements until it was clear they possessed the requisite water right to divert water.

One such effort to identify improvements even during the focus on establishing the Coles' water right, occurred in 2005, as identified in the Draft Order. (Draft Order p. 8.) On May 5, 2005, the Coles participated in a stakeholders' meeting that identified a number of potential improvements. One of the identified improvements was a project that would return water used for hydroelectric power to Stanshaw Creek via a pipeline installed near Highway 96. That solution was identified based on the circumstances at that time. In 2005, there was both funding available and ongoing work near Highway 96, including ditches being dug to install fiber optic cable that could have incorporated a return flow pipe for the Coles' diversion. The work near Highway 96 is now complete and the funding opportunities are no longer available. Current estimates for this effort indicate that the cost of returning flow to Stanshaw Creek through a piped conveyance along Highway 96 is likely to be greater than $500,000.

B. Jurisdictional and Legal Issues

1. The Diversion Ditch does not Constitute Waste, Unreasonable Use or an Unreasonable Method of Diversion of Water

The Draft Order alleges that the ditch diversion system at the Ranch is an unreasonable use of water and an unreasonable method of diversion. (Draft Order ¶¶ 29 – 32.) A strict definition of what constitutes an unreasonable use 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. (*Id.*)

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 must be 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. The diversion uses unlined ditches to convey water to the Ranch and is operated in a manner to keep conveyance loss to a minimum. In addition, the Coles have greatly reduced the amount of water they divert during the current low flow periods to comply with the National Marine Fisheries Services ("NMFS") bypass flow recommendation. The reduced diversion, during low flow periods, complies with the NMFS bypass flow recommendation, but this reduction in no way demonstrates an intention to waive or reduce the amount of their established pre-1914 right to divert 3 cfs of water, nor does it waive the Coles' right to develop alternatives that ensure the Coles' operations do not impact fishery resources in Stanshaw Creek. The Coles will regularly inspect the diversion during the upcoming high-flow period to address overtopping and seepage concerns as well.

All of the water the Coles divert is put to a beneficial use as has been demonstrated. These uses include domestic use for residents and guests at the Ranch, hydropower generation, irrigation, stock watering and fire protection. Thus, the Coles are not engaged in waste, unreasonable use of water or an unreasonable method of diversion.

2. <u>The Water Board Lacks the Jurisdiction to Require the Coles to Change the Operation of the Diversion Based on Public Trust Resources</u>

The Draft Order raises 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. (Draft Order ¶¶ 38, 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. Super. 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. A decision to extend jurisdiction in this manner would likely result in vigorous opposition by numerous pre-1914 water right holders.

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*; *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. The State Water Board lacks substantial evidence of harm to trust resources; 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. 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. Actions taken by the Coles do not support this finding or the extension of established case law regarding the public trust doctrine.

C. NMFS Year Round Bypass Flow Recommendation Does Not Benefit Fisheries

The Draft Order incorporates, in its public trust resources allegations, NMFS's recommended bypass flow as outlined in NMFS's letter dated August 3, 2016. (Draft Order ¶¶ 34(a) – (d).) NMFS recommends that the Coles implement a 90% bypass flow year round, with no less than a 2 cfs bypass amount at the point of diversion, and return any flow used to generate hydroelectric power to Stanshaw Creek. (NMFS Bypass Flow Recommendation, p.11-12.) Requiring the Coles to return flow to Stanshaw Creek and limiting the Coles' diversion to 10% of flow year round is prohibitively expensive and unnecessary.

The cold water refuge at the confluence of Stanshaw Creek and the Klamath River that the NMFS recommendation is based upon only benefits fishery resources during the warmer months of the year when the Klamath River's temperatures rise. As discussed above, to invoke the public trust doctrine as a method of regulating a water right holder, actual harm must exist. The NMFS letter does not provide evidence of harm during the high flow periods to justify limiting the Coles diversion to 10% of those flows or to require the Coles to return flow to Stanshaw Creek.

The Coles have already voluntarily agreed to reduce and have been reducing their diversion to 10% of the flows in Stanshaw Creek during low flow periods. This provides the cold water refuge NMFS identifies as significant habitat for salmonids during the warmer months that generally coincide with low flow periods. The reduction in flow has come with significant increases in operational costs for the Ranch as the Coles must operate their diesel generator when they are not using their hydroelectric facilities. The increased operational costs in addition to the likely cost of over $500,000 to return flow to Stanshaw Creek under the NMFS recommendation are not justified.

D. The Coles Continued Commitment to Resource Improvements

Despite the State Water Board's lack of jurisdiction to require the Coles to implement specific improvements, the Coles remain committed to implementing a permanent physical solution. As part of their commitment, the Coles have upgraded their consumptive use water filtration and storage system at a cost of $60,000. Photographs

of that update were included in the September 30, 2016 progress report provided to the State and Regional Water Boards. The Coles are also still committed to installing the six inch pipe in the diversion ditch to convey consumptive use water to the Ranch. They are seeking funding to implement this project and have learned that grant funding decision will be made on October 19, 2016. If the Coles are awarded the grant, they will proceed with construction at that time, weather permitting.

E. The Coles Concerns with the Draft Order's Requirements

In addition to the jurisdictional issues discussed above, outlined below are the concerns the Coles wish to address.

1. Reports required under the CAO and Draft Order

The CAO and Draft Order require that the Coles complete a number of reports and studies of the diversion. These studies require that the Coles find and retain professionals to gather information about the diversion without any clear connection to implementing solutions at the Ranch. The Coles must redirect their time, effort, and monetary resources to these studies to identify solutions that have already been discussed for an over 20 year period. Further study is not focused on providing any additional information for a solution to improve the Coles' diversion.

The onerous requirements in the CAO and Draft Order for these studies has also further complicated the Coles' effort to comply. Their previous consultants have elected to resign from further participation in the project rather than face any possible action based on onerous results that they must produce in a limited amount of time. The Coles are now in the process of identifying and retaining new consultants, but this has further delayed their ability to comply with the CAO and the Draft Order.

2. Develop an Implementation Plan to return flow back to Stanshaw Creek with input from stakeholders and permitting agencies

As discussed above, the State Water Board lacks the jurisdiction to require the Coles to return flow back to Stanshaw Creek. The Coles are pre-1914 appropriative right holders with an established right to divert 3 cfs of water year round. Further, the course of the Coles diversion with the outfall point into Irving Creek has been in place for over 150 years. Any potential impact to fishery resources occurred years before the Coles purchased the property and continued to operate the diversion. The water used for hydroelectric generation that leaves the diversion at the Irving Creek outfall point is returned to the Klamath River, just as it would be if the flow was returned to Stanshaw Creek.

Despite this lack of jurisdiction, the Coles, as part of their effort to identify and retain new consultants, have retained a fish biologist, Steven Cramer of Cramer Fish Sciences, to assist them with avoiding impacts to fishery resources. Based on Mr. Cramer's initial review of NMFS's report, he concurs the base flows during low flow periods appear reasonable. With Mr. Cramer's assistance, the Coles are interested in taking action to support the cold water refuge at the Stanshaw Creek confluence with the Klamath River during higher temperature periods in the Klamath River typically associated with low flows in Stanshaw Creek.

Mr. Cramer requires at least six months to study site specific circumstances that were not available for the NMFS recommendation. Additional measurement of stream dimensions and flows will help insure that the Coles are implementing a solution that includes minimum flow that fully accounts for site specific circumstances that affect the quality of the Stanshaw Creek and Klamath River confluence's aquatic habitat. These measurements can be completed this fall/winter and can be used to submit a plan for the State Water Board's review by next spring.

3. Install a permanent water diversion control mechanism and conveyance infrastructure in the ditch, such as a pipeline or other suitable infrastructure, adequate to eliminate the misuse of water in the ditch

As discussed above, the ditch is not a misuse of water. However, the Coles seek clarification of this requirement. The directive refers to "a conveyance infrastructure," not to the six inch pipe project which has been the focus of stakeholder discussions and the Coles' efforts up to the present. The Coles have not submitted plans or contemplated funding an additional pipeline to divert their full pre-1914 3 cfs water right at this time. They anticipate that they may install a larger pipeline in the diversion at some point in the future, but that project will not be completed in time to comply with the Draft Order's October 15, 2016 deadline.

If instead the Coles are interpreting the State Water Board's directive correctly and identify this requirement as one to install the six inch pipe by October 15, 2016, they lack funding to comply with this directive. They will not receive the grant funding decision until October 19, 2016. If they are provided funding, they will move forward with the project at that time, weather permitting. As part of that project, the Coles will install a headgate at the point of diversion. In the meantime, the Coles will continue to inspect and manage the diversion as they have through the most recent low flow period.

4. Stabilize head cut and slope at Irving Creek

The Coles have previously submitted a letter addressing the CAO that demonstrates they are unable to stabilize the head cut and slope at Irving Creek until a proper study of that outfall point can be done. The study requires more water being diverted to actually have water exiting the outfall and leaf off, wet conditions. These conditions are not

available until the wet season. Rocco Fiori has submitted a declaration of these fact in support of the Coles' appeal of the Regional Water Board's CAO. The declaration is attached to this letter as **Exhibit A**. Thus, the Coles will not be able to provide a report that adequately assesses the situation until the spring of 2017, with implementation of any recommendations from that report through the fall of 2017.

5. Install a flow gauge upstream from the Stanshaw Creek Point of Diversion and a flow gauge downstream below the Highway 96 culverts

The Coles are unable to comply with this requirement. They lack the authority to enter the Forest Service's land above the Point of Diversion and downstream below the Highway 96 culverts to install flow gauges. The Coles also lack the authority to enter the Fisher's property to install a flow gauge below the Highway 96 culvert if the location contemplated for the flow gauge is on the Fisher's property. The Coles welcome the State Water Board's assistance in achieving this objective in securing permission and funding to place these flow gauges, however, the Coles are not obligated to install and monitor flow gauges above and below their point of diversion.

Conclusion:

The Coles have been active participants in the process of discussing a final physical solution to benefit all stakeholders in the Stanshaw Creek system for over 20 years. The Draft Order in concert with the CAO do not focus on a physical solution and instead seek additional reports and information gathering that the Coles must fund without any clear path to these studies resulting in a final, physical solution. The Coles are in the process of identifying and retaining a new team of consultants to complete the effort to make resource improvements at the Ranch since their previous consultants elected to resign.

The State Water Board lacks the jurisdiction to require that the Coles change their operations in the manner directed under the Draft Order. The State Water Board relies on its jurisdiction under the public trust doctrine but have not shown the diversion results in any harm to public trust resources or a waste or unreasonable use of water.

To demonstrate their commitment to resource improvements, the Coles have already voluntarily reduced their diversion amount to benefit fishery resources during the warmer months that typically coincide with low flow periods. This addresses the public trust concerns raised by the various stakeholders over the last 20 years. The Coles continue to be committed to a final physical solution to managing their diversion while still operating a successful small business. The Draft Order and CAO make continued collaboration to achieve that goal difficult at best.

We anticipate meeting with the State Water Board to discuss these issues and potentially identify a basis for a long term agreement for all parties. The Coles are agreeable to being a participant in improving the Stanshaw Creek system, but as small business owners are unable to bear the onerous requirements and potential liability under the Draft Order and CAO. Please feel free to contact me at barbara@churchwellwhite.com or (916) 468-0950.

Regards,

Churchwell White LLP

Barbara A. Brenner

KAF/dmg

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Attorneys for Petitioners
DOUGLAS COLE AND HEIDI COLE

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of Douglas Cole and Heidi Cole for Review and Stay of the North Coast Regional Water Quality Control Board Issuance of Cleanup and Abatement Order No. R1-2016-0331.	DECLARATION OF ROCCO FIORI IN SUPPORT OF PETITION FOR REVIEW AND STAY OF CLEANUP AND ABATEMENT ORDER NO. R1-2016-0331

I, ROCCO FIORI, declare as follows:

1. I am the Principle at Fiori Geosciences, a position I have held for 10 years, a Licensed Geologist (PG 8066), and have 30 years of experience assessing and mitigating anthropogenic erosion and sedimentation problems. I make this declaration in support of the accompanying Petition for Review and Stay of Cleanup and Abatement Order No. R1-2016-0331. I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. I am the author of the Fiori Geosciences Technical Memorandum dated May 14, 2016.

3. I evaluated the Coles diversion at Marble Mountain Ranch on April 20, 2016, reviewed the North Coast Regional Water Quality Control Board inspection report by Stormer Feiler dated March 9, 2015, and used desktop analysis, including qualitative assessment of site conditions using a 1-meter resolution LiDAR DEM, Digital Ortho-Photographs, and the Regional

Geologic Map to reach my conclusions in my Technical Memorandum dated May 14, 2016.

4. The May 14, 2016 Technical Memorandum accurately reflects my opinion of the causes of sedimentation and erosion that results from the Coles diversion at Marble Mountain Ranch.

5. The May 14, 2016 Technical Memorandum accurately reflects my recommendations for addressing the sedimentation and erosion impacts to waters of the state from the Coles diversion at Marble Mountain Ranch

6. I have reviewed all of the required reports and deliverables contained in Cleanup and Abatement Order No. R1-2016-0031 and determined that leaf off, wet conditions are necessary to accurately complete the required reports and deliverables in Cleanup and Abatement Order No. R1-2016-0031.

7. The requirements in paragraph 4(a) on page 11 of Cleanup and Abatement Order No. R1-2016-0031 requires that the Coles "[a]ssess slopes between the upper ditch and Stanshaw creek and the streambed of Stanshaw Creek and Irving Creek and the unnamed tributary to Irving Creek for stored sediment deposits and erosional sources associated with the past and current failures of the ditch" cannot be fully implemented as it would be difficult to deconvolve natural, and legacy ditch related sediment deposits from those that are a result of modern ditch failures. Furthermore, an assessment of the cause of the erosion and sediment deposits cannot provide unequivocal evidence that a nuisance impact to the waters of the State had occurred unless the actual discharge, or flow path and deposit can be traced from the point of origin to the discharge location.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on this 6 day of September, 2016, at Klamath, California.

ROCCO FIORI
Engineering Geologist, PG 8066
Fiori GeoSciences

EXHIBIT 5

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January 4, 2017

VIA U.S. MAIL/EMAIL

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Re: Douglas and Heidi Cole, Marble Mountain Ranch
Progress Report January 2017
Cleanup and Abatement Order R1-2016-0031 and Draft Order WR 2017-00XX-DWR, issued on August 30, 2016

Dear Messrs. O'Hagan, Murano, Petruzzelli, Feiler, and Ms. Lee:

Douglas and Heidi Cole (the "Coles"), owners and operators of Marble Mountain Ranch ("Ranch"), provide the following quarterly status report with regard to their efforts to implement resource improvements at the Ranch.

Actions taken since the previous Progress Report was submitted on September 30, 2016

1. Retention of a new consultant team

The Coles have been diligently researching and identifying a new team of consultants to assist them in their compliance efforts, since their previous team of consultants elected to abandon the Coles following release of Cleanup and Abatement Order R1-2016-0031 ("CAO") and Draft Order WR 2017-00XX-DWR ("Draft Order"). The Coles have retained the services of Michael Preszler with ECORP, Environmental Consulting and

Jim Kramer with Kramer Fish Services and continue to work with Rocco Fiori of Fiori Geosciences. Mr. Preszler will assist the Coles with all environmental permitting required for any resource improvements at the Ranch, while Mr. Kramer will provide independent review of any impacts to fishery resources to the Klamath River from Stanshaw Creek and the Coles' activities at the Ranch. These consultants will be integral in continuing to implement resource improvements at the Ranch and are well versed in the Klamath River environment, as well as regulatory matters such as those currently involving the Ranch.

2. Sedimentation study

In the Coles' response to the North Coast Regional Water Quality Board's ("Regional Water Board") CAO, and in their petition to the State Water Resources Control Board ("State Water Board") for a stay and review of the CAO, they indicated that their expert, Mr. Fiori, would not be able to complete his studies of the diversion until leaf off, wet conditions existed at the Ranch. Those conditions were present during a storm event at the Ranch on December 15 and 16, 2016. Mr. Fiori was present at the Ranch for that storm event and completed his inspection of the diversion on December 16, 2016. His conclusions, as outlined in his initial report dated May 14, 2016, were confirmed in his site visit to the Ranch on December 15 and 16, 2016. Mr. Fiori's report reflecting his final review of the Ranch's diversion will be released by January 31, 2017.

As more fully discussed below, Doug Cole, along with his attorneys and Mr. Preszler, met with State Water Board and Regional Water Board staff on December 16, 2016, while Mr. Fiori was completing his inspection of the Ranch's diversion. During that meeting, Stormer Feiler of the Regional Water Board indicated that he may be willing to visit the Ranch with Mr. Fiori following release of Mr. Fiori's report. Following the meeting and discussion with Mr. Fiori, Mr. Fiori would be agreeable to a site visit with Mr. Feiler and would like to conduct that visit before he releases his report. A request has been submitted to the State Water Board's counsel, Mr. Petruzzelli, to determine if this is possible. That request has been forwarded to an attorney for the Office of Chief Counsel, Nathan Jacobsen, and is pending further discussion and review with the Regional Water Board before a final decision is made.

3. Identification of possible alternative piping solution

The Coles have also been pursuing additional strategies to improve their diversion works. That effort includes discussions with the Farmers Conservation Alliance to determine whether their fish screen and ditch lining technology is a fit for the Ranch. Their design comes in a pre-fabricated structure that can be installed at an existing site. A diagram and examples of this possible solution are attached as **Exhibit A**.

The Coles and their counsel have been consulting with Roy Slayton at Farmers Conservation Alliance regarding this possible improvement to the diversion. Thus far, the effort to implement the fish screening and ditch lining improvement has been stymied by

lack of response from the fishery agencies determining whether they will approve the pre-fabricated fish screen. Mr. Slayton has been in contact with both the National Marine Fisheries Service ("NMFS") and the California Department of Fish and Wildlife ("CDFW") and is awaiting a response from CDFW before conducting further engineering on the possibility of installing the fish screen at the Ranch.

4. Meeting with State and Regional Water Board Staff

On December 16, 2016, Doug Cole, Mr. Preszler, and Mr. Cole's counsel attended a meeting with staff from the State and Regional Water Board to discuss a way forward to addressing both the State and Regional Water Board's concerns, while taking into account the Coles' limited resources and continued efforts to cooperate with all stakeholders in making improvements at the Ranch. That discussion resulted in a possible way forward for settlement of both the Draft Order and CAO. The Coles, with the assistance of counsel and their consultants, will be submitting a proposed settlement with a revised time schedule to implement several of the key resource improvements in the CAO and Draft Order. This will allow the Coles time to effectively plan, permit, and fund these improvements without running afoul of any of the timelines currently contained in the CAO and Draft Order.

Prior to the meeting with the State and Regional Water Boards, the State Water Board's Office of Enforcement attorney, Ken Petruzzelli, provided the Coles' counsel with a substantial list of questions and a form used to determine the Coles' current financial status and ability to fund any resources improvements. The Coles are finalizing their answers to the questions that were provided along with the requested supporting documentation. They will be submitting a package of information answering the provided questions to Mr. Petruzzelli by February 1, 2017. The Coles have also completed the form demonstrating their financial status along with three years of tax returns. The ability to pay and three years of redacted tax returns are attached to this progress report as **Exhibit B**.

Planned Activities for the Period until the next Progress Report

The planned activities for implementing resource improvements at the Ranch before the next Progress Report is due on April 1, 2017 are:

1. Farmers Conservation Alliance Fish Screen Determination

The Coles will continue to work with Farmers Conservation Alliance to determine whether their fish screen and ditch lining technology will be approved for use by the fisheries agencies. If approved, Farmers Conservation Alliance will move forward with engineering the project to confirm that their screen will work at the Ranch and provide a cost estimate for the project. Following the completion of those plans, the Coles will rely on their consultant team and counsel to pursue permitting the project. The steps following Farmers

Conservation Alliance's engineering are a long term project that will not be completed before the next project report. The Coles will keep the State and Regional Water Boards informed of any forward progress on this effort. The Coles will also be consulting with an engineer to determine the cost and feasibility of piping the Stanshaw Creek diversion as an alternative to the Farmers Conservation Alliance technology.

2. Release of Mr. Fiori's final report and potential site visit with Mr. Feiler

Mr. Fiori completed his site inspection of the Ranch on December 16, 2016. He has indicated that his site visit confirms his tentative evaluation of the Ranch's diversion and is currently drafting his final report. Once he completes the report, and the Coles and their consultants are able to review it, the Coles will provide the report for the State and Regional Water Board's review.

The Coles are willing to allow Mr. Feiler to conduct an inspection of the diversion either before or after Mr. Fiori releases his report. Mr. Fiori's report will be completed in January unless Mr. Feiler and Mr. Fiori meet prior to issuance of the report. Meeting prior to issuance of the Fiori report would help eliminate a back and forth discussion between Mr. Fiori and Mr. Feiler and would be more efficient. Mr. Fiori's report encompasses two of the elements of the CAO: the sedimentation study and the slope stability analysis. Thus, the Coles anticipate that the sedimentation study and slope stability analysis required under the CAO will be completed by April 1, 2017. Though that date may change if completion of Mr. Fiori's report is dependent upon Mr. Feiler's review of the report and inspection of the Ranch.

3. Continued discussion and negotiation with the State and Regional Water Board regarding their orders

The Coles are in the process of reviewing all of the elements of the CAO and Draft Order with their new team of consultants and establishing timelines and priorities for the tasks contained in those orders. Based on this review, the Coles anticipate they will submit a proposed outline for settlement by the first week of February 2017. That outline will serve as a basis for further discussion and negotiation with the State and Regional Water Boards to ensure that the Coles can implement resource improvements that are properly designed, permitted and funded in a timely manner.

4. Development of implementation plans for agreed to projects in the settlement effort

Depending on a successful outcome of discussions and negotiations with the State and Regional Water Boards, the Coles will turn their efforts to developing implementation plans for the agreed to resource improvements at the Ranch. These next step in the effort to comply with the Draft Order and CAO will only take place once the State and Regional Water Boards are agreeable to the Coles' plans as outlined in a settlement document. The Coles will establish a plan for each resource improvement that includes deadlines and

specific tasks within the projects contained in any settlement with the State and Regional Water Boards. These deadlines and tasks will guide the Coles in their steps moving forward.

If you have any questions regarding this progress report, please contact me at barbara@churchwellwhite.com or (916) 468-0625.

Regards,

Churchwell White LLP

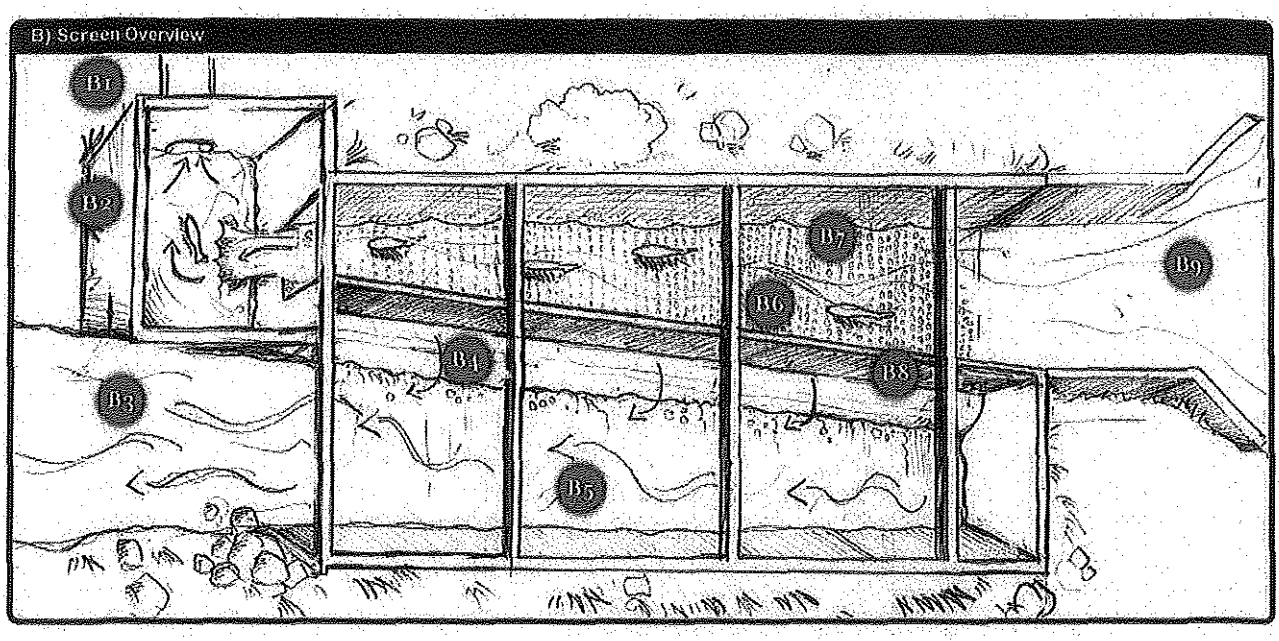
for Barbara A. Brenner

KAF/dmg

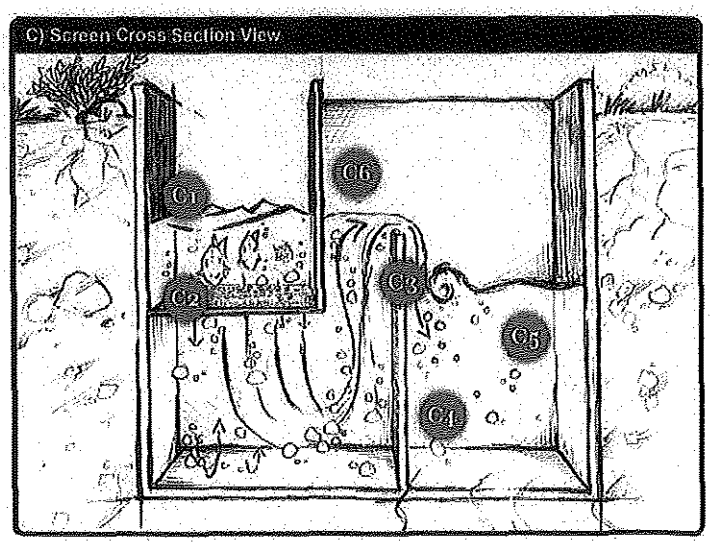
Enclosure: **Exhibit A:** Farmer's Conservation Alliance Fish Screen Installation Examples
Exhibit B: Ability to Pay and Three Years of Redacted Tax Returns

EXHIBIT A

SYSTEM COMPONENTS



The Farmers Screen™ fish screen has several components that work together to create the hydraulic conditions necessary for both fish protection and debris management without the need for a mechanical cleaning mechanism. These system components work in harmony to create consistent hydraulic conditions to effectively manage debris and protect fish.



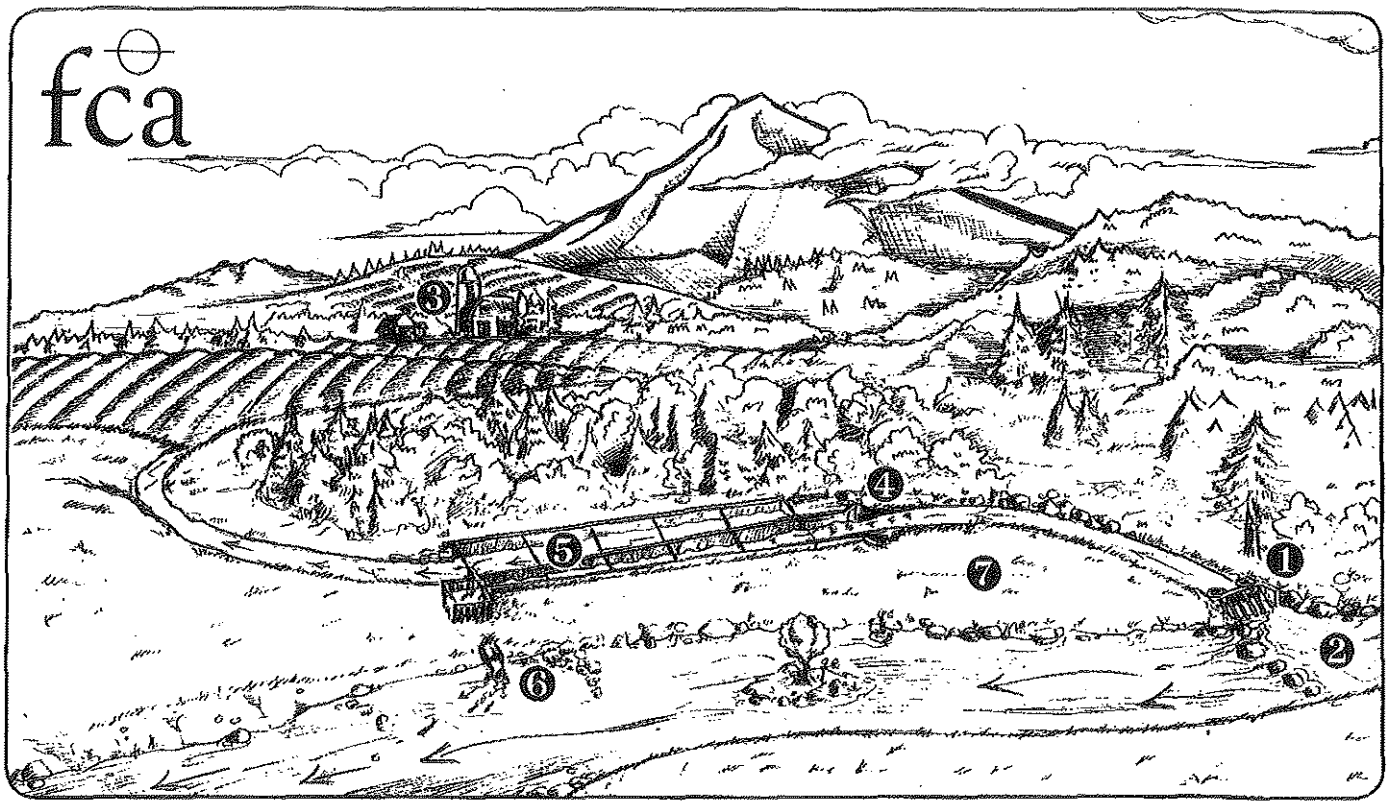


Illustration credit: Tommy Hood

FARMERS SCREEN SITING CRITERIA

❶ The proposed site must be located off-channel, and the flow to the screen must be controlled with a properly functioning head gate.

❷ There must be adequate flow in the stream to ensure that the proper amount of by-pass flow (necessary for the particular screen to operate properly), in addition to the desired screened flow, is available 100% of the time that the screen is operating. The by-pass flow required is a direct function of the screen design and will be determined when the flow range of the screen is determined.

❸ A screen owner/operator must be willing to agree to operate the screen as designed and as specified in the Operation Manual.

❹ The water at the leading edge of the screen must be of steady uniform flow at a velocity of between 3 and 7 feet per second. There must be sufficient gradient from the point of diversion to the leading edge of the screen to induce the required flow characteristics.

❺ A minimum total head differential (potential energy) of 0.3 feet, as measured from the flume water surface elevation to the attenuation bay water surface elevation is required for proper screen function in order to overcome head loss through the screen and into the attenuation bay.

❻ The slope of the source river or stream must exceed the slope of the diverted water conveyance such that the elevation differential between the screen surface elevation and the stream (at the point where the by-pass water return pipe enters the stream) is sufficient to meet NMFS criteria regarding by-pass flow hydraulics.

❼ There must be adequate land to locate the screen structure in a place that is protected from high flow events.

FOR MORE INFORMATION:

If your site meets these criteria, or if you would like help in evaluating your site conditions, FCA has an easy-to-use questionnaire that addresses these and all other relevant site issues.

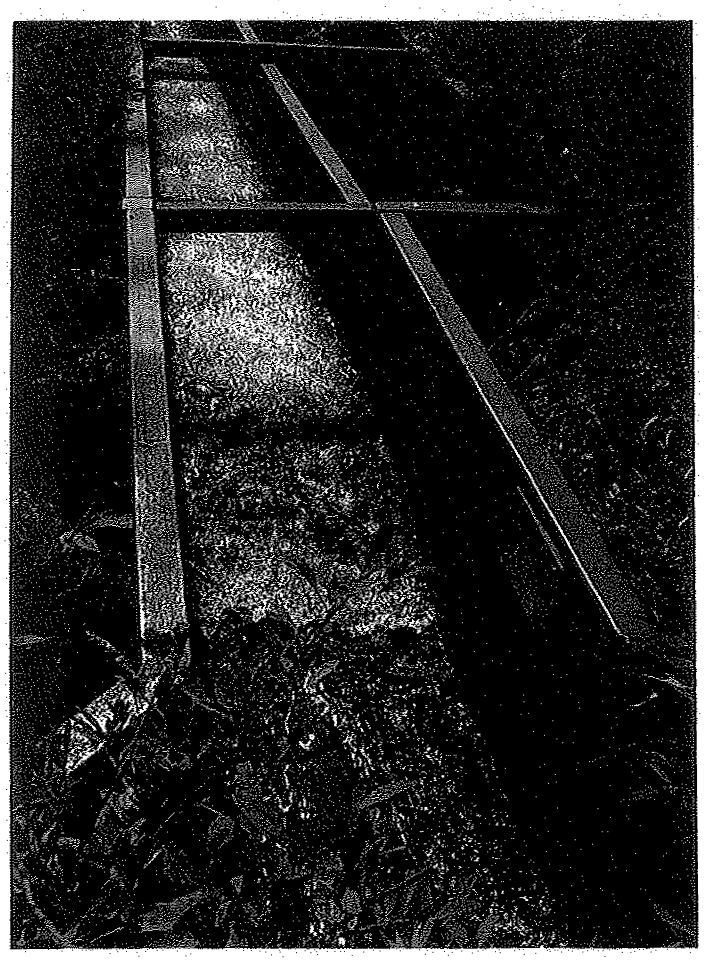
Tours of existing Farmers Screen installations, model demonstrations, and in person presentations are available to people interested in learning more about this innovative fish screening technology.

CONTACT FCA:

Phone: 541.716. 6085 • Email: info@fcasolutions.org
FarmerScreen.org • FCASolutions.org

GLENDALE

2 CFS, Two Section Modular Farmers Screen



Quick Facts:

- Location: Glendale, Idaho
- Basin: Weiser River
- Partners: Glendale Ditch Company, USFW, NRCS, North Central Highlands RC&D
- Installation Date: Fall of 2008

This Farmers Screen project addresses the following issues:

- Anadromous/ESA Species
- Irrigation
- Sediment & Debris
- Modular Design

The Glendale Ditch utilizes water diverted from the Weiser River in central Idaho. This ditch had not been screened prior to the installation of the two section modular Farmers Screen unit.

GLENDALE

2 CFS, Two Section Modular Farmers Screen

This project involved a lot of in-stream work to establish a new rock weir to direct flow into the Glendale Ditch. NRCS provided the design services and construction oversight. The new rock weir directs flow to the diversion where the water flows through a head gate and into a pipe. The water exits the pipe and enters the fish screen where the screened water flows on to an open canal and the cleaning water returns to the river via a pipe. This Farmers Screen has a maximum capacity of 4 CFS.

Quick Facts:

- Location: Glendale, Idaho
- Basin: Weiser River
- Partners: Glendale Ditch Company, USFW, NRCS, North Central Highlands RC&D
- Installation Date: Fall of 2008

This Farmers Screen project addresses the following issues:

- Anadromous/ESA Species
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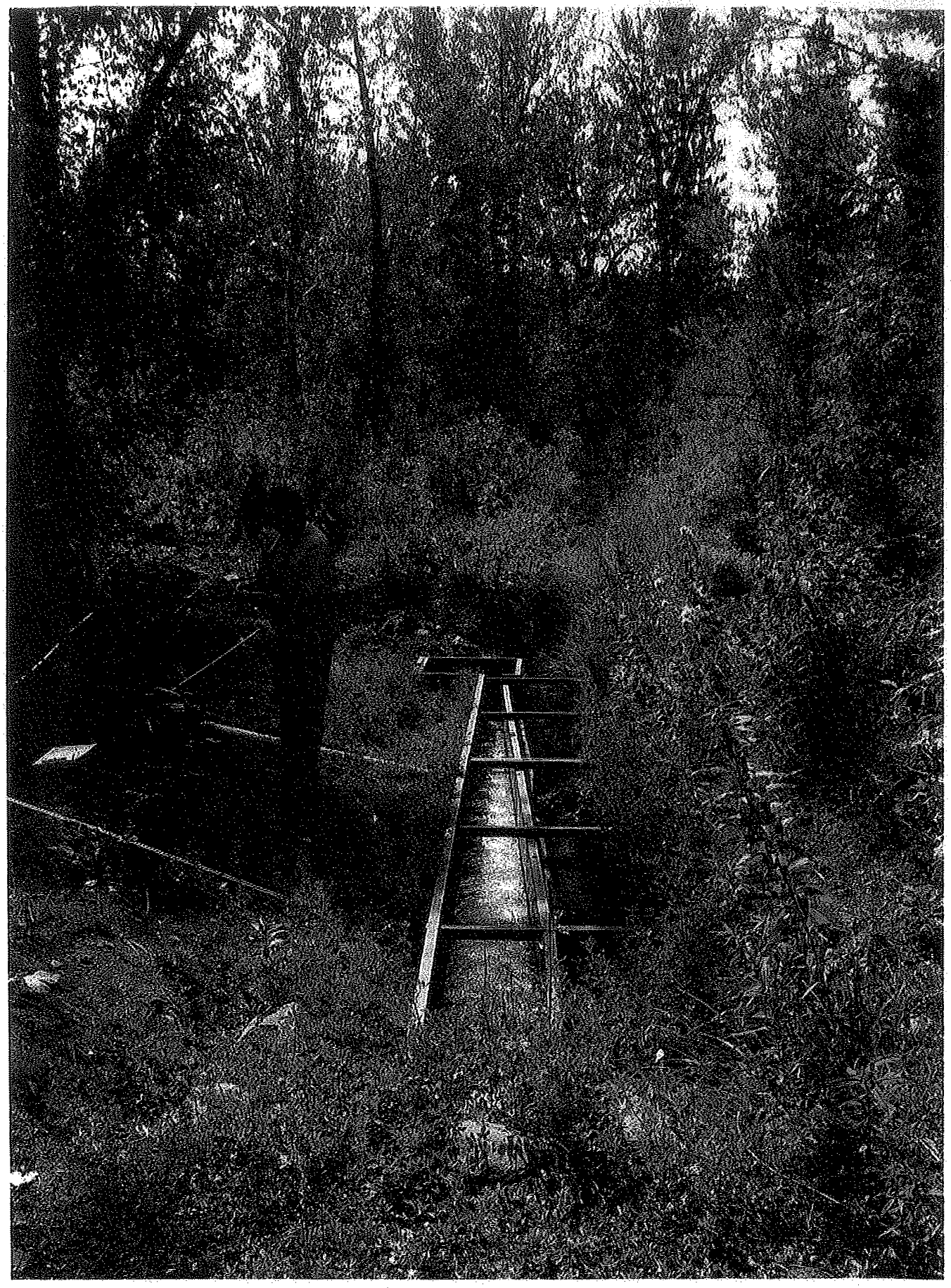
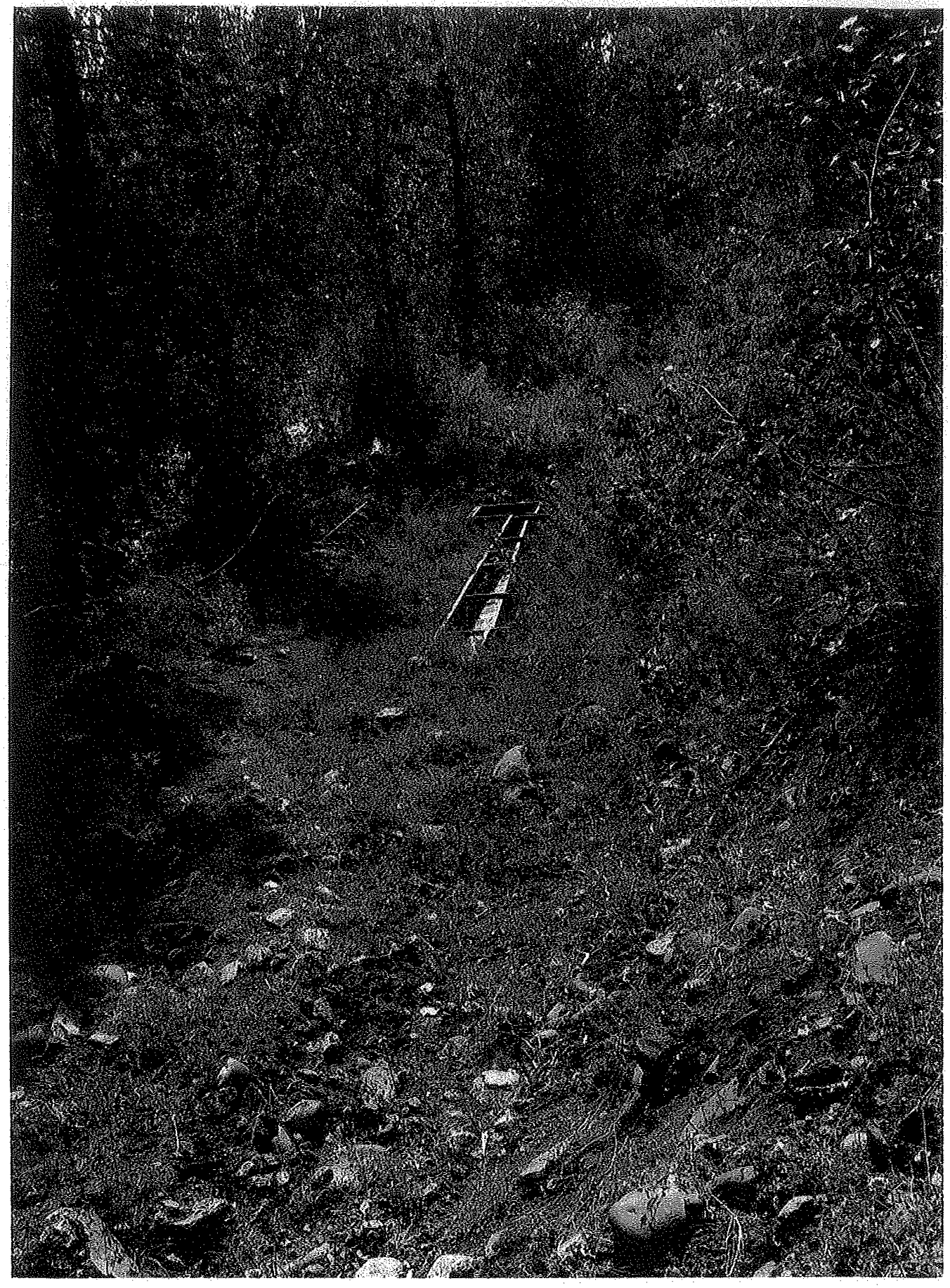
- Modular Design





DEEPK

3.25 CFS Modular Screen

The Deep Creek diversion which supplies water to Black Lake was previously unscreened. This new two section modular Farmers Screen will ensure that resident westslope cutthroat trout, bull trout, brook trout, and rainbow trout will stay in Deep Creek.

Black Lake is used as a spawning and rearing pond for the Crystal Lakes Fish Hatchery which is a privately owned. Recently, Crystal Lakes Fish Hatchery partnered with Montana FWP to create a genetic reserve for arctic grayling and to provide a certified disease-free source of brook trout.

A new headgate and inlet pipe were installed, leading up to the new 3.25cfs modular screen. The new screen has 20 feet of straight inlet flume leading up to the two section 20' screen.

Crystal Lakes Hatchery Manager Bob LeBlanc sent us this terrific video of the screen operating in very icy conditions just after install.

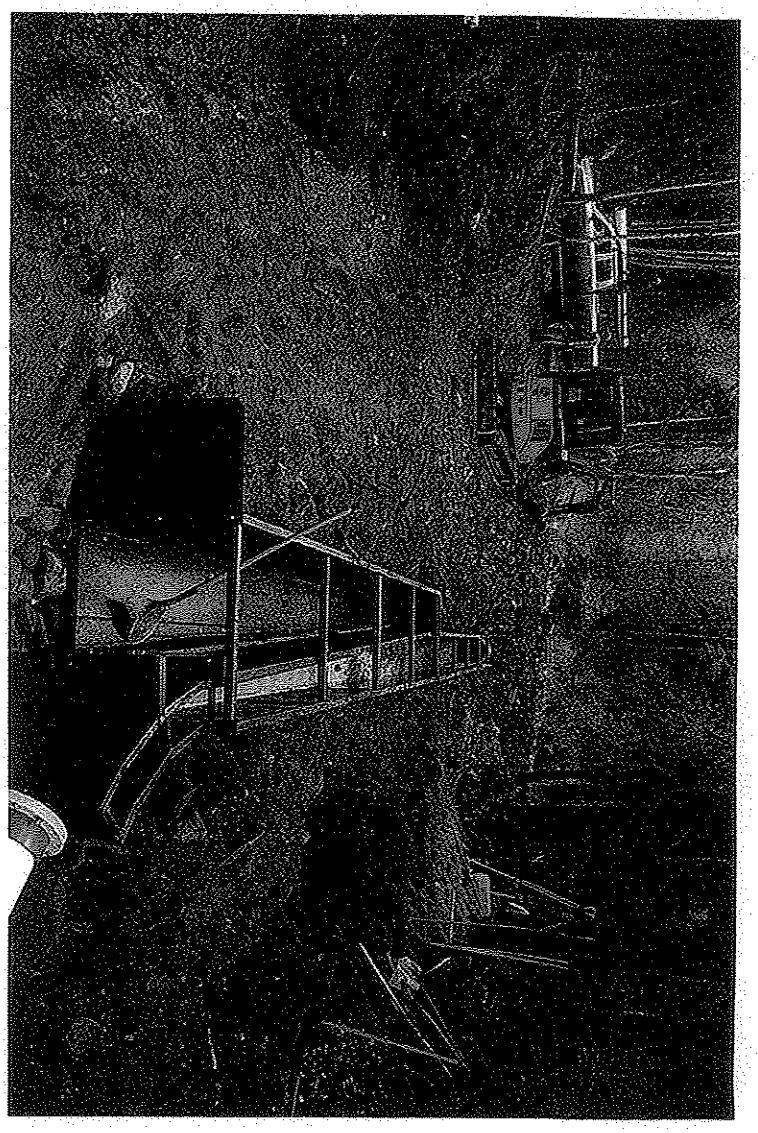
Quick Facts:

- **Location:** Fortine, MT
- **Basin:**Tobacco River Drainage
- **Partners:** Montana FWP, BPA through Libby Mitigation Project, the irrigator (James Smith) and Koocanusa Excavating
- **Installation Date:** October 2013

This Farmers Screen project addresses the following issues:

- ESA species
- Sediment & Debris

EXHIBIT 5



STREAM

6 CFS Modular

FCA teamed up with project partners to install a modular Farmers Screen on this previously unscreened irrigation diversion. Providing safe in-stream fish passage to resident Bull trout, Westslope Cutthroat, Rainbow trout, and Brown trout, the 6 CFS Farmers Screen also provides reliably screened irrigation water to a local ranch.

Stony Creek is located in the Beaverhead-Deerlodge National Forest, twenty miles west of Phillipsburg, Montana, and is a tributary to Rock Creek which flows into the Clark Fork River. The entire local river system is an important recreational fishery in the state of Montana and project partners Trout Unlimited, USFS, USFWS, and Montana FWP were keen to see this passage barrier removed.

The new screen system consists of:

- A three-section modular Farmers Screen
- A rebuilt headgate
- In-stream rock weir passage structure
- A three section modular Farmers Screen
- A piped fish return

Quick Facts

- **Location:** Phillipsburg, MT
- **Basin:** Clark Fork
- **Engineering Partners:** Great West Engineering
- **Partners:** Trout Unlimited, USFS, USFWS, Montana FWP, FCA, Groomes Excavating Contractors
- **Installation Date:** November 2014

This Farmers Screen project addresses the following issues:

- Irrigation
- Sediment & Debris
- National Forest
- High Gradient
- Remote Site
- Bull Trout

This Farmers Screen helped to open 11 stream miles for safe fish passage with the removal of one passage barrier.

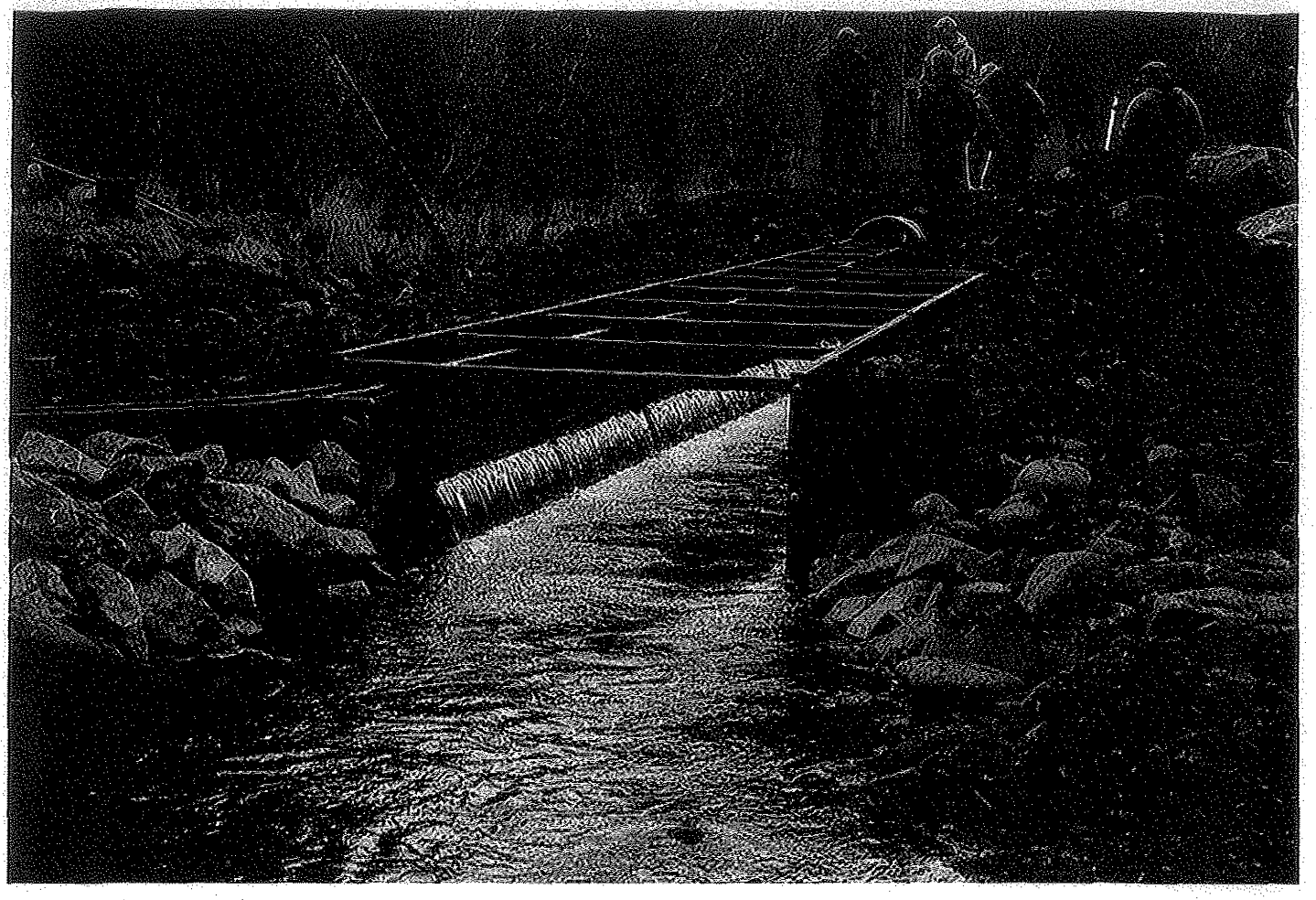


EXHIBIT B

EXHIBIT 5

BUSINESS ORGANIZATION
ABILITY TO PAY CLAIM
Financial Data Request Form

This form requests information regarding your financial status. The data will be used to evaluate your ability to pay for environmental clean-up or penalties. If there is not enough space for your answers, please use additional sheets of paper. Note that we may request further documentation of any of your responses. We welcome any other information you wish to provide supporting your case, particularly, if you feel your situation is not adequately described through the information requested here. If a particular question does not apply to your business, please indicate that it does not apply and give the reason. **Failure to answer all the questions clearly and completely may result in denial of your claim of inability to pay.**

Certification

Under penalties of perjury, I declare that this financial statement submitted by me as a responsible officer of the organization is a true, correct, and complete statement of all organization income and assets, real and personal, whether held in the company name or otherwise to the best of my knowledge and belief. I further understand that I will be subject to prosecution by the United States Government to the fullest extent possible under the law should I provide any information that is not true, correct, and complete to the best of my knowledge.

Douglas T. Cole
Signature

12/12/16
Date

Douglas T. Cole
Name (printed or typed)

CEO
Corporate Position

1. Business Name: Marble Mountain Ranch Inc

2. For Profit X Not for Profit ___

3. Business Address: 92520 State Hwy 96
Street
Somes Bar CA 95568
City State Zip

NOTE: Attach Schedule of all Business Addresses

4. Foreign N/A Domestic Non additional

5. Legal Form of Business Organization during the last 5 years

X Corporation

___ Subchapter S Corporation

___ Partnership

___ Proprietorship

___ Trust

___ Other: _____

6. State of Incorporation California Date of Incorporation Feb 2, 2015

7. Name of Registered Agent: Douglas T. Cole

8. Address of Registered Agent: 92520 State Hwy 96
Street

Somes Bar CA 95568
City State Zip

530-469-3322
Phone

EXHIBIT 5

Name and address of principal stockholders and number of shares owned by each. (If more than 8 shareholders, list only those with 5 percent or more stock ownership). If your business is a partnership, list all partners and ownership percentage.

Total outstanding shares: 100

Name	Address	Shares
1. Douglas T. Cole	92520 St. Hwy 96, Somes Bar, CA. 95568	50
2. Heidi A. Cole	"	50
3.		
4.		
5.		
6.		
7.		
8.		

9.A. Name and address of current, (and for previous 5 years), officers and number of shares held by each. For partnerships, list all partners for last 5 years.

Name	Address	Shares	Term
Douglas T. Cole	92520 St. Hwy 96 Somes Bar, CA.	50	
Heidi A. Cole	92520 St. Hwy 96 Somes Bar, CA. 95568	50	

9.B. Name and address of current, (and for previous five years), members of board of directors and number of shares held by each.

Name	Address	Shares	Term
Douglas T. Cole	92520 St. Hwy 96 Somes Bar, CA 95568	50	
Heidi A. Cole	92520 St. Hwy 96 Somes Bar, CA 95568	50	

10. Has this organization ever issued a prospectus for the sale of stock? Yes ___ No X
If yes, list date, number and type of shares for each prospectus during the last five years.

Date	Number of Shares	Type of Shares
	N/A	

11.A. Registration on international, national or local stock exchange(s). Give details, including date of registration and/or de-listing.

1. _____
2. _____
3. N/A
4. _____

11.B. Total authorized shares for each type issued and present market value per share on each type of stock (or book value if not actively traded)

Types of Shares	Total Shares	Book Value	Market Value
1.			
2.	N/A		
3.			
4.			

C. Total outstanding shares of each type of stock currently being held as Treasury Stock.

N/A

D. Total outstanding shares of each type of stock.

N/A

E. Amount of bonded debt and principle bondholders.

N/A

12. List states and municipalities to which taxes have been paid and/or are being paid. Describe nature and amount of such taxes, state most recent year of payments thereof and whether tax payments are current.

Siskiyou County Tax collector: property taxes = $10,140.48
Siskiyou County Tax collector: Modular home taxes = $ 351.44

TAXES ARE CURRENT. NEXT INSTALLMENTS ARE DUE ON Feb. 1, 2017.

13. Has this organization filed United States income tax returns during the last five years?
Yes X No ____

To what I.R.S. Office(s)

What Years? 2015,

Are Federal Taxes current? Yes X No ____

Provide **SIGNED** Federal income tax returns and **ALL** associated schedules for the last five years.

14. Name and address of:

A. Organization=s Independent Certified Public Accountants
Al Dorff, CPA. 1181 Puerta del Sol #140,
San Clemente, CA. 92673 Ph. 949.498.5585 x 124

B. Organization=s Attorney(s) presently and during the past five years.
Barbara Brenner, Churchwell White, 1414 K Street,
3rd floor, Sacramento, CA. 95814

15. Has this organization filed Financial Forms with any organization or government entity? List name of organization or entity, date and type of Financial Form.

N/A

16. Does this organization have a Profit and Loss Statement and Balance Sheet for the most recent calendar or fiscal year and for specified past years? Past five years:

Submit one copy of each. (Audited documents are preferred.)

See C.P.A. prepared tax returns

A. Assets

		2015	2014	2013	2012	2011
Cash	$					
Securities	$					
Facilities	$					
Depreciation	$					
Equipment	$					
Depreciation	$					
Inventory	$					
Accounts Receivable	$					
Other	$					
TOTAL ASSETS	$					

B. Liabilities and Stockholder's Equity

		2015	2014	2013	2012	2011
Loans Principle	$					
Monthly Payment	$					
Mortgages Principle	$					
Monthly Payment	$					
Accounts Payable	$					
Deferred Taxes	$					
Insurance Premiums	$					
Other	$					

C. Stockholder's Equity

		2015	2014	2013	2012	2011
Common Stock	$					
Paid-in Capital	$					
Retained Earnings	$					

		2015	2014	2013	2012	2011
TOTAL LIABILITIES & EQUITY	$					

17. Loans Payable:

A.

Owed to: Kubota Credit	Purpose: Mini excavator
Term: 60 months	Interest Rate: 0%
Collateral: excavator	Cosigner:
Monthly Payments: $ 405.94	
Original Amount: $ 14,000	Date: June 2016
Present Balance $ 9,000	

B.

Owed to: Chase	Purpose: Truck loan
Term: 60 months	Interest Rate: 2.89%
Collateral: 2016 GMC truck	Cosigner:
Monthly Payments: $ 716.00	
Original Amount: $ 39,962	Date: 3/13/16
Present Balance $ 22,000	

C.

Owed to: First Tennessee	Purpose: Fund Water consultants
Term: 36 mos	Interest Rate:
Collateral: M.M.R. real estate	Cosigner: N.D. Cole
Monthly Payments: ≈500.—	
Original Amount: $45,000	Date: 11/12/16
Present Balance $45,000	

D.

Owed to: Kubota credit	Purpose: tractor back-hoe
Term: 60 months	Interest Rate: 0%
Collateral: tractor	Cosigner:
Monthly Payments: 716.56	
Original Amount: $42,000	Date: Oct 2015
Present Balance $35,000	

18. Mortgages Payable:

A.

Owed To: Nationstar Mortgage	Address of Property: 92520 Hwy 96 Somes Bar, CA. 95568
Term: 30 years	Interest Rate: 3.375 %
Collateral: home	Cosigner: N.D. Cole et al
Monthly Payments: $1,821.51	
Original Amount: $255,000	Date: June 2016
Present Balance: $246,802	

EXHIBIT 5

B. Additional loans ↓

Owed To: Chadwell Wight	Address of Property:
Term:	Interest Rate:
Collateral: none	Cosigner:
Monthly Payments:	
Original Amount: $40,000	Date: 11/12/16
Present Balance: ≈ $37,000	water rights defense, balance carried forward.

C.

Owed To:	Address of Property:
Term:	Interest Rate:
Collateral:	Cosigner:
Monthly Payments:	
Original Amount:	Date:
Present Balance:	

D.

Owed To:	Address of Property:
Term:	Interest Rate:
Collateral:	Cosigner:
Monthly Payments:	
Original Amount:	Date:
Present Balance:	

EXHIBIT 5

19. Income/Expenses:

Gross Income		2015	2014	2013	2012	2011
Net Sales	$					
Interest Income	$					
Dividends	$					
Other	$					
Operating Expenses						
Wages	$					
Overhead	$					
Lease Payments	$					
Interest Expense	$					
Cost of Sales	$					
Net Income	$					

20. In addition, provide the following firm size information:

Number of Employees	15 seasonal, 3 full-time employees				
Size of Warehouse(s)					
Volume Shipped					
Other					

21. Does this organization maintain bank accounts? Give names and addresses of banks, savings and loan associations, and other such entities, within the United States or elsewhere.

A. Checking

Name of Bank	Address of Bank	Account #	Balance
Chase	3607 crater Lake Hwy. medford, oregon 97504	322271625	≈ 2,000

B. Savings/Certificate of Deposit

Name of Bank	Address of Bank	Account #	Balance

C. Other Accounts

Name of Institution	Address of Institution	Account #	Balance

D. Savings & Loan Associations or other such entities

Name of Institution	Address of Institution	Account #	Balance

E. Trust Account(s)

Name of Institution	Address of Institution	Account #	Balance

F. Other Account(s)

Name of Institution	Address of Institution	Account #	Balance

22. List all commercial paper, negotiable or non-negotiable, in which the organization has any interest whatsoever, presently in transit or in the possession of any banking institution. Describe such paper and the organization=s interest therein, and state its present location. List all loans receivable in excess of $10,000.00 and specify if due from an officer, stockholder, or director.

23. Has this organization engaged in any Joint Loan Agreements, including Letters of Credits, with any other organization(s)? If yes, describe all such agreements.

24. Does this organization have any debt coinsured by another organization? If yes, describe such arrangements.

25. List all equity participation in other organizations, both domestic and foreign, in which this organization has an interest, including the type, amount and terms of such interest.

26. List all debt participation in other organizations, both domestic and foreign, in which this organization has an interest, including the type, amount and terms of such interest.

_____

_____

_____

_____

27. Is this organization presently:

A. Active
(Answer No for inactive, but still in existence) Yes X No _____

B. Void and/or terminated by State authority. Yes_____ No _____

C. Otherwise dissolved Yes_____ No _____

1. Date _____

2. By Whom _____

3. Reason _____

28. A. List corporate salaries, bonuses to and/or drawings of the following personnel for the last five taxable years:

Position	Name	2015	2014	2013	2012	2011
President	Doug Cole	-net losses- see returns to IRS.				
Vice President						
Chairman						
Secretary	Heidi Cole					
Treasurer						

see tax returns & schedules

B. List the five most highly compensated employees or officers other than the above, describe position and list annual salary and/or bonus for the last five taxable years:

Name	Position/Title	2015	2014	2013	2012	2011
None						

C. Describe the nature of the compensation paid to the persons listed in (A) and (B) above and set forth any stock options, pensions, profit sharing, royalties, or other deferred compensation rights of said persons.

N/A

29. List the organizations commercial activity, (fields of activity resulting in income), and SIC Code.

	Commercial Activity	SIC Code
Primary	Dude Ranch	70320102
Other 1.		
Other 2.		
Other 3.		

30. List all other supplementary fields of activity in which this organization is engaged, either directly, through it affiliates, stating the name(s) and states(s) of incorporation of such subsidiaries or affiliates:
Contract services to Cal Fire and United States Forest Service for fire camps. Fire camp income/expense is included in Marble Mountain Ranch gross incomes/expenses.

31. Has this organization at any time been the subject of any proceeding under the provisions of any State Insolvency Law, or the federal Bankruptcy Act, as amended? If so, supply the following information as to each such proceeding:

A. Date (Commencement) N/A

B. Date (Termination)

C. Discharge or other disposition, if any, and operative effect thereof:

D. State Court _____ Docket No. _____
County

E. Federal Court _____ Docket No. _____
County

32. A. List all real estate, and personal property of an estimated value in excess of $ 10,000 owned or under contract to be purchased by this organization with names and addresses of seller and contract price and where located:
(1) Real estate known as "Marble Mountain Ranch" at 92520 Hwy 96, Somes Bar, CA. 95568
(2) See attached Siskiyou County business property tax schedule.

MARBLE MOUNTAIN RANCH BUSINESS PROPERTY
Feb 2016

100 HP HYDRO ELECTRIC PLANT AND THES CONTROLS
65 KW GENERATOR
AC/DC ARC WELDER
ACETYLENE TORCH
DE WALT 12" RADIAL ARM SAW
WOOD SPLITTER
DISC, BRUSH HOG, BOX SCRAPER
2 LAWN MOWERS
2008 JOHN DEER RIDING MOWER (purchased July 2008)
1940 JOHN DEER TRACTOR
4 WHEEL BARRELS AND MISC GARDEN TOOLS
10 REFRIGERATORS
1 CHEST FREEZER
1 COMMERCIAL REFRIGERATOR
2 COMMERCIAL STOVES
DINING ROOM SEATING AND TABLES FOR 25
2 COMMERCIAL CLOTHES DRYERS
2 COMMERCIAL CLOTHES WASHERS
25 TWIN BEDS
5 QUEEN OR FULL SIZED BEDS
LINENS FOR 30 BEDS
DRESSERS, NIGHT STANDS, LAMPS FOR 12 CABINS
MISC PICNIC TABLES
I-MAC COMPUTER AND PRINTER
2 @ 5000 GAL WATER STORAGE TANKS
3 @ SAND FILTERS
300 FEET OF 3" HOOK-LATCH AG PIPE
2 "BIG GUN" SPRINKLERs
STOCK: 15 MIXED BREED HORSES AND TACK FOR 15 HORSES (approx. 16,000 – evolving as horses age)
2 USED UTILITY TRAILERS
1 ICE MACHINE (approx. $1000 new-2008)
2 used STHIL POLE SAWs (approx. $500)
Sthil string weed eater ($450 new in 2012
2009 Rogue Jet boat (new purchase price was $40K)
2008 Hyde drift boat (new acquisition 2012 for $3500)
3 misc older rafts with gear, approx. value $4,500
2012 Sotar Raft (new acquisition 2012 for $3800)
2015 Sotar Raft (new acquisition 2015 for $4380)
2015 Kubota tractor (new acquisition 2015 $41,600)
2014 BBQ smoker ($3000 purchase)
1998 used mobile home-serial number GWOR23N20422 (new acquisition 2012 for $18,000)
Two 20' cargo containers, $7000 total purchase price

SIGNED: Doug Cole DATE: 12/12/16

33. List and describe all judgments, recorded and unrecorded, this organization is a party of:
A. Against the organization

N/A

B. In favor of the organization

N/A

34. List and describe all other encumbrances (including but not limited to security interest, whether perfected or not) against any such personal property owned by the organization as is listed in 30 (A) above.

N/A

35. List all life insurance, now in force on any or all officers, directors, and/or Akey@ employees, setting forth face amounts, names of life insurance companies and policy numbers where this organization has an Ainsurable interest@ and/or paying the premium or part of same. Where applicable, indicate under which policy(s) this organization is beneficiary, type of policy(s) this organization is a beneficiary, yearly premium, and location of policy(s). In addition, state the cash value if any and the conditions of any borrowing options available under each policy.

N/A

EXHIBIT 5

36. For the following types of policies, list all primary and excess insurance policies, the deductible amount, per occurrence and aggregate coverage limit for each policy.

A. Comprehensive General Liability

see attached general liability accord showing $1000,000 coverage.

B. Environmental Impairment Liability

N/A

C. Other policies for which coverage might apply including participation in risk retention pools.

N/A

37. List all transfers of assets (real) and/or (personal) (over $10,000.00) made by this organization, OTHER THAN IN THE ORDINARY COURSE OF BUSINESS, during the last three calendar years and state to whom transfer was made. Describe compensation paid by recipient and to whom.

Date	Value	Property Transferred	To Whom	Compensation Paid

ACORD

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY): 06/23/2014

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER	CONTACT NAME: PATRICK EILERT
EILERT INSURANCE GROUP 16450 MONTEREY RD, SUITE 4 MORGAN HILL, CA 95037 (408) 776-9090 PHONE (408) 776-9075 FAX	PHONE (A/C, No, Ext): 408-776-9090 FAX (A/C, No): 408-776-9075 E-MAIL ADDRESS: CSR@EILERTINSURANCE.COM PRODUCER CUSTOMER ID #:

INSURED	INSURER(S) AFFORDING COVERAGE	NAIC #
MARBLE MTN RANCH, LLC 92520 STATE HWY 96 SOMES BAR, CA. 95568	INSURER A: PHILADELPHIA INSURANCE CO	18058
	INSURER B: STATE COMPENSATION INSURANCE FUND	
	INSURER C:	
	INSURER D:	
	INSURER E:	
	INSURER F:	

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
A	GENERAL LIABILITY	X		PHPK1183082	06/25/2014	06/25/2015	EACH OCCURRENCE	$ 1,000,000
	X COMMERCIAL GENERAL LIABILITY						DAMAGE TO RENTED PREMISES (Ea occurrence)	$ 100,000
	CLAIMS-MADE X OCCUR						MED EXP (Any one person)	$ 5,000
							PERSONAL & ADV INJURY	$ 1,000,000
							GENERAL AGGREGATE	$ 2,000,000
	GEN'L AGGREGATE LIMIT APPLIES PER:						PRODUCTS - COMP/OP AGG	$ 2,000,000
	X POLICY PRO-JECT LOC							$
A	AUTOMOBILE LIABILITY			PHPK1183082	06/25/2014	06/25/2015	COMBINED SINGLE LIMIT (Ea accident)	$ 1,000,000
	ANY AUTO						BODILY INJURY (Per person)	$
	ALL OWNED AUTOS						BODILY INJURY (Per accident)	$
	X SCHEDULED AUTOS						PROPERTY DAMAGE (Per accident)	$
	X HIRED AUTOS						MED PAY	$ 5,000
	NON-OWNED AUTOS							$
	UMBRELLA LIAB OCCUR						EACH OCCURRENCE	$
	EXCESS LIAB CLAIMS-MADE						AGGREGATE	$
	DEDUCTIBLE							$
	RETENTION							$
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY			1953146-14	06/01/2014	06/01/2015	X WC STATU-TORY LIMITS OTH-ER	
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) Y / N N/A						E.L. EACH ACCIDENT	$ 1,000,000
	If yes, describe under DESCRIPTION OF OPERATIONS below						E.L. DISEASE - EA EMPLOYEE	$ 1,000,000
							E.L. DISEASE - POLICY LIMIT	$ 1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

AS USUAL TO INSUREDS OPERATIONS

CERTIFICATE HOLDER

HAPPY CAMP RANGER DISTRICT
PO BOX 377
HAPPY CAMP, CA 96039
FAX: 530-469-1796

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

38. Is this business organization a party in any law suit now pending?
Yes (Give details below) _____ No X

39. List names and addresses of any persons or other business entity, holding funds in escrow or in trust for this organization, or any of its subsidiaries or affiliates.

N/A

40. Other information requested:

Form **1120S**

Department of the Treasury
Internal Revenue Service

U.S. Income Tax Return for an S Corporation

▶ Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.

▶ Information about Form 1120S and its separate instructions is at www.irs.gov/form1120s.

OMB No. 1545-0123

2015

For calendar year 2015 or tax year beginning , and ending

A	02/02/2015	Name	D [redacted]
B	713900	MARBLE MOUNTAIN RANCH, INC.	E 02/02/2015
C	attached ☐	[redacted]	F $ 2,594,301. filed
G		☐ X ☐	
H	(1) ☐	(2) ☐ (3) ☐ (4) ☐ (5) ☐	
I			▶ 2

Caution: only

Income	1a Gross receipts or sales	627,649.	b Returns and allowances 257.	c Bal. ▶ 1c 627,392.
	2			2 4,179.
	3			3 623,213.
	4			4
	5			5
	6 Total income (loss).			▶ 6 623,213.
Deductions (See instructions for limitations)	7			7
	8			8 35,895.
	9			9 58,464.
	10			10
	11			11
	12	STATEMENT 2		12 15,766.
	13			13 16,853.
	14			14 186,804.
	15 Depletion (Do not deduct oil and gas depletion.)			15
	16			16 6,661.
	17			17
	18			18
	19	STATEMENT 3		19 387,774.
	20 Total deductions.			▶ 20 708,217.
	21 Ordinary business income (loss).			21 -85,004.
Tax and Payments	22a		22a	
	b		22b	
	c			22c
	23a		23a	
	b		23b	
	c		23c	
	d			23d
	24			▶ ☐ 24
	25 Amount owed.			25
	26 Overpayment.			26
	27 Credited to 2016 estimated tax ▶		Refunded ▶	27

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Sign Here ▶ _____ Date ▶ PRESIDENT Title

May the IRS discuss this return with the preparer shown below (see instr.)? [X] Yes ☐ No

Paid Preparer Use Only	Print/Type preparer's name	Preparer's signature	Date	Check if self-employed ☐	PTIN
	Firm's name ▶ ALLAN K. DORFF, CPA INC.			Firm's EIN ▶	[redacted]
	Firm's address ▶ [redacted]			Phone no.	[redacted]

Schedule B Other Information

		Yes	No
1	(a) [X] (b) [ ] (c) [ ]		
2			
	(a) RECREATION (b) GUEST RANCH ADVENTURES		
3			X
4			
a			X

(i)	(ii) Employer	(iii) incorporation	(iv) Percentage of Stock Owned	(v) If Percentage in (iv) Is 100%, Enter the Date (if any) a Qualified Subchapter S Subsidiary Election Was Made

b			a	X

(i)	(ii) Employer	(iii)	(iv) Organization	(v) Maximum Percentage Owned in Profit, Loss, or Capital

5a			X
	(i) ▶		
	(ii) ▶		
b			X
	(i) ▶		
	(ii) ▶		
6	Form 8918,		X
7	discount	▶ [ ]	
	Form 8281,		
8	(a) or		
	and (b)		
9	por		
10	both		
a			
b			X
11			X
	ducti		
12			X
13a			X
b			X

MARBLE MOUNTAIN RANCH, INC. [redacted] 3

Schedule K Shareholders' Pro Rata Share Items

				Total amount
Income (Loss)	1		1	-85,004.
	2		2	
	3a	3a	3c	
	b	3b		
	c			
	4		4	
	5 a		5a	
	b	5b	6	
	6			
	7		7	
	8a		8a	
	b	8b	9	
	c	8c		
	9			
	10 Other income (loss) (see instructions) Type		10	
Deductions	11		11	
	12a	STATEMENT 4	12a	6,592.
	b		12b	
	c Section 59(e)(2) expenditures (1) Type		12c(1)	
	(2)		12c(2)	
	d Other deductions (see instructions) Type		12d	
Credits	13a		13a	
	b		13b	
	c		13c	
	d Other rental real estate credits (see instructions) Type		13d	
	e Other rental credits (see instructions) Type		13e	
	f		13f	
	g Other credits (see instructions) Type		13g	
Foreign Transactions	14a		14b	
	b		14c	
	c		14d	
	d egor		14e	
	e		14f	
	f		14g	
	g		14h	
	h		14i	
	i		14j	
	j		14k	
	k		14l	
	l ☐ ☐		14m	
	m			
	n			
Alternative Minimum Tax (AMT) Items	15a		15a	29,472.
	b		15b	
	c		15c	
	d		15d	
	e		15e	
	f		15f	
Items Affecting Shareholder Basis	16a		16a	
	b		16b	
	c Nondeductibl	STATEMENT 5	16c	179.
	d		16d	
	e		16e	

SCHEDULE C (Form 1040)

Department of the Treasury Internal Revenue Service (99)

Profit or Loss From Business
(Sole Proprietorship)

► Information about Schedule C and its separate instructions is at *www.irs.gov/schedulec*.
Attach to Form 1040, 1040NR, or 1041; partnerships generally must file Form 1065.

OMB No. 1545-0074

2014

Attachment Sequence No. **09**

Name of proprietor	Social security number (SSN)
DOUGLAS T. COLE	[redacted]

A Principal business or profession, including product or service (see instructions): RECREATION

B Enter code from instructions ► 713900

C Business name. If no separate business name, leave blank. MARBLE MOUNTAIN RANCH

D Employer ID number (EIN), (see instrs)

E Business address (including suite or room no.) ►

City, town or post office, state, and ZIP code

F Accounting method: (1) [X] Cash (2) [ ] Accrual (3) [ ] Other (specify) ►

G Did you 'materially participate' in the operation of this business during 2014? If 'No,' see instructions for limit on losses. [X] Yes [ ] No

H If you started or acquired this business during 2014, check here ► [ ]

I Did you make any payments in 2014 that would require you to file Form(s) 1099? (see instructions) [ ] Yes [X] No

J If 'Yes,' did you or will you file required Forms 1099? [ ] Yes [ ] No

Part I Income

1	Gross receipts or sales. See instructions for line 1 and check the box if this income was reported to you on Form W-2 and the 'Statutory employee' box on that form was checked ► [ ]	1	474,017.
2	Returns and allowances	2	1,305.
3	Subtract line 2 from line 1	3	472,712.
4	Cost of goods sold (from line 42)	4	4,110.
5	**Gross profit.** Subtract line 4 from line 3	5	468,602.
6	Other income, including federal and state gasoline or fuel tax credit or refund (see instructions) SEE STATEMENT 1	6	6,347.
7	**Gross income.** Add lines 5 and 6 ►	7	474,949.

Part II Expenses. Enter expenses for business use of your home only on line 30.

8	Advertising	8	9,003.	18	Office expense (see instructions)	18	3,044.
9	Car and truck expenses (see instructions)	9	13,196.	19	Pension and profit-sharing plans	19	
10	Commissions and fees	10	12,99[illegible]	20	Rent or lease (see instructions):		
11	Contract labor (see instructions)	11		a	Vehicles, machinery, and equipment	20a	
12	Depletion	12		b	Other business property	20b	
13	Depreciation and section 179 expense deduction (not included in Part III) (see instructions)	13	57,823.	21	Repairs and maintenance	21	69,473.
14	Employee benefit programs (other than on line 19)	14		22	Supplies (not included in Part III)	22	9,368.
15	Insurance (other than health)	15	30,979.	23	Taxes and licenses	23	20,474.
16	Interest:			24	Travel, meals, and entertainment:		
a	[illegible]	16a	16,499.	a	Travel	24a	668.
b	Other	16b	1,088.	b	Deductible meals and entertainment (see instructions)	24b	786.
17	Legal & professional services	17	21,935.	25	Utilities	25	37,522.
				26	Wages (less employment credits)	26	17,794.
				27a	Other expenses (from line 48)	27a	151,105.
				b	**Reserved for future use**	27b	

28	**Total expenses** before expenses for business use of home. Add lines 8 through 27a ►	28	473,754.
29	Tentative profit or (loss). Subtract line 28 from line 7	29	1,195.
30	Expenses for business use of your home. Do not report these expenses elsewhere. Attach Form 8829 unless using the simplified method (see instructions). **Simplified method filers only:** enter the total square footage of: (a) your home: _____ and (b) the part of your home used for business: _____. Use the Simplified Method Worksheet in the instructions to figure the amount to enter on line 30	30	
31	**Net profit or (loss).** Subtract line 30 from line 29. If a profit, enter on both **Form 1040, line 12** (or **Form 1040NR, line 13**) and on **Schedule SE, line 2.** (If you checked the box on line 1, see instructions). Estates and trusts, enter on **Form 1041, line 3.** If a loss, you **must** go to line 32.	31	1,195.

32 If you have a loss, check the box that describes your investment in this activity (see instructions).

If you checked 32a, enter the loss on both **Form 1040, line 12,** (or **Form 1040NR, line 13**) and on **Schedule SE, line 2.** (If you checked the box on line 1, see the line 31 instructions). Estates and trusts, enter on **Form 1041, line 3.**

* If you checked 32b, you **must** attach **Form 6198.** Your loss may be limited.

32a [ ] All investment is at risk.

32b [ ] Some investment is not at risk.

Schedule C (Form 1040) 2014 DOUGLAS T. COLE [redacted] Page 2

Part III Cost of Goods Sold (see instructions)

33 Method(s) used to value closing inventory: a ☐ Cost b ☐ Lower of cost or market c ☐ Other (attach explanation)

34 Was there any change in determining quantities, costs, or valuations between opening and closing inventory? If 'Yes,' attach explanation ☐ Yes ☐ No

35	Inventory at beginning of year. If different from last year's closing inventory, attach explanation	35	
36	Purchases less cost of items withdrawn for personal use	36	4,110.
37	Cost of labor. Do not include any amounts paid to yourself	37	
38	Materials and supplies	38	
39	Other costs	39	
40	Add lines 35 through 39	40	4,110.
41	Inventory at end of year	41	
42	**Cost of goods sold.** Subtract line 41 from line 40. Enter the result here and on line 4	42	4,110.

Part IV Information on Your Vehicle. Complete this part **only** if you are claiming car or truck expenses on line 9 and are not required to file Form 4562 for this business. See the instructions for line 13 to find out if you must file Form 4562.

43 When did you place your vehicle in service for business purposes? (month, day, year) ▶ _____

44 Of the total number of miles you drove your vehicle during 2014, enter the number of miles you used your vehicle for:

a Business _____ b Commuting (see instructions) _____ c Other _____

45 Was your vehicle available for personal use during off-duty hours? ☐ Yes ☐ No

46 Do you (or your spouse) have another vehicle available for personal use? ☐ Yes ☐ No

47a Do you have evidence to support your deduction? ☐ Yes ☐ No

b If 'Yes,' is the evidence written? ☐ Yes ☐ No

Part V Other Expenses. List below business expenses not included on lines 8-26 or line 30.

SEE STATEMENT 2		
48 **Total other expenses.** Enter here and on line 27a	48	151,105.

Schedule C (Form 1040) 2014

DOUGLAS T. AND HEIDI A. COLE [redacted]

STATEMENT 1 - RECREATION
SCHEDULE C, LINE 6
OTHER INCOME

RESALE GIFT MERCHANDISE	$	6,347.
TOTAL	$	6,347.

STATEMENT 2 - RECREATION
SCHEDULE C, PART V
OTHER EXPENSES

ACCOUNTING	$	775.
AMMUNITION/SHOOTING RANGE EXPENSES		4,379.
BANK CHARGES		137.
CASUAL LABOR		6,400.
DUES AND SUBSCRIPTIONS		1,426.
FEES - DOT		301.
FISHING EXPENSES		3,323.
FOOD & LODGING SUPPLIES-DAY TRIPS		63,640.
GIFTS/DONTATIONS/PROMOTION		4,050.
GROUNDS MAINTENANCE		3,409.
MISCELLANEOUS		105.
RAFTING EXPENSES		1,319.
SMALL SPORTING EQUIPMENT EXPENSES		2,393.
SPECIAL USE PERMITS-USFS/BLM		6,533.
SQUIRES REPAYMENT EXPENSES		9,405.
STOCK FEED		33,393.
TELECOM		6,290.
TOOLS		992.
UNIFORMS		956.
VET EXPENSES		1,879.
TOTAL	$	151,105.

STATEMENT 3
FORM 4562, PART I
ELECTION TO EXPENSE CERTAIN TANGIBLE PROPERTY (SECTION 179)

DESCRIPTION OF PROPERTY		COST		ELECTED COST
7-YEAR	BEE EQUIPMENT	2,154.	$	2,154.
7-YEAR	KAYAKS	6,623.		6,623.
7-YEAR	GENERATOR	9,000.		9,000.
7-YEAR	CARGO CONTAINER	3,550.		3,550.
7-YEAR	SMOKER	3,950.		3,950.
	TOTAL		$	25,277.

SCHEDULE C (Form 1040)
Department of the Treasury
Internal Revenue Service (99)

Profit or Loss From Business
(Sole Proprietorship)

▶ For information on Schedule C and its instructions, go to www.irs.gov/schedulec.
▶ Attach to Form 1040, 1040NR, or 1041; partnerships generally must file Form 1065.

OMB No. 1545-0074
2013
Attachment Sequence No. 09

Name of proprietor DOUGLAS T COLE	Social security number (SSN) [redacted]
A Principal business or profession, including product or service (see instructions) RECREATION : SERVICE	B Enter code from instructions ▶ 713900
C Business name. If no separate business name, leave blank. MARBLE MOUNTAIN RANCH	D Employer ID number (EIN), (see instr.)
E Business address (including suite or room no.) ▶ [redacted] City, town or post office, state, and ZIP code	

F Accounting method: (1) [X] Cash (2) [ ] Accrual (3) [ ] Other (specify) ▶

G	Did you "materially participate" in the operation of this business during 2013? If "No," see instructions for limit on losses	[X] Yes	[ ] No
H	If you started or acquired this business during 2013, check here ▶	[ ]	
I	Did you make any payments in 2013 that would require you to file Form(s) 1099? (see instructions)	[ ] Yes	[X] No
J	If "Yes," did you or will you file required Forms 1099?	[ ] Yes	[ ] No

Part I Income

1	Gross receipts or sales. See instructions for line 1 and check the box if this income was reported to you on Form W-2 and the "Statutory employee" box on that form was checked ▶ [ ] ATTACHMENT	1	434,530.
2	Returns and allowances	2	
3	Subtract line 2 from line 1	3	434,530.
4	Cost of goods sold (from line 42)	4	
5	Gross profit. Subtract line 4 from line 3	5	434,530.
6	Other income, including federal and state gasoline or fuel tax credit or refund (see instructions) ATTACHMENT	6	2,750.
7	Gross income. Add lines 5 and 6 ▶	7	437,330.

Part II Expenses — Enter expenses for business use of your home only on line 30.

8	Advertising	8	5,895.	18	Office expense (see instructions)	18	3,950.
9	Car and truck expenses (see instructions)	9	16,179.	19	Pension and profit-sharing plans	19	
10	Commissions and fees	10	16,039.	20	Rent or lease (see instructions):		
11	Contract labor (see instructions)	11	13,423.	a	Vehicles, machinery, and equipment	20a	
12	Depletion	12		b	Other business property	20b	
13	Depreciation and section 179 expense deduction (not included in Part III) (see inst)	13	40,120.	21	Repairs and maintenance	21	22,972.
14	Employee benefit programs (other than on line 19)	14		22	Supplies (not included in Part III)	22	
15	Insurance (other than health)	15	34,542.	23	Taxes and licenses ATTACHMENT	23	21,217.
16	Interest:			24	Travel, meals, and entertainment:		
a	Mortgage (paid to banks, etc.)	16a		a	Travel	24a	1,972.
b	Other	16b	254.	b	Deductible meals and entertainment (see instructions)	24b	780.
17	Legal and professional services	17	18,545.	25	Utilities	25	31,296.
				26	Wages (less employment credits)	26	11,717.
				27a	Other expenses (from line 48)	27a	145,334.
				b	Reserved for future use	27b	

28	Total expenses before expenses for business use of home. Add lines 8 through 27a ▶	28	384,235.
29	Tentative profit or (loss). Subtract line 28 from line 7	29	53,095.
30	Expenses for business use of your home. Do not report these expenses elsewhere. Attach Form 8829 unless using the simplified method (see instructions). Simplified method filers only: enter the total square footage of: (a) your home: _____ and (b) the part of your home used for business: _____. Use the Simplified Method Worksheet in the instructions to figure the amount to enter on line 30	30	
31	Net profit or (loss). Subtract line 30 from line 29. • If a profit, enter on both Form 1040, line 12 (or Form 1040NR, line 13) and on Schedule SE, line 2. (If you checked the box on line 1, see instructions). Estates and trusts, enter on Form 1041, line 3. • If a loss, you must go to line 32.	31	53,095.

32 If you have a loss, check the box that describes your investment in this activity (see instructions).
• If you checked 32a, enter the loss on both Form 1040, line 12, (or Form 1040NR, line 13) and on Schedule SE, line 2. (If you checked the box on line 1, see the line 31 instructions). Estates and trusts, enter on Form 1041, line 3.
• If you checked 32b, you must attach Form 6198. Your loss may be limited.

32a [ ] All investment is at risk.
32b [ ] Some investment is not at risk.

Part III Cost of Goods Sold (see instructions)

33 Method(s) used to value closing inventory: a [X] Cost b [ ] Lower of cost or market c [ ] Other (attach explanation)

34 Was there any change in determining quantities, costs, or valuations between opening and closing inventory? If "Yes," attach explanation . . . [ ] Yes [X] No

35	Inventory at beginning of year. If different from last year's closing inventory, attach explanation	35	
36	Purchases less cost of items withdrawn for personal use	36	
37	Cost of labor. Do not include any amounts paid to yourself	37	
38	Materials and supplies	38	
39	Other costs	39	
40	Add lines 35 through 39	40	
41	Inventory at end of year	41	
42	Cost of goods sold. Subtract line 41 from line 40. Enter the result here and on line 4	42	

Part IV Information on Your Vehicle. Complete this part **only** if you are claiming car or truck expenses on line 9 and are not required to file Form 4562 for this business. See the instructions for line 13 to find out if you must file Form 4562.

43 When did you place your vehicle in service for business purposes? (month, day, year) ▶ _____

44 Of the total number of miles you drove your vehicle during 2013, enter the number of miles you used your vehicle for:

a Business _____ b Commuting (see instructions) _____ c Other _____

45 Was your vehicle available for personal use during off-duty hours? [ ] Yes [ ] No

46 Do you (or your spouse) have another vehicle available for personal use? [ ] Yes [ ] No

47a Do you have evidence to support your deduction? [ ] Yes [ ] No

b If "Yes," is the evidence written? [ ] Yes [ ] No

Part V Other Expenses. List below business expenses not included on lines 8-26 or line 30.

SEE STATEMENT	145,334.

48	Total other expenses. Enter here and on line 27a	48	145,334.

EXHIBIT 6

Churchwell White LLP

churchwellwhite.com

1414 K Street, 3rd Floor
Sacramento, CA 95814
T 916.468.0950 | F 916.468.0951

Barbara A. Brenner
T: 916.468.0625
Barbara@churchwellwhite.com

February 8, 2017

VIA U.S. MAIL/EMAIL
(kenneth.petruzzelli@waterboards.ca.gov)

Kenneth Petruzzelli
State Water Resources Control Board
801 K Street, 23rd Floor
Sacramento, CA 95814

Re: Proposed Time Schedule for Projects at Marble Mountain Ranch

Dear Mr. Petruzzelli:

Based on our discussion on December 16, 2016, regarding Marble Mountain Ranch ("Ranch"), please find below a proposed time schedule to complete many of the projects outlined in the State Water Resources Control Board's ("State Water Board") Draft Order WR 2017-00XX-DWR ("Draft Order"), and the North Coast Regional Water Quality Control Board's ("Regional Water Board") Cleanup and Abatement Order R1-2016-0031 ("CAO"). Douglas and Heidi Cole (the "Coles") remain committed to implementing improvements at the Ranch but require additional time to properly retain experts, create plans to implement improvements, secure permits for the identified improvements and execute the plans to make the improvements.

While the Coles remain engaged stewards of the Stanshaw Creek system, there are several requirements in the Draft Order and CAO that are not necessary to achieve the goal of a sustainable Stanshaw Creek system. The Coles are small business owners with limited resources to address any improvements at the Ranch. To ensure that the highest priority improvements are the focus of the Coles' efforts and resources moving forward, a discussion of the lack of need for several of the projects that do not contribute to the goal of establishing a sustainable Stanshaw Creek system contained in the Draft Order and CAO is also included below.

The dates included herein are based on several assumptions that may affect the time required to complete the projects. Those assumptions include, but are not limited to, (1) the Coles and the State and Regional Water Board being able to agree to a time schedule for improvements; (2) the Coles being able to secure all required permits and regulatory approvals for each of the projects; and (3) weather and other unforeseen circumstances not causing undue delay. If the Coles encounter any of these possible complications, additional time to complete the projects may become necessary.

Need for Additional Time

The Coles have been involved in the effort to implement improvements at the Ranch for over 20 years. During that time, in addition to successfully defending their pre-1914 3 cfs water right, the Coles have been engaged with stakeholders discussing and identifying resource improvements for the Ranch, many of which are included in the Draft Order and CAO. Following receipt of the Draft Order and the CAO, the Coles have taken steps to comply with the requirements in those orders, including pursuing a sedimentation study and slope stability analysis, retaining new consultants to assist them in their compliance efforts, submitting progress reports to the State and Regional Water Boards, and providing a water sampling plan for the Regional Water Board's review.

In addition to their efforts to submit the required documentation under the CAO and Draft Order, the Coles have also engaged in diversion management practices that ensure the diversion complies with the requirements under the Draft Order and CAO while they work toward permanent solutions. Those efforts include the Coles temporarily reducing the amount of water they are diverting, not running their hydropower generation plant to comply with the National Marine Fisheries Service ("NMFS") bypass flow requirements and continuing regular inspection and maintenance efforts. Though the Coles have elected to reduce the amount of water they are diverting during their compliance efforts, the Coles are not demonstrating any intention to waive their full pre-1914 3 cfs water right.

Proposed Time Schedule for Resource Improvements at Marble Mountain Ranch

Water Code section 13300 allows for a water user to enter into a time schedule of specific actions the water user will take to avoid a violation of any requirement prescribed by the State or Regional Water Board. To that end, and based on the reasoning below, the Coles propose the following time schedule for several of the projects in the Draft Order and CAO. Proposed dates for significant elements of each of the projects and the final completion date for those projects is also summarized in a table attached as **Exhibit A**.

Install conveyance infrastructure in the ditch, such as a pipeline or other suitable infrastructure (Draft Order, Page 22, Table 4)

The Coles have previously submitted designs and permit review determinations to install a six inch pipe in the diversion at the Ranch. Those plans were proposed as an approach to comply with the NMFS bypass flow recommendation and would have only allowed the Coles to divert enough water for their consumptive use needs. The Coles still identify the piping of at least the first 1,000 feet of the diversion as a practical approach to improving the diversion but must increase the size of the pipe to be installed in order to convey the full complement of their 3 cfs water right to the Ranch.

Thus, they require additional time to create the plan for the greater capacity pipe, obtain any necessary permits, secure the necessary funds for the project and finally install the pipe. Based on projections from the Coles' environmental consultants, ECORP Consulting, Inc., the Coles will require until **June 30, 2018,** to install a conveyance infrastructure in at least the first 1,000 feet of the ditch, such as a pipeline or other suitable infrastructure. The table below details additional dates for submitting plans, securing permits, and beginning and completing construction.

Task 1	**Proposed Date**
Submit plans for an enlarged piping project	June 30, 2017
Secure any necessary permits and agency approvals	January 1, 2018
Begin construction	April 1, 2018*
Project complete	June 30, 2018

*Weather permitting

Install a diversion control mechanism at the point of diversion (Draft Order, Page 22, Table 4)

The Coles are in the process of identifying possible alternatives for a diversion control mechanism and are seeking an engineering consultant to assist them in that effort. The Coles anticipate that a diversion control mechanism will require additional time to design and install based on the nature of the Coles' diversion and the Stanshaw Creek system. The Coles have reached out to the Farmers' Conservation Alliance to discuss the possibility of using their prefabricated fish screen at the Ranch, but those efforts have been stalled by a lack of response from the California Department of Fish and Wildlife with regard to whether they will accept the prefabricated fish screen design. The project may also require additional permitting. Therefore, the diversion control mechanism is projected to be installed at the Ranch by **December 31, 2018**. A proposed timeline to install the diversion control mechanism is outlined in the following table.

Task 2	**Proposed Date**
Submit plans for the diversion control mechanism	June 30, 2017
Secure any necessary permits and agency approvals	January 1, 2018
Begin construction	April 1, 2018*
Project complete	June 30, 2018

*Weather permitting

Stabilize head cut and slope at Irving Creek outfall point (Draft Order, Page 22, Table 4)

The Coles will stabilize the head cut and slope at the Irving Creek outfall point; however, a full remediation of the area that includes a Restoration and Monitoring Plan does not appear warranted or the best approach. The reasons for not perusing a full remediation of the Irving Creek outfall point are more fully discussed on page 7 of this correspondence. Briefly, based on an initial assessment of the area, introducing any fill at the Irving Creek outfall point will potentially result in discharge of that fill material. Therefore, it is requested that any remediation plans avoid fill of the area during the stabilization effort. In order to properly secure any necessary permits, or other approvals for the stabilization effort and any required construction materials, the Coles anticipate they will complete this task by **December 31, 2017**. Deadlines for the significant activities required to implement the stabilization effort at Stanshaw Creek are proposed as follows:

Task 3	**Proposed Date**
Submit plans to stabilize the head cut and slope at Irving Creek	May 31, 2017
Secure any necessary permits and agency approvals	July 31, 2017
Begin construction	September 30, 2017*
Project complete	December 31, 2017

*Weather permitting

Develop a plan to return flow to Stanshaw Creek and return flow to Stanshaw Creek (Draft Order, Page 22, Table 4)

The Coles have been attempting to achieve the goal of returning flow to Stanshaw Creek since at least 2005. Those efforts have been complicated by the challenge to the Coles' water right and many different federal and state agencies' jurisdictional interest in the project. While the Coles maintain that the State Water Board lacks the jurisdiction to require the Coles to return flow to Stanshaw Creek, they are willing to continue exploring a plan to return flow to Stanshaw Creek.

The Coles are in the initial process of identifying possible alternatives for the project and securing cost estimates for permitting and completing each of those alternatives. Therefore, they are unable to speculate on a timeline for any of the elements of this project. In addition to determining possible approaches to returning flow to Stanshaw Creek, the Coles will also be seeking grant funding for the planning and implementation of this project. The uncertainty with regard to when and how the Coles may receive funding for the project further prohibits the Coles from speculating on any possible timelines for implementation or completion of this project; however, an outline of the proposed timeline to seek these funding opportunities is outlined below.

Task 4	Proposed Date
Assess funding opportunities	April 30, 2017
Submit funding proposals or applications, if any	August 31, 2017

Provide a slope stability assessment and sedimentation study of the diversion (CAO, Pages 10 and 11, Items 3 and 4)

The Coles have retained Rocco Fiori of Fiori Geosciences to complete the slope stability assessment and sedimentation study of the diversion. As was discussed at the December 16, 2016, meeting with the State and Regional Water Boards, Mr. Fiori completed a field review of the Ranch on December 16, 2016. Since that time, Mr. Fiori has been in the process of completing a report of his findings. Following the storm events in January of 2017, and conversations with the Coles, Mr. Fiori has had to delay release of his report until **February 28, 2017,** to incorporate additional analysis.[1] As soon as Mr. Fiori completes his report, it will be provided to the State and Regional Water Boards.

Task 5	Proposed Date
Site Visit	December 16, 2016
Slope stability assessment and sedimentation study complete	February 28, 2017

Submit Division of Drinking Water ("DDW") Public Water System determination or copy of DDW Public Water System permit to the Division of Water Rights (Draft Order, Page 22, Table 4)

The Coles completed a declaration in 2005 certifying that the Ranch does not qualify as a public water system. They received a notice on December 22, 2016, that the DDW "received information suggesting that Marble Mountain Ranch may be serving water to at least 25 people daily at least 60 days out of the year." The notice advised the Coles that they either needed to "apply for a permit to operate a public water system" or sign and return a declaration that was attached to the letter. Douglas Cole signed and completed the declaration certifying that the Ranch still does not qualify as a public water system in January of 2017.

[1] Beyond the additional information following the January 2017 storms, Mr. Fiori's report has also been delayed because the scope of his review has expanded and he has been ill during the month of January.

Implement National Marine Fisheries Service ("NMFS") bypass flow recommendation (Draft Order, Page 22, Table 4)

The Coles have voluntarily reduced the amount of water they are diverting to comply with the NMFS bypass flow since the low flow periods of the summer of 2016. The lack of clarity from the State Water Board with regard to how it would implement NMFS's recommendation led the Coles to make the decision to temporarily reduce the amount of water they divert. The Draft Order indicates that the NMFS bypass flow should be implemented upon completion of the return flow to Stanshaw Creek project. The Coles may not be completing the Stanshaw Creek return flow project if they are unable to secure funding for the project. Therefore, the Coles will continue to implement NMFS's bypass flow recommendation during low flow periods, as they have during 2016 low flow periods.

Submit Quarterly Progress Reports (Draft Order and CAO)

Since the release of the CAO and Draft Order, the Coles have submitted two quarterly progress reports for the last two quarters of 2016. The Coles will continue to submit quarterly progress reports until they have completed the projects proposed through this correspondence.

Pending Projects

Water Quality Sampling Plan (CAO, page 11, ¶ 4(b).)

The Coles previously submitted a water quality sampling plan ("Sampling Plan") to the Regional Water Board in the event the Coles would be discharging water from the Ranch. The Regional Water Board approved the Sampling Plan, but the Coles have not taken any further steps to implement the Sampling Plan at the Ranch. Their reasons for this are two-fold.

First, the CAO specifically requires the Coles implement a Sampling Plan to "[e]nsure that water used onsite, conveyed in the ditch and discharged, does not adversely impact waters of the state." (CAO, page 11, ¶ 4(b).) The Coles are not currently discharging water so there is no impact to waters of the state from the Ranch. Secondly, the Coles' water system is tested and monitored by Siskiyou County on a quarterly basis. Therefore, the Ranch's water quality is already monitored and deemed safe by a governmental agency. Once the Coles begin diverting water that they then discharge to waters of the state, they will revisit the Sampling Plan and provide any proposed modifications.

Ditch Operation and Maintenance Plan (CAO, page 11, ¶ 3(b).)

The CAO requires that the Coles provide a ditch operation and maintenance plan "that includes an inspection and maintenance schedule" for the diversion. The Coles have an existing inspection and maintenance schedule that they are in the process of formalizing into a plan with the assistance of their environmental consultants, ECORP Consulting, Inc. Douglas Cole outlined his operation and maintenance efforts at the December 16, 2016, meeting. The Coles propose that they will submit a ditch operation and maintenance plan on the following time schedule.

Task 6	Proposed Date
Submit ditch operation and maintenance plan	March 31, 2017

Projects the Coles do not anticipate completing

Several of the projects contained in the Draft Order and CAO are not necessary to achieve a sustainable Stanshaw Creek system. To focus the Coles' efforts moving forward on the highest priority projects, the Coles propose eliminating the following projects from the Draft Order and CAO. The reasons for eliminating each of the projects is also discussed.

Remediation of the Irving Creek Outfall point that includes a Restoration and Monitoring Plan with monitoring reports through 2021 (CAO, page 8, item 2 and page 10, item 2)

Rocco Fiori of Fiori Geosciences has discussed his initial findings from his site visit at the Ranch with the Coles. Part of the conclusions that will be contained in his forthcoming report indicate that a fill and full remediation of the Irving Creek outfall is unnecessary and will likely result in discharge of that fill material. To avoid that potential outcome, the Coles anticipate that they will install a culvert at the top of the outfall point and riprap at the base of the outfall point to address any impacts to waters of the state from the outfall point. Following that effort, no further remediation or monitoring should be required at the Irving Creek outfall point.

Complete Energy Audit and develop plan to implement recommendations from that audit (CAO, page 8, item 1)

The Coles have established their pre-1914 right to divert 3 cfs of water that includes the right to use water for hydroelectric generation. As part of the discussions with stakeholders in the Stanshaw Creek system, the Coles agreed to pursue possible alternative courses of action to address stakeholder concerns. A review of their energy use was part of that strategy; however, with the issuance of the Draft Order and CAO, the Coles can no longer afford to pursue any additional optional approaches to

addressing stakeholders concerns. The 3 cfs right allows the Coles to operate their existing hydroelectric power plant which adequately serves the Coles' energy needs. Therefore, the Coles do not plan to complete the energy audit or further pursue this alternate course of action.

Complete a water efficiency study (Draft Order, Page 22, Table 4)

As discussed above, the Coles have an established pre-1914 right to divert 3 cfs of water. They have provided data that details the beneficial uses they put that water to at the Ranch. A water efficiency study will not provide any additional helpful information toward the effort to implement water efficiency improvements at the Ranch. Therefore, the Coles do not plan to complete a water efficiency study.

Install a flow gauge upstream from the point of diversion in Stanshaw Creek and downstream below the Highway 96 culvert (Draft Order, Page 22, Table 4)

The Coles lack the authority to place a flow gauge upstream of their point of diversion in Stanshaw Creek, as that area is United States Forest Service land. They also lack the authority to place a flow gauge downstream below the Highway 96 culvert because they do not own property at that location. When the flow gauges were originally discussed, it was the Coles' understanding that flow gauges may be placed by the federal or state fishery agencies. Further, there is no internet or power source along this portion of Stanshaw Creek which makes installation of flow gauges impracticable. Because the Coles lack the authority to comply with this directive, they are not able to implement this task as outlined in the Draft Order.

Cease discharge to Irving Creek by April 30, 2017 (Draft Order, Page 22, Table 4)

As previously noted, the Coles maintain that the State Water Board lacks the authority to require that the Coles return flow to Stanshaw Creek and cease discharging water used for hydroelectric power generation to Irving Creek. The Draft Order bases its requirement that the Coles cease discharging to Irving Creek and return flow back to Stanshaw Creek on the public trust doctrine. (Draft Order ¶¶ 38, 47.)

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. Further, to invoke jurisdiction under the public trust doctrine, the State Water Board must show that the diversion *clearly* harms the interests protected by the public trust. (*National Audubon Society v. Super. Court* (1983) 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's theoretical calculations of in-stream flow requirements. The State Water Board lacks substantial evidence of harm to trust resources. 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. Invoking the public trust doctrine to require that the Coles cease discharging to Irving Creek would require an extraordinary finding of harm to justify the extension of the public trust doctrine to holders of pre-1914 rights. Actions taken by the Coles do not support this finding.

Consequently, the Coles request the ability to return flow to Irving Creek after stabilizing the head cut and slope at the Irving Creek outfall point and obtaining any necessary permits. If and when the Coles are able to secure funding for the effort to return flow to Stanshaw Creek, they will cease diverting water to Irving Creek.

Develop a plan to remove the outboard berm if the ditch is piped (CAO, Page 8, Item 1)

The Coles anticipate that they will be piping at least the first 1,000 feet of the diversion. The diversion lies along a forested hillside that includes many large trees and is habitat for large animals such as elk that can cause damage to installed infrastructure. The outboard berm establishes a path of access to any pipe that is installed in the historical ditch footprint. Therefore, the Coles anticipate keeping the outboard berm in place to ensure that they are able to inspect and repair any damage to any pipe installed in the existing ditch.

Please contact me at barbara@churchwellwhite.com or (916) 468-0625 if you have any questions or concerns.

Regards,

Churchwell White LLP

Barbara A. Brenner
KAF/dmg

Enclosure

(via email, with enclose)
cc: Douglas and Heidi Cole (guestranch@marblemountainranch.com)
Eric Stitt, ECORP Consulting, Inc. (estitt@ecorpconsulting.com)

Marble Mountain Ranch
Proposed Time Schedule Summary Table by Project

EXHIBIT 6

Install conveyance infrastructure in the ditch, such as a pipeline or other suitable infrastructure

Task 1	Proposed Date
Submit plans for an enlarged piping project	June 30, 2017
Secure any necessary permits and agency approvals	January 1, 2018
Begin construction	April 1, 2018*
Project complete	June 30, 2018

*Weather permitting

Install a diversion control mechanism at the point of diversion

Task 2	Proposed Date
Submit plans for a diversion control mechanism	June 30, 2017
Secure all necessary permits and agency approvals	January 1, 2018
Begin construction	April 1, 2018*
Project complete	June 30, 2018

*Weather permitting

Stabilize head cut and slope at Irving Creek outfall point

Task 3	Proposed Date
Submit plans to stabilize the head cut and slope at Irving Creek	May 31, 2017
Secure all necessary permits and agency approvals	July 31, 2017
Begin construction	September 30, 2017*
Project complete	December 31, 2017

*Weather permitting

Seek funding opportunities to return flow to Stanshaw Creek

Task 4	Proposed Date
Assess funding opportunities	April 30, 2017
Submit funding proposals and applications, if any	August 31, 2017

Provide a slope stability assessment and sedimentation study of the diversion

Task 5	Proposed Date
Site Visit	December 16, 2016
Slope stability assessment and sedimentation study complete	February 28, 2017

Provide a ditch operation and maintenance plan

Task 6	Proposed Date
Submit ditch operation and maintenance plan	March 31, 2017

Implement National Marine Fisheries Service bypass flow recommendation

Ongoing Task	Proposed Remedy
Implement bypass flow recommendation	As required during low flow periods

Marble Mountain Ranch

Proposed Time Schedule Summary Table by Project

EXHIBIT 6

Quarterly progress reports

Ongoing Task	Proposed Date
Submit Report	Quarterly through June 30, 2018*

*The Coles may submit additional progress reports depending on the status of the return flow project

EXHIBIT 7

March 17, 2017

Douglas and Heidi Cole
100 Tomorrow Road
Somes Bar, CA 95569

Dear Douglas and Heidi Cole:

Subject: **Notice of Violation No. 2 and Response to August 26, 2016 Letter Regarding** 13267/Cleanup and Abatement Order No. R1-2016-0031 (CAO) Requirements

File: Douglas and Heidi Cole, Marble Mountain Ranch, 92520 Highway 96, Somes Bar: Siskiyou County APN 026-290-200, Klamath River Watershed, WDID No. 1A15024NSI

The purpose of this letter is to notify you that you are in violation of the above-referenced CAO; in particular, Directives 1, 2, 3, and 4 a. (refer to Attachment A for the full text of directives).

Directive 1-Due date October 15, 2016

Directive 2- Due date September 10, 2016

Directive 3-Due date October 15, 2016

Directive 4.a.-Due date September 10, 2016

This is a second Notice of Violation. Ongoing and additional violations of Order directives subject you to penalties of $5,000 per day under section 13350 for each day of violation, and in the event of discharges of waste to receiving waters, you may be fined up to $10,000 per day and $10 per gallon for each discharge, pursuant to section 13385 of the California Water Code.

This Notice of Violation also provides a response to the August 26, 2016 correspondence in which Ms. Barbara Brenner, attorney, and Douglas and Heidi Cole (Discharger) allege, in brief, that the Final CAO (Attachment A) was a surprise and unanticipated, conflicts with the National Marine Fisheries Service (NMFS) instream flow requirements and does not allow sufficient time to complete tasks required in the CAO. To address the proceedings at

hand, a case history provides context to the overall background of the case to allow discussion of pertinent issues introduced by the Discharger as reasons for non-compliance.

Case History

In January of 2011, Andy Baker of the North Coast Regional Water Quality Control Board staff (Region 1) received an anonymous complaint alleging sediment discharges and waste and unreasonable use of water as a result of operating the Stanshaw Creek Diversion ditch on the Marble Mountain Ranch in Siskiyou County. The 2011 complaint was referred to the Region 1 Complaint Liaison, Stormer Feiler, who subsequently referred the complaint to the State Water Resources Control Board Division of Water Rights (DIV). At that time, Andy Baker remained the lead investigator for Region 1 on the complaint and proceeded to work collaboratively with the stakeholders to address water quality concerns through the established collaborative forum. The collaboration is an ongoing process, to date lasting over 18 years without resolution. Due to the Discharger's failure to address the water quality concerns through the collaborative forum, additional steps were determined necessary, which brings us to the CAO and its requirements.

On February 12, 2015, at the request of the DIV, Region 1 staff accompanied the DIV and inspected the Marble Mountain Ranch.[1] The inspection identified 20 locations where the Stanshaw Creek Diversion ditch had failed in the past or posed a potential for failure in the future. Several of these locations had resulted in large volumes of erosion and discharges of sediment directly to streams tributary to Stanshaw Creek and Irving Creek.

On December 3, 2015, as a result of the inspection and subsequent documentation of violations, Region 1 issued a Draft CAO and Notice of Violation (Attachment C and C. a.), mailed under cover of the DIV correspondence, which also included a Report of Inspection from the DIV. The Draft CAO requirements did not provide firm compliance deadlines, but rather provided examples of how such compliance could be timed. The scope of work was the same as provided in the Final CAO. The element of surprise regarding Water Code compliance requirements, potential enforcement, and the general timing of compliance would appear eradicated by issuing the draft CAO and attendant letters.

On January 19, 2016, in response to the Draft CAO and the DIV requirements the Discharger provided a preliminary scope of work and time schedule. After evaluating the scope of work and time schedule, Region 1 and the DIV discussed the scope of work and time schedule with the Discharger's attorney, and concluded the proposed scope of work and time schedule by the Discharger failed to address concerns outlined in the Draft CAO and DIV Report of Inspection. In a joint correspondence dated February 12, 2016, the DIV

[1]For inspection results refer to the March 9, 2015 inspection report (Attachment B).

and Region 1 notified the Discharger that we would be pursuing formal enforcement, and we urged the Discharger to take corrective actions.

On March 24, 2016, the DIV and Region 1 received a supplemental response from the Discharger that provided a scope of work and revised compliance time schedule for a variety of tasks associated with the Draft CAO and DIV requirements (Attachment D). This schedule was used by the Region 1 staff, in part, to develop Final CAO directive deadlines, which in many instances were extended beyond the time-schedule provided by the Discharger. In summary, the Final CAO directive deadlines are based on the Discharger's time schedule with extensions where it was clear the Discharger had already missed their own deadlines. The timing of Draft CAO deadlines was to have a basis for decisions by the Discharger arise from the water/energy efficiency study, described and proposed in Directive 1 of the Draft CAO, and to complete necessary erosion control work before the winter period. In terms of the Draft CAO directive deadlines and fairness, a comparison of the Draft CAO Directive 1 and the March 24, 2016 time schedule provided by the Discharger shows that the Discharger, in March of 2016, proposed to have this scope of work completed by July of 2016. In the Final CAO, the Directive 1 deadline was extended to October 15, 2016. Another example of a missed self-prescribed deadline by the Discharger is the proposal on page 3 of the March 24, 2016 letter to provide the restoration and monitoring plan (RMP) by April 15, 2016. The Final CAO requires the Discharger to evaluate, assess, and develop a RMP by September 10, 2016. To date, the Discharger has failed to provide a RMP. When confronted with such a history of non-compliance, CAO directives with enforceable compliance schedules are necessary to ensure compliance with the Water Code and protection of the beneficial uses.

On August 4, 2016, Region 1 issued the Final CAO to the Discharger.

On August 26, 2016, the Discharger provided Ken Petruzzelli of the SWRCB Office of Enforcement correspondence in response to the Final CAO (Attachment E). The letter requests extensions of due dates for most CAO directives, suggests that the CAO requirements are unfair and overly burdensome and conflict with DIV requirements, and alleges the Discharger does not have the ability to pay and continue in business. The allegations contained within the Discharger's August 26, 2016, correspondence is the basis for the following discussion.

On October 18, 2016, Region 1 issued a Notice of Violation to the Discharger for a failure to comply with Final CAO Directives No. 2 and 4.a. (Attachment F)

Discussion of August 26, 2016 Discharger correspondence

The following discussion addresses the Discharger's allegations in the sequence stated in their August 26, 2016 letter.

National Marine Fisheries Service Bypass Flow Recommendations
The Discharger alleges that implementing the bypass flow requirements limits the amount of water in the ditch and creates a situation where the Discharger cannot comply with the ditch and slope evaluations required by the Final CAO. Region 1 staff finds that the bulk of the assessment of the ditch and slope can be accomplished without flow in the ditch. The points of concern the evaluation may miss would be areas of seepage where fills associated with the ditch are saturating. This is a potential ditch failure mechanism that should be evaluated should the ditch become fully operational. In the interim, it is entirely feasible for the Discharger to assess the areas of past failure and mass erosion that have occurred along the ditch and pollutants discharged to tributaries to Irving Creek and Stanshaw Creek. These affected tributary streams and erosion areas are obvious to a trained professional or a person with relevant experience.

The Discharger also contends that the NMFS bypass flow requirement does not allow them to utilize their full pre-1914 water right, and thus causes a hardship in terms of electricity generation. While it is true that implementing the NMFS bypass flows can simultaneously protect water quality by limiting the amount of water in the ditch, and in turn reduce the potential for ditch failure; these bypass flow requirements are not within Region 1 purview; the appropriate parties for this discussion would be the DIV and NMFS.

CAO Compliance Requirements
The Discharger alleges that the Region 1's CAO in general is 1) too detailed and impractical to implement, 2) the Discharger is a small business owner with limited funds to address CAO requirements and may require additional licensed professionals to complete the scope of work, 3) the CAO goes beyond the scope of the stakeholder group's discussion to date, and requires water quality monitoring if flow is returned to waters of the state from the diversion, which increases costs.

The Discharger belabors each directive and its concurrent deadline as a problem due to 1) a lack of grant funding opportunities, 2) the unavailability of the preferred consultant, and 3) the assessment of the Irving Creek outfall requires over a year to complete, as it is necessary to assess in the wet season to determine where seepage occurs. The Discharger contends that the necessity of the CAO required reports and mitigation does not bear a reasonable relationship to the costs, and that the report provided by Rocco Fiore is sufficient to meet the Restoration and Monitoring plan requirements.

Rocco Fiore Report

The report provided by Rocco Fiore, dated May 14, 2016, is a good start. However, it is incomplete in terms of assessing and inventorying the ditch and its failure points for areas where instream restoration can be implemented to restore eroding stream beds that are/were caused by the ditch operation. As Mr. Fiore proposes, piping the diversion may be the best solution to the issues posed by operating the ditch; however, the efficiency of this proposal has not been evaluated nor assessed in the context of water and energy use

efficiency as associated with the operation of the ditch for hydropower to determine if there were measures or methods that could be taken that would reasonably increase efficiencies and decrease the need for the diversion at its full rate; increased operational efficiencies and reductions in diversion would in turn benefit water quality and water quantity in Stanshaw Creek which also helps support beneficial uses in the Creek and Klamath River. Mr. Fiore's report also indicates that the Discharger should focus their analysis of the ditch on the upper 1100 feet of ditch, which represents an area of high priority; in addition; the Region 1 staff have pointed out the importance of stabilizing the Irving Creek outfall. Assessing the highest priority areas is a reasonable approach to assessing the ditch for areas requiring mitigation and streams requiring restoration and thus providing an inventory of the ditch with attendant mitigation measures that will likely meet CAO requirements. Yet, Mr. Fiore did not include this required scope of work within his assessment. Keep in mind, any inventory and/or plan(s) submitted will likely be reviewed in the field by Region 1 staff prior to approval.

Mr. Fiore has indicated that it may be advisable to outslope and install rolling dips along the filled surface of the ditch if installing a pipeline is the chosen alternative. This approach allows the filled ditch to become a road accessing the pipeline in the event repair or maintenance is required. Region 1 staff is willing to evaluate this approach further in the context of reviewing an adequate plan that naturally disperses surface drainage and identifies and restores all points where ditch operations and failures have caused damage in streams as part of this remediation plan. As of October 18, 2016, we have not received a plan for this scope of work nor seen an energy/water efficiency study supporting the preferred alternative.

In summary, the Mr. Fiore's report is incomplete in terms of meeting CAO directive requirements.

<u>Irving Creek Outfall Assessment</u>

With regard to the assessment of the Irving Creek outfall in relationship to wet weather conditions, a consultant with the proper training and experience should be able to assess the Irving Creek outfall during any time of year and develop mitigation adequate to restore and revegetate the impacted slopes and streams. For over 40 years Cal Trans and licensed geologists and engineering geologists have maintained highways in California through multiple slope failures. As such, there is a large body of design-related material available in the literature, online, and in various forums related to and providing designs for slope stabilization on and near streams with subsurface ground water interconnection. These materials would likely give an experienced licensed practitioner the tools necessary to design a restoration plan for the Irving Creek outfall. Granted there may be some advantage in reviewing the site during saturated soil conditions; however, it is not absolutely necessary. There is usually evidence of seepage whether the water is actively seeping or not. The subsequent compliance time schedule and required monitoring allows the Discharger to evaluate the effectiveness of the restoration and revegetation in

subsequent years and address any deficiencies as they may arise. Any plans and designs require Executive Officer approval prior to implementation.

CAO Necessity and Costs of Compliance

The CAO requires information in the form of technical reports to guide design and implementation of mitigation to address water quality concerns. The issues discussed within the stakeholder group are only a portion of what requires restoration in terms of the impacts the ditch has had on water quality over its operating life. To the best of Region 1's knowledge, the March 9, 2015 inspection report is the first documented inspection of the water quality issues associated with the Stanshaw Creek ditch. As this inspection occurred late in the stakeholder group's 18+ year discussion of these problems, Region 1 contends these issues would not have been part of the bulk of that discussion. In developing the CAO, Region 1 assessed the requirements of Water Code Sections 13267 and 13304 and the application of such as described in State Water Resources Control Board's Resolution No. 92-49[2]. The burden of the required mitigation includes the costs of both the inventories and assessments (water/energy efficiency assessment and the inventory of the Stanshaw Creek ditch for active sediment delivery and failures that require restoration) required to guide the process of developing mitigation. This analysis should logically be followed by mitigation design, which upon approval by the Executive Officer, is adequate to comply with the Water Quality Control Plan-North Coast Region (Basin Plan). This is standard practice for the Region 1 staff in terms of addressing violations of Basin Plan prohibitions.

The costs of compliance are costs the Discharger appears to have avoided for many years of ditch operation. Over the course of the stakeholder group negotiations, the Discharger and their legal counsel have indicated that they rely on grant funding for property improvements; a funding stream unavailable to most people in business.

The Discharger has provided no documentation to support the allegation that the costs of compliance are prohibitive of staying in business. In investigating the Marble Mountain Ranch in Westlaw, it is apparent the ranch reports an income stream of $500,000-$1,000,000 annually. The Stanshaw Creek ditch is a water transportation feature for commercial and domestic purposes operated by the Marble Mountain Ranch with the operational life of the ditch spanning the 19th through the 21st centuries. Since the inception of the Porter Cologne Water Quality Control Act the diversion has apparently not complied with the Water Code and does not appear to have been operated to provide adequate protections to public trust resources.

When faced with a situation wherein a Discharger asserts that they cannot afford the cost of compliance; the Discharger has options. In accordance with Section 13360 of the Water

[2] Resolution 92-49 Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304. http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/1996/rs96_079.pdf

Code the Discharger may propose an alternative that provides equal or better protection than what has been required by the CAO. In such a case, the Regional Water Board will determine if the alternative is adequate. In addition, the Discharger should propose alternatives within the deadlines specified in the CAO.

CAO Directive Extension Requests

Having addressed the Discharger's general discontent with the regulatory process we now turn to the Discharger's request for multiple extensions on CAO directive due dates.

CAO Directive No. 1 -Water Efficiency Study and Water Delivery System Design

The CAO deadline is October 15, 2016 by 5:00 PM.

The Discharger requests an extension until October 29, 2016.

Extension is not granted for reasons provided below:

The Discharger has known of this requirement since December 3, 2015, and of their own volition previously indicated they would provide the information by July of 2016. In previous correspondence and in meetings we (Region 1 and the DIV) were repeatedly assured that the Discharger was working on these items. In terms of designing an efficient process for the operation of the diversion, this should be the first priority for the Discharger to complete.

CAO Directive No. 2. – Submit Restoration and Monitoring Plan for the active erosion at the Irving Creek outfall

The CAO deadline is September 10, 2016.

The Discharger requests an extension to March 31, 2017.

Extension is not granted for reasons provided below:

The deadline for this scope of work was intentionally set for September 10, 2016 to allow Region 1 staff adequate time to review and approve any plans submitted prior to the wet weather period so that adequate erosion controls could be implemented to stabilize the head cut and prevent further erosion of earthen materials. In previous meetings and discussions, the DIV and Region 1 were assured that the Discharger would stabilize the Irving Creek outfall by the winter period of this year.

In the event the ditch is operated this winter for Pelton wheel operation there will be no controls in place to stabilize the head cut and prevent further erosion.

The Discharger has provided no plan to evaluate in terms of continued use of the Irving Creek outfall through this winter period; in addition, the discussion provided in the subject correspondence appears to avoid mitigation through interpreting directives as a requirement to conduct a study rather than meeting CAO requirements. The CAO requires assessment of the Irving Creek outfall and to restore and stabilize the eroded slopes and stream channel. Such assessment is necessary for the Discharger to develop effective mitigation and restoration actions and for Region 1 staff to evaluate whether proposed mitigation and restoration actions will likely eliminate the discharge of pollutants. There is no mention of study in the CAO.

In conclusion, we reiterate our previous comment on this issue. The Discharger contends that assessing the Irving Creek outfall must be done with the ditch flowing and the soils saturated and that only the chosen consultant can perform the scope of work. A consultant with proper training and experience should be able to assess the Irving Creek outfall and develop mitigation adequate to restore and revegetate the slope during any time of year. There are many consultants capable of this scope of work; the Discharger appears to be placing a limitation on compliance in terms of consultant availability, particularly when the Discharger has been aware of this requirement for at least several months. We do not see this as reason for non-compliance.

Due to the uncertain situation regarding Pelton Wheel operation and the lack of any defined plan to address use of the ditch through this winter period, and a history of what appears to be chronic and ongoing noncompliance; as such, an extension is not granted.

CAO Directive No. 3 – Ditch Evaluation and Operations and Monitoring Plan

CAO Directive deadline is October 15, 2016.

The Discharger requests an extension to March 31, 2017.

Extension is not granted for reasons provided below:

The Discharger requests an extension to March 31, 2017, with the caveat that they will provide a ditch operation and monitoring plan by October 15, 2016. We have not yet received such a plan; and are therefore unable to approve this extension. The Discharger contends the directive requirements are unclear. The directive is provided below for discussion purposes and to reiterate the requirements.

3. In the event that the delivery system will require continued operation of all or a portion of the diversion ditch, retain an appropriately qualified and experienced California-licensed professional to evaluate and submit a report to the Executive Officer for review and approval by **October 15, 2016.** The report shall include the following:

a. Evaluation of the entire ditch system, identifying all features and locations susceptible to failure by any of the physical processes and mechanisms described herein, (including but not limited to ditch seepage, berm fill saturation, upslope cut bank stability), and identifying where there is potential for sediment delivery to receiving waters in the event of a failure.

   Specify appropriate corrective action measures or steps to take, including design and construction standards and an implementation schedule to complete the defined scope of work. In addition, assess all areas of past failures to determine if the features reach Stanshaw Creek and deliver sediment and represent future delivery routes that require mitigation, propose mitigation as necessary to control sediment delivery and surface flows in the event of future failures or during annual rainfall events.

b. A ditch operation and maintenance plan that includes an inspection and maintenance schedule and identifies any permits required for the scope of work anticipated. The plan should include proposed measures to ensure that the slopes above the ditch do not collapse into or block the ditch, that water seepage from the ditch does not saturate underlying materials and result in failure, that the ditch does not overtop the berm, that the berm does not fail, and that sediment does not deliver from the ditch to waters of the state. The plan must also include specifications for measures to be constructed and/or incorporated to prevent further erosion and sediment delivery from the discharge point to Irving Creek, and to restore and stabilize the channel between the discharge point and Irving Creek.

For clarity, Directive 3.a. requires an inventory of the ditch for areas prone to failure and of areas where there are failures that impact water quality. Upon completion of an assessment or inventory, the directive requires development of mitigation for areas where active and historic failures are likely to continue to contribute sediment to waters of the state. Please also refer to the discussion of Rocco Fiore's Report provided above.

3.b. applies if the ditch operations continue as they have. In order to ensure the ditch operates in a manner protective of water quality, the development of a ditch operation and maintenance plan that addresses the items discussed in 3.b. is necessary. As such, an extension is not granted.

Directive No. 4 –Slope Assessment and Water Quality Sampling

CAO Directive due date is September 10, 2016

The Discharger requests an extension until March 31, 2017. This directive deadline was recently addressed in a Notice of Violation sent by the Regional Board to the Discharger on October 18, 2016 (Attachment F). The text of that discussion is provided below.

> Directive No. 4a - Regardless of the ultimate water delivery system, the following additional measures shall be taken by **September 10, 2016** to protect water quality: Assess slopes between the upper ditch and Stanshaw Creek and the streambed of Stanshaw Creek and Irving Creek and the unnamed tributary to Irving Creek for stored sediment deposits and erosional sources associated with the past and current failures of the ditch. Identify all erosional issues and those that should be corrected, propose corrective measures and provide a schedule for implementing corrective measures.

The Discharger contends the proposed long-term fix of piping water through the ditch results in no discharge of pollutants from the ditch and hence there is now no reason to evaluate the ditch. However, the Regional Water Board staff contends erosion controls and instream restoration are necessary due to past ditch operation and failures and/or active erosional sources that exist at ditch diversion points. These active erosional sources require inventory and corrective actions. Although the proposed fix of piping water through the existing ditch may alleviate some of the failures and threatened discharges, it is incomplete unless additional corrective actions are proposed, such as decommissioning the ditch as a surface feature and laying back the cut bank slopes to a stable angle with implementing schedules. Therefore, the Discharger has not fully complied with directive 4.a.

The ditch, if not treated appropriately, would retain the capacity to flow by capturing rainfall and intercepting groundwater during the wet season. Even if flows in the ditch are reduced, these flows may continue to exacerbate existing conditions. The Order's September 10, 2016 deadline for Directive 4.a. allowed the Regional Water Board time to review any information submitted and to approve any immediate restoration or erosion control work necessary to prevent, minimize and mitigate for discharges that are likely to occur this winter period. A failure to comply with this directive likely results in continued erosion throughout this 2016/2017 winter period. As such, no extension is granted.

Directive 4.b. has been met with the Sampling Plan received via email on September 9, 2016. Directive 4.b. states:

> Directive 4b – Ensure that water used onsite, conveyed in the ditch and discharged does not adversely impact waters of the state. Develop a sampling plan to assess the quality of water in the ditch as it passes through the ranch property for potential sources of fecal coliform, total coliform, total petroleum hydrocarbons, temperature, and nutrients. The sampling plan shall assess water quality above the diversion and ranch complex, and below the ranch complex to evaluate if there are any pollutants entering the surface

waters from the ditch or pond. Submit the Sampling Plan for approval by the Executive Officer by **September 10, 2016**. Upon approval implement the sampling plan and provide results of the sampling by **November 1, 2016**. In the event that sampling identifies inputs of constituents of concern, then develop a plan to remedy the discharges and submit the plan by **December 1, 2016** to the Executive Officer for review and approval.

Although the plan does not address our original concern regarding potential pollutants from the ranch entering the ditch and downstream receiving waters during high flows and summer low flow periods, we are accepting it as proposed due to the current limited use of the ditch. In the event the ditch is used throughout the season again, we will likely request a revised sampling schedule.

Directive 5 – Quarterly Progress Reports

On October 5, 2016, we received a progress report from Marble Mountain Ranch, the report did not demonstrate progress towards compliance, but it did provide an adequate update as to the Discharger's intentions. (Attachment G)

Monitoring Plan Inquiry Response

The Discharger requests clarification on monitoring plan requirements after slope restoration is implemented. The CAO requires a successful restoration and revegetation of the stream side slopes following restoration. This is encapsulated in a required 5-year monitoring plan and, based upon the success of the revegetation or lack thereof, the monitoring can be extended as re-planting may be necessary, or as restoration failures may necessitate. The monitoring required primarily relies on photo documentation through inspection. Inspection frequency and monitoring plan details are left to the Discharger to develop. The CAO directive provides a backdrop of requirements the monitoring plan shall meet. Please refer to the directive when developing your monitoring plan. Keep in mind the Monitoring Plan shall be approved by the Executive Officer or the Executive Officer's designee.

Conclusion

As a reminder, the Order directives lay out time frames for reporting on aspects of the ditch operation, use, and maintenance that should guide the process of developing a solution that meets all requirements. The delayed submittal of the restoration and monitoring plan required by Directive No. 2 delays your ability to apply for any required permits and may prevent you from completing the required scope of work within the CAO-directed timeframe.

Please be aware that the Discharger may be subject to administrative civil liabilities for failure to comply with the CAO. The liabilities can be up to $5,000 per day pursuant to

Water Code section 13350 for each day the violation occurs. When there is a discharge, the liabilities can be up to $10,000 per day and $10 per gallon of waste discharged pursuant to Water Code sections 13385.

If you have any questions, please contact Stormer Feiler of my staff by email at Stormer.Feiler@waterboards.ca.gov, or by phone at (707) 543-7128, or his supervisor, Diana Henrioulle, by email at Diana.Henrioulle@waterboards.ca.gov, or by phone at (707) 576-2350.

Sincerely,

Shin-Roei Lee
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Water Boards

Shin-Roei Lee
Assistant Executive Officer

170317_SRF_er_Marble_Mountain_Ranch_Notice_of_Violation

Certified - Return Receipt Requested

Enclosures:
Attachment A- Marble Mountain Ranch CAO
Attachment B- Stanshaw Creek Diversion/Marble Mountain Ranch Inspection Report, March 9, 2015
Attachment C- Region 1 Marble Mountain Ranch CAO draft
Attachment C(a)- Region 1 Marble Mountain NOV, December 3, 2015
Attachment D- MMR 3-24-16 correspondence
Attachment E- MMR 8-26-16 correspondence
Attachment F- Marble Mountain Ranch Notice of Violation, October 18, 2016
Attachment G- 10-5-2016 Marble Mountain Ranch Progress Report 1

cc by email:

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Ukonom Ranger District
c/o Mr. Jon Grunbaum
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SECRETARY FOR
ENVIRONMENTAL PROTECTION

North Coast Regional Water Quality Control Board

April 24, 2017

Mr. Douglas Cole et. al.
100 Tomorrow Road
Somes Bar, CA 95569
guestranch@marblemountainranch.com

Dear Douglas and Heidi Cole:

Subject: February 8, 2017, Letter Regarding Proposed Time Schedule for Projects and Marble Mountain Ranch

The purpose of this letter is to respond to your letter, dated February 8, 2017, proposing a "time schedule to complete many of the projects outlined in the State Water Resources Control Board's ("State Water Board") Draft Order WR 2017-00XX-DWR ("Draft Order"), and the North Coast Regional Water Quality Control Board's ("Regional Water Board") Cleanup and Abatement Order Rl-2016-0031 ("CAO")."

The CAO is a final order of the Regional Water Board. Unless rescinded or revised, the time schedule in the CAO cannot be changed. For issues of delayed compliance, the CAO, page 13, paragraph 14, states:

> If for any reason, the Dischargers are unable to perform any activity or submit any document in compliance with the schedule set forth herein, or in compliance with any work schedule submitted pursuant to this Order and approved by the Assistant Executive Officer, the Dischargers may request, in writing, an extension of the time specified. The extension request shall include justification for the delay. Any extension request shall be submitted as soon as a delay is recognized and prior to the compliance date. An extension may be granted by revision of this Order or by a letter from the Assistant Executive Officer.

To date, the CAO has not been revised nor has the Assistant Executive Office issued a letter authorizing any extensions. The time schedule in the CAO was based on a proposed time

schedule you provided to us by letter dated March 24, 2016. The final CAO extended all of the deadlines that would have passed before we issued the CAO, effectively granting you extensions.

On August 26, 2016, you asked us to extend deadlines in the CAO. You anticipated submitting a proposed Restoration Monitoring Plan ("RMP") by March 31, 2017, rather than September 10, 2016, a ditch evaluation report by March 31, 2017, rather than by October 15, 2016, and completing the energy audit and water efficiency studies by October 29, 2016, rather than by October 15, 2016.

On October 18, 2016, Regional Water Board staff issued you a Notice of Violation ("NOV") notifying you that you were in non-compliance with Directives 2 and 4a. You achieved partial compliance with Directive 4b by submitting the water quality sampling plan on September 9, 2016. However, other portions of Directive 4b were incomplete and the proposed water quality sampling plan, which would not sample Irving Creek, was deemed adequate, but only because discharges to Irving Creek were not occurring. If discharges to Irving Creek resume, the proposed water quality sampling plan will be insufficient.

On February 8, 2017, you notified Regional Water Board staff that you would require additional extensions and would cease work on other project milestones. You stated that you would delay assessing the slope of the Irving Creek outfall until February 29, 2017 (Directive 4a). You would also delay stabilizing the headcut at Irving Creek from October 15, 2016 to December 31, 2017 (Directive 4b). You would not fully implement the water quality sampling plan (Directive 4b) and would not complete the energy audit or water efficiency study (Directive 1) or restore the eroded Irving Creek outfall and ditch outlet (Directive 5).

On March 17, 2017, Regional Water Board staff issued you a NOV providing notice to you that you are in violation of the CAO. The March 17, 2017 NOV also addresses your requests for time schedule extensions and the Assistant Executive Officer's basis for denying your requests. Due to the ongoing delay in implementing project milestones you proposed to meet CAO directives, and subsequently, in correspondence, your stated intent to abandon other CAO requirements, I decline to modify the CAO to grant extensions at this time. Instead, the Regional Water Board staff will exercise enforcement discretion in determining whether to take further enforcement action to address the violations described in the NOVs and in determining what form any further enforcement action should take.

Insofar as your February 8, 2017, letter addresses water right issues, the Regional Water Board's authority does not extend to the regulation and enforcement of water rights. Please direct any questions regarding the Draft Order to the enforcement staff at the Division of Water Rights.

If you have any questions, please contact Stormer Feiler of my staff by email at Stormer.Feiler@waterboards.ca.gov, or by phone at (707) 543-7128, or his supervisor,

EXHIBIT 8

Diana Henrioulle, by email at Diana.Henrioulle@waterboards.ca.gov, or by phone at (707) 576-2350.

Sincerely,

Matthias St.John Water Boards
Digitally signed by Matthias St.John
Date: 2017.04.24 13:03:38 -07'00'

Matthias St. John
Executive Officer

170424_SRF_dp_MarbleMountainRanch_Response

Certified-Return Receipt Requested

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