

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

Douglas and Heidi Cole            )  
and Marble Mountain Ranch        )  
  )  
Stanshaw Creek in Siskiyou        )  
County                                )  
  )  
Public Hearing                        )  
\_\_\_\_\_ )

REGION 5 AUDITORIUM  
CENTRAL VALLEY WATER QUALITY CONTROL BOARD  
11020 SUN CENTER DRIVE, SUITE 200  
RANCHO CORDOVA, CA

Tuesday, November 14, 2017

9:30 A.M.

Volume 2

Pages 1 - 265

Reported by: Peter Petty

APPEARANCES

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

Division of Water Rights

Board Members Present:

Steven Moore, Vice Chair (Hearing Officer)

Hearing Team Members Present:

Lily Weaver, Staff Counsel

Mara Irby, Staff Environmental Scientist

Jean McCue, Staff Engineer

Conny Mitterhofer, Senior Water Resource Control Engineer

Jane Farwell-Jensen, Staff Environmental Scientist

Michael Buckman, Hearing Unit Chief

Prosecution Team Members Present:

Kenneth Petruzzelli, Attorney III, Office of Enforcement

Heather Mapes, Attorney I

INTERESTED PARTIES

For Douglas and Heidi Cole, Marble Mountain Ranch (MMR)

Barbara A. Brenner, Partner, Churchwell White, LLP

Kerry Fuller, Attorney

For California Department of Fish & Wildlife (CDFW)

Stephen Puccini, Senior Staff Counsel

Nathan Voegeli, Staff Counsel

For California Sportfishing Protection Alliance (CSPA)

Christopher R. Shutes, FERC Projects Director

For Karuk Tribe

Drevet J. Hunt, Attorney, Lawyers for Clean Water

Klamath Riverkeeper

Paul Kibel

APPEARANCES (Cont.)

INTERESTED PARTIES (Cont.)

For Old Man River Trust

Konrad Fisher

For National Marine Fisheries Service (NMFS)

Christopher Keifer

WITNESSES:

Witness Panel for the Division of Water Rights  
Prosecution Team:

Taro Murano  
Skyler Anderson  
Stormer Feiler

Paul Kibel,  
Klamath Riverkeeper

Leaf Hillman,  
Karuk Tribe

Jeffrey K. Meyer,  
for Douglas and Heidi Cole, Marble Mountain Ranch (MMR)

Douglas Taylor Cole,  
for Douglas and Heidi Cole, Marble Mountain Ranch (MMR)

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1 Tuesday, November 14, 2017

9:30 A.M.

2 P R O C E E D I N G S

3 ---000---

4 HEARING OFFICER MOORE: Good morning. This  
5 meeting is called back to order at 9:30 a.m. on Tuesday,  
6 November 14th, 2017. Welcome back to the Marble Mountain  
7 Ranch Hearing. I'm Steven Moore, Vice Chair of the State  
8 Water Board and Hearing Officer. With me, I'm being  
9 assisted by Staff Counsel Lily Weaver and staff Mara Irby  
10 and Jean McCue and other staff assisting me here.

11 I want to thank everyone for returning and  
12 taking time out of your schedules to be here for the  
13 second day of this hearing. We know we've all made  
14 sacrifices to be here and want you to know how much we  
15 appreciate your time.

16 At this time, just to remind folks evacuation  
17 procedure before we get started, identify the exits  
18 nearest you. The exit route over to my left, your right,  
19 is probably the best way to exit the building in case you  
20 hear an alarm. Please evacuate the room immediately if  
21 you hear an alarm. We will gather at the entrance to the  
22 building out in the parking lot and when we get the all-  
23 clear, we'll all return to this room.

24 We are broadcasting this hearing on the  
25 Internet and recording both audio and video.

1           In addition, a court reporter, Peter, is  
2 present to prepare a transcript of this proceeding.  
3 Anyone who would like an expedited copy of the transcript  
4 must make separate arrangements with the court reporter.

5           And when you speak please be sure to use the  
6 microphone, so that everyone can hear you.

7           At this time let's all take a moment to check  
8 our cell phones and make sure they are muted. And we  
9 appreciate you double checking.

10           So today -- and just to remind everyone --  
11 we're going to start with the cross-examination of the  
12 Prosecution Team's remaining witnesses. Then we will  
13 hear from Klamath Riverkeeper's opening statement and  
14 direct testimony, followed by cross-examination.

15           After Klamath Riverkeeper we will hear the  
16 Karuk Tribe's opening statement and direct testimony of  
17 their remaining -- or of their witness, Leaf Hillman.  
18 Following cross-examination of Mr. Hillman, Marble  
19 Mountain Ranch may proceed with a presentation of direct  
20 testimony of their remaining witnesses.

21           Then we will continue in the order I outlined  
22 yesterday with the National Marine Fisheries Service,  
23 California Department of Fish and Wildlife and remaining  
24 witnesses from the Karuk Tribe and Old Man River Trust.

25           So, are there any other questions or other

1 housekeeping items before we continue? Is that amenable?

2 Yes, from the Karuk Tribe. Mr. Hunt, I  
3 believe?

4 MR. HUNT: Yeah. I would just like to say that  
5 we have flexibility. Maybe we got a little further  
6 yesterday than we thought we might, so if we're moving  
7 along and it -- we don't need to fit Leaf in at the time  
8 allotted and we can just do all of Karuk presentation at  
9 once that would be fine with us, as well. Just so you  
10 know, if we're getting there, so we don't have to take  
11 things out of order depending on how it's going. I just  
12 wanted to bring that up in case.

13 HEARING OFFICER MOORE: Okay, well there's a  
14 lot of --

15 MR. HUNT: Yeah.

16 HEARING OFFICER MOORE: -- potential items  
17 stacked ahead of that --

18 MR. HUNT: Yeah, okay. Yeah.

19 HEARING OFFICER MOORE: -- so, I don't think at  
20 this time I could guarantee we would be able to get to  
21 it.

22 MR. HUNT: Sure. I just wanted to put that out  
23 there, so that we can get back into the flow --

24 HEARING OFFICER MOORE: Okay. Well --

25 MR. HUNT: -- as it goes. But we'll see, okay?

1 Thanks.

2 HEARING OFFICER MOORE: We appreciate your --  
3 the thoughtfulness of that offer. I think we'll keep the  
4 plan as we have it though, just to keep us on track.  
5 Okay. Thank you.

6 Would the Prosecution Team witnesses please  
7 come back up? You've already taken the oath, so we don't  
8 have to repeat that, but all the Prosecution Team  
9 witnesses: Mr. Feiler, Mr. Anderson, Mr. Murano.

10 (Witnesses previously sworn.)

11 TARO MURANO, SKYLER ANDERSON and STORMER FEILER  
12 called as witnesses for the Petitioner, having  
13 been previously duly sworn, were examined and  
14 testified further as hereinafter set forth:

15 HEARING OFFICER MOORE: And I want to invite  
16 Marble Mountain Ranch, Ms. Brenner, to prepare to conduct  
17 cross-examination.

18 (Pause in proceedings.)

19 MS. BRENNER: So, just another housekeeping  
20 question. I'm not sure how we're going to -- what the  
21 expectation of the Board is on the Panel Cross? But what  
22 I was -- what I propose is that there are certain  
23 questions that each of them could answer or one of them  
24 can answer for the entire panel and then have certain  
25 questions for particular witnesses in their Direct. A

1 lot of their testimony was the same, so -- or repetitive  
2 so --

3 HEARING OFFICER MOORE: That was my expectation  
4 was you can be fairly open and, you know, open-ended in  
5 terms of any witness you can ask a question of. It  
6 should relate to their specific testimony --

7 MS. BRENNER: Oh yeah.

8 HEARING OFFICER MOORE: -- as I would imagine  
9 that would be. So, at this point you can pick your own  
10 order of which witnesses to ask which questions.

11 MS. BRENNER: Okay. Thank you.

12 HEARING OFFICER MOORE: Yes.

13 MS. WEAVER: If you're not sure -- you know,  
14 you might have a question for all the witnesses, not know  
15 who the best person to ask is, so you can ask the panel.  
16 And then they'll --

17 MS. BRENNER: Right.

18 MS. WEAVER: -- they'll nominate somebody.

19 MS. BRENNER: Right. There's certain questions  
20 I have for particular witnesses --

21 MS. WEAVER: Right.

22 MS. BRENNER: -- and not the entire panel.

23 MS. WEAVER: Right.

24 CROSS-EXAMINATION BY

25 MS. BRENNER: Okay. Good morning. I believe

1 each of you testified that the Marble Mountain diversion  
2 impacts fishery habitat. Is that a true statement?

3 (No audible response.)

4 Can I get an answer?

5 WITNESS FEILER: Yes. Yes.

6 HEARING OFFICER MOORE: Turn your mic on,  
7 please.

8 WITNESS MURANO: That's correct.

9 MS. BRENNER: Okay. I --

10 WITNESS FEILER: Yes.

11 MS. BRENNER: The reporter can't take your  
12 nods, so I need verbal responses. Thanks.

13 WITNESS MURANO: Absolutely.

14 MS. BRENNER: What direct, casual evidence  
15 supports that conclusion?

16 WITNESS FEILER: The data portrayed in my  
17 presentation yesterday supports the conclusion that  
18 there's been impacts to fisheries from the Marble  
19 Mountain Ranch diversion.

20 MS. BRENNER: Are you specifically referring to  
21 the July 1st, 2009 data?

22 WITNESS FEILER: Yes.

23 MS. BRENNER: How about the other data supplied  
24 by the Karuk Tribe; does that support your conclusion?

25 MR. PETRUZZELLI: I'm going to object to that



1 on the basis that it's vague. It would help if you would  
2 specify which data and which conclusions you're asking  
3 about.

4 MS. BRENNER: I'm asking them what supports  
5 their conclusion. They indicated one data point in one  
6 set of a multiple year of data. So we -- I can get more  
7 specific on that particular set of data.

8 HEARING OFFICER MOORE: Yeah. I think I would  
9 sustain the objective -- objection, because you're asking  
10 about a different set of data and not about the testimony  
11 of the panel.

12 MS. BRENNER: He testified to that data, his  
13 interpretation of the data. And he just indicated that's  
14 what he's relying upon.

15 HEARING OFFICER MOORE: Right. In his  
16 presentation, right.

17 MS. BRENNER: Right.

18 HEARING OFFICER MOORE: But not the Karuk data.

19 MS. BRENNER: No, no. He --

20 Did you rely on the Karuk data for your  
21 testimony?

22 WITNESS FEILER: Karuk and U.S. Forest Service  
23 provided the data.

24 HEARING OFFICER MOORE: Okay. Thank you for  
25 the clarification.

1 MS. BRENNER: Okay.

2 HEARING OFFICER MOORE: I just want to make  
3 sure that we're asking about the testimony --

4 MS. BRENNER: Yeah.

5 HEARING OFFICER MOORE: -- that you received.  
6 Thank you.

7 MS. BRENNER: Yeah. I'm actually using his  
8 data or what he relied upon.

9 And Mr. Anderson, you indicated that you  
10 followed up with the Karuk Tribe relevant to the  
11 "reported" fish kills, correct?

12 WITNESS ANDERSON: I believe it was alleged  
13 fish kills.

14 MS. BRENNER: That was alleged fish kills?

15 WITNESS ANDERSON: That was -- that's how I  
16 stated it in my presentation.

17 MS. BRENNER: Did you obtain any follow-up  
18 evidence as to the cause of that alleged fish kill?

19 WITNESS ANDERSON: Yeah. We received  
20 information from Toz Soto with the Karuk Tribe. And  
21 which he indicated he believed the fish that was  
22 documented, I believe, there was --from my recollection  
23 there was five steelhead found dead in the Stanshaw pool  
24 and it was either one or two Coho. And they believe that  
25 the fish died from temperature shock.

1 MS. BRENNER: And do you know when that  
2 occurred or is there any data, any -- anything in the --

3 WITNESS ANDERSON: I would have to pull up the  
4 email to kind of give you further clarification. There's  
5 a lot of exhibits in this hearing, so I can't  
6 specifically remember all the details of that  
7 correspondence.

8 MS. BRENNER: Do you recall if that was in  
9 2009?

10 WITNESS ANDERSON: That sounds about right, but  
11 again I can't be a hundred percent confident without  
12 pulling up the exhibits.

13 MR. PETRUZZELLI: So I'm going to object to  
14 that question. It's unclear whether you're asking  
15 whether the correspondence was in 2009 or whether the  
16 alleged -- you're asking about an alleged fish kill that  
17 would have occurred in 2009.

18 MS. BRENNER: I'm asking about what additional  
19 information he obtained to support that conclusion. He  
20 indicated during his testimony that he sought additional  
21 information.

22 WITNESS ANDERSON: Well, and again I would need  
23 to pull up the exhibit just to confirm -- to be a hundred  
24 percent confident it was 2009.

25 MS. BRENNER: Okay. But you got it from the

1 Karuk Tribe?

2 WITNESS ANDERSON: Yes.

3 MS. BRENNER: Okay.

4 HEARING OFFICER MOORE: So regarding the  
5 objection I will overrule it. Continue the questioning,  
6 please.

7 MS. BRENNER: Do you recall whether you were  
8 provided any temperature data during that time period as  
9 a result of that inquiry?

10 WITNESS ANDERSON: Yes. We were provided some  
11 temperature data and some flow data as well, or flow  
12 velocity data.

13 MS. BRENNER: Do you recall what it said?

14 WITNESS ANDERSON: All of the data?

15 MS. BRENNER: No, the data that supported the  
16 conclusion or the allegation of a fish kill.

17 WITNESS ANDERSON: Now, the -- the -- if I  
18 remember this specific correspondence with Toz Soto, the  
19 data logger that was in that pool had been lost due to  
20 sedimentation, I believe. And that they didn't have  
21 specific temperature measurements when that fish kill was  
22 documented.

23 MS. BRENNER: Okay.

24 Did -- and I believe it was Mr. Anderson and  
25 Mr. Feller -- I'm not -- is that how you pronounce your

1 last name?

2 WITNESS FEILER: Feiler.

3 MS. BRENNER: Feiler, thank you. But you both  
4 participated in a investigation at Marble Mountain Ranch?

5 WITNESS FEILER: Yes.

6 WITNESS ANDERSON: Yes, we did.

7 MS. BRENNER: Okay. Did you observe outfalls  
8 from the Marble Mountain Ranch ditch?

9 WITNESS ANDERSON: Yes, we both observed two  
10 outfalls.

11 MS. BRENNER: Do those outfalls help ensure no  
12 overtopping of the ditch?

13 WITNESS FEILER: Potentially.

14 MS. BRENNER: Do you know whether the Pelton  
15 wheel on the Marble Mountain Ranch can be adjusted to  
16 produce power with less than 2.5 cfs?

17 WITNESS ANDERSON: I'm aware that the Pelton  
18 wheel contains as Doug described, different jets that can  
19 be inserted into the Pelton wheel. And now these jets  
20 have orifices of varying diameters that would then  
21 concentrate the flow of water to produce more pressure,  
22 which would drive the power production.

23 MS. BRENNER: Okay. So you can adjust it such  
24 that if there is 2 cfs coming down the ditch you can  
25 still produce power, correct?

1                   WITNESS ANDERSON: Throughout our investigation  
2 we never -- was able to get a threshold as far as the  
3 minimum amount of water in which Marble Mountain Ranch  
4 needs to run their Pelton wheel.

5                   MS. BRENNER: But you know it can be adjusted  
6 to less -- to produce energy at less than 3 cfs?

7                   WITNESS ANDERSON: Yeah, and kind of  
8 clarification the capacity as stated in the original  
9 application submitted by the Youngs of the Pelton wheel  
10 and the pen -- or excuse me, of the penstock, is 2.5 cfs.

11                  MS. BRENNER: Is that the same Pelton wheel  
12 that exists there today?

13                  WITNESS ANDERSON: I didn't say the Pelton  
14 wheel, the penstock.

15                  MS. BRENNER: Okay. Is that the same system  
16 that exists today?

17                  WITNESS ANDERSON: I'm not a hundred percent  
18 positive. I know the Pelton wheel has been changed out,  
19 but I'm -- I'm -- I think -- I believe the penstock has  
20 remained the same.

21                  MS. BRENNER: Okay.

22                  Do you know anything about the change out of  
23 the Pelton wheel?

24                  WITNESS ANDERSON: I -- no, I do not.

25                  MS. BRENNER: Okay. But you're aware it

1 occurred by the Coles?

2 WITNESS ANDERSON: I don't know who. I'm  
3 unaware of the change out, so I don't know which party  
4 was in ownership when the change out occurred.

5 MS. BRENNER: Okay. Are you aware of -- we'll  
6 just ask it this way -- was there a time period where the  
7 Marble Mountain Ranch was flood irrigated?

8 WITNESS ANDERSON: Yes. I believe that was  
9 indicated in either the Lennihan Report or the Cascade  
10 Stream Solutions technical report.

11 MS. BRENNER: And it's no longer flood  
12 irrigated today?

13 WITNESS ANDERSON: I do not believe so.

14 MS. BRENNER: You testified it's now piped and  
15 use sprinklers?

16 WITNESS ANDERSON: Sprinklers and hose bibs.

17 MS. BRENNER: Is that more efficient than flood  
18 irrigation?

19 WITNESS ANDERSON: Most definitely.

20 MS. BRENNER: Do you know how many people  
21 reside at the Mountain House?

22 WITNESS ANDERSON: Are you talking about  
23 Mountain Home, the landowners above?

24 MS. BRENNER: Correct.

25 WITNESS ANDERSON: Well, Mountain Home -- when

1 the application was originally submitted it was for -- it  
2 was a large parcel. There were five homes on the land  
3 owned by, I believe there was Brickle -- I would need to  
4 look at my inspection report to get exact last names of  
5 all the five families. But then one of the residents  
6 also had a rental, so there could be anywhere from -- I  
7 would have to approximate 10 to 20 people on Mountain  
8 Home amongst the seven different residences.

9 MS. BRENNER: Where is that located?

10 WITNESS ANDERSON: Above Marble Mountain Ranch.

11 MS. BRENNER: Is that -- how many people reside  
12 there today?

13 WITNESS ANDERSON: Where is "there," Marble  
14 Mountain Ranch --

15 MS. BRENNER: Mountain Home.

16 WITNESS ANDERSON: -- or Mountain Home?

17 MS. BRENNER: Mountain Home.

18 WITNESS ANDERSON: Well, my inspection, we  
19 learned that one of the landowners who occupied one of  
20 the homes had passed and that his family had received it.  
21 They frequented it for vacation and holidays. And I  
22 believe one of the other residents was also more of a  
23 vacation and a second home of one of the landowners. But  
24 Mr. Steve Robinson lives there full time. His son Noah  
25 and his family live there full time. And they also have



1 a rental with a tenant who lives there full time and have  
2 some livestock.

3 MS. BRENNER: Okay. That's your understanding?

4 WITNESS ANDERSON: That's what we documented  
5 during the inspection.

6 MS. BRENNER: In what year?

7 WITNESS ANDERSON: I believe that was in April  
8 of 2016.

9 MS. BRENNER: Okay. In December 2015 had the  
10 stakeholders developed a physical solution for the Marble  
11 Mountain Ranch diversion?

12 WITNESS ANDERSON: No. There were a few  
13 options being discussed, but nothing was concrete.

14 MS. BRENNER: Had the Coles voluntarily  
15 participated in the stakeholder process up until that  
16 time?

17 WITNESS ANDERSON: Yes.

18 MS. BRENNER: Did the Coles consistently state  
19 that they would cooperate with the efforts to return flow  
20 back to Stanshaw Creek as long as such efforts allowed  
21 them to continue to function as a dude ranch?

22 WITNESS ANDERSON: Yes.

23 MS. BRENNER: Did they -- Coles consistently  
24 indicate that the cost to return the flow back to  
25 Stanshaw Creek was too high for them to absorb?

1                   WITNESS ANDERSON: We've never seen any project  
2 proposals or quotes for returning --

3                   MS. BRENNER: I didn't ask you if you've ever  
4 seen quotes. I asked you, during the stakeholder process  
5 did the Coles consistently indicate that the cost of  
6 doing the return flow to Stanshaw Creek was too high for  
7 them to absorb?

8                   WITNESS ANDERSON: I don't believe cost was  
9 indicated. It was physically. It was the physical  
10 nature of returning flows is what was cited as far as  
11 permits and other activities. Cost might have been  
12 included, but there was a host of --

13                   MS. BRENNER: Host of issues?

14                   WITNESS ANDERSON: -- of hurdles.

15                   MS. BRENNER: Okay. When did NMFS provide  
16 their bypass flow recommendation?

17                   WITNESS ANDERSON: Which one?

18                   MS. BRENNER: The last one, the last one that's  
19 at issue here today.

20                   WITNESS ANDERSON: The most recent?

21                   MS. BRENNER: Yes, the most recent.

22                   WITNESS ANDERSON: It was submitted to the  
23 Executive Director of the Division of Water Rights on  
24 August 3rd, 2016.

25                   MS. BRENNER: And when did the Regional Board

1 issue their Cleanup and Abatement Order?

2 WITNESS ANDERSON: That would be better suited  
3 for Stormer Feiler.

4 WITNESS FEILER: I believe it was August. I  
5 believe it was August 4th, 2016.

6 MS. BRENNER: Directly after the NMFS bypass  
7 recommendation?

8 WITNESS FEILER: Yes.

9 MS. BRENNER: Was there a physical solution in  
10 place at that time?

11 WITNESS FEILER: No.

12 MS. BRENNER: Was there a continued discussion  
13 or was there -- were the stakeholders waiting for the  
14 NMFS bypass flow recommendation at that time as part of  
15 the process?

16 WITNESS FEILER: Not that I'm aware of.

17 MS. BRENNER: Was grant funding available in  
18 May of 2016 for the Marble Mountain Ranch diversions,  
19 some of the efforts to go towards the physical solution?  
20 In other words, was grant funding in place in May in 2016  
21 to help improve the Marble Mountain Ranch as directed by  
22 the regulatory agencies, do you know?

23 WITNESS ANDERSON: Are you -- are you asking  
24 both of us still?

25 MS. BRENNER: I'm asking either -- any of you.

1                   WITNESS MURANO:  No, I believe it wasn't.  
2  There was a proposal, but the grant funding had not been  
3  -- hadn't been considered by NFWF (phonetic) at the time.

4                   MS. BRENNER:  Was Joey Howard working with  
5  grant money when he was developing some of the electrical  
6  analysis?

7                   WITNESS MURANO:  I'm not aware of that.

8                   MS. BRENNER:  Did Joey Howard and Will Harling  
9  continue to try and respond to the regulatory agency  
10 requests in the spring of 2016, in summer of 2016?

11                  WITNESS ANDERSON:  Yes, they did.

12                  MS. BRENNER:  Did they subsequently quit the  
13 project around the fall of 2016?

14                  WITNESS MURANO:  Can you elaborate on "they?"

15                  MS. BRENNER:  Joey Howard and Will Harling.

16                  WITNESS ANDERSON:  I don't -- I'm not fully  
17 aware of when they exactly -- or either of them walked  
18 away from the projects.  I know that they have, but I  
19 don't know the exact dates.

20                  MS. BRENNER:  Did the Coles ever indicate to  
21 the -- both the State Water Board and Regional Board that  
22 that -- they had lost their consultant on this project  
23 around the fall of 2016?

24                  WITNESS MURANO:  I do recall the communication  
25 that the consultants did leave.  I don't recall the

1 dates.

2 MS. BRENNER: Okay. Do you recall a report  
3 from Mr. Fiori, a Fiori Geosciences Report that was  
4 submitted to both the State Water Board and the Regional  
5 Board regarding the Marble Mountain Ranch diversion?

6 WITNESS FEILER: Yes.

7 MS. BRENNER: Was that in response to the  
8 Cleanup and Abatement Order; was that report prepared in  
9 response to the Cleanup and Abatement Order?

10 WITNESS FEILER: Yes.

11 MS. BRENNER: Do you recall the conclusion of  
12 that assessment?

13 WITNESS FEILER: I'd need to look at the  
14 report. There were several conclusions in the report.

15 MS. BRENNER: Did Mr. Fiori find that the ditch  
16 deposition areas that you photographed have been  
17 stabilized over the years?

18 WITNESS FEILER: No.

19 MS. BRENNER: That's not your recollection of  
20 the report?

21 WITNESS FEILER: No. He said he didn't think  
22 they were an ongoing problem, but he didn't see that they  
23 were stabilized.

24 MS. BRENNER: Did he think that it was a good  
25 idea to fill those deposition areas as recommended by the

1 Regional Board?

2 WITNESS FEILER: The Regional Board's  
3 recommendation was not to fill those areas. The Regional  
4 Board's recommendation was to provide restoration  
5 measures for those areas where they were affecting  
6 streams.

7 MS. BRENNER: Did he agree with that  
8 assessment? Did he agree with that recommendation?

9 WITNESS FEILER: No.

10 MS. BRENNER: Did you actually see sediment  
11 from Marble Mountain Ranch ditch enter Stanshaw Creek at  
12 your -- during your investigation?

13 WITNESS FEILER: I saw evidence of erosion.

14 MS. BRENNER: Hey, are we coaching our  
15 witnesses over here? (Laughing.)

16 WITNESS FEILER: I saw evidence of erosion.

17 MS. BRENNER: Okay. So, your answer is "no?"

18 WITNESS ANDERSON: No, but you could see water  
19 from the second outfall -- if you recall Stormer's  
20 presentation -- and the proximity to Stanshaw Creek in  
21 the background. There was a pretty good amount of flow,  
22 about I'd say a third of to half of a cfs going down the  
23 hill, which was carrying storm -- or excuse me -- I'd  
24 describe it kind of as storm water. It was muddy, murky  
25 water you could see entering Stanshaw Creek.

1 MS. BRENNER: And where was that water coming  
2 from?

3 WITNESS ANDERSON: Secondary outfall structure,  
4 approximately 300 feet downstream of the POD on the  
5 Marble Mountain ditch.

6 MS. BRENNER: Is that the area where the  
7 trestle used to be along the ditch?

8 WITNESS ANDERSON: I've -- I'm unaware of a  
9 trestle.

10 MS. BRENNER: Okay. Does the Marble Mountain  
11 Ranch ditch experience debris flow; do you know?

12 MR. FEILER: Can you clarify your question?

13 MS. BRENNER: Does it experience sediment and  
14 small pebbles from the Stanshaw Creek into the ditch;  
15 does sediment flow from the creek into the ditch?

16 WITNESS ANDERSON: Yes.

17 MS. BRENNER: Is Stanshaw Creek a steep-slope  
18 creek system?

19 WITNESS ANDERSON: Yes. I'd consider it pretty  
20 vertical.

21 MS. BRENNER: Did you walk Stanshaw Creek; did  
22 you investigate the creek itself?

23 WITNESS ANDERSON: Yes.

24 MS. BRENNER: Did you see any -- any slough-off  
25 along the creek bed or along the creek banks?

1 WITNESS ANDERSON: But can you be more  
2 specific?

3 MS. BRENNER: Can you -- can you answer with a  
4 -- with a verbal response for me?

5 WITNESS FEILER: Can you -- can you be more  
6 specific in your question, please?

7 MS. BRENNER: Did you see any sediment  
8 deposition from the bed or banks of the creek itself into  
9 the creek during your investigation?

10 WITNESS ANDERSON: I did not walk the stream of  
11 Stanshaw Creek during my inspection.

12 MS. BRENNER: Okay. I'm sorry, I thought you'd  
13 just indicated that you did.

14 WITNESS ANDERSON: Nope. That wasn't during  
15 the inspection, that was when we went back to install  
16 pressure transducers and data loggers in the stream in  
17 2017. We had to walk the stream, because we were not  
18 granted access by Mr. Cole to use his property.

19 MS. BRENNER: Correct.

20 WITNESS ANDERSON: So we parked at --

21 MS. BRENNER: So that -- okay.

22 WITNESS ANDERSON: Yeah.

23 MS. BRENNER: So did you see slough-off along  
24 the creek system when you walked it?

25 WITNESS ANDERSON: I wasn't particularly



1 looking --

2 MS. BRENNER: Okay.

3 WITNESS ANDERSON: -- at slough-off from --

4 MS. BRENNER: Okay. But it's a steep creek  
5 system, correct?

6 WITNESS ANDERSON: Yes.

7 MS. BRENNER: And it experiences some  
8 significantly high flows in the wintertime? And by  
9 significantly high, in the excess of 30, 50 cfs.

10 WITNESS ANDERSON: I don't believe 50. But  
11 I've looked at the surrogate data that Margaret Tauzer  
12 had procured from the Ti Creek gauge. And when you  
13 average the four years, from '61 to '64, I believe the  
14 highest flows I saw were in the upper 30s.

15 MS. BRENNER: That's an average high. I'm  
16 asking for not an average, but an actual.

17 WITNESS ANDERSON: Again I --

18 MS. BRENNER: You don't know?

19 WITNESS ANDERSON: -- I didn't -- no, I didn't  
20 see any days where it was above 30 cfs, eor into the 40s.

21 MS. BRENNER: Have you experienced other steep-  
22 slope creek systems in Northern California?

23 WITNESS FEILER: Yes.

24 WITNESS ANDERSON: And yes.

25 MS. BRENNER: As your -- when you have

1 inspected those other creek systems do you often see  
2 sediment flowing down after winter rains?

3 WITNESS ANDERSON: There's a lot of variables  
4 that would contribute to sediment entering a stream after  
5 winter rains.

6 MS. BRENNER: Would you consider Stanshaw Creek  
7 a sediment-transport system? In other words, does it  
8 typically transport sediment during the winter rains.

9 WITNESS FEILER: All streams transport sediment  
10 during winter rains.

11 MS. BRENNER: At your time of inspection did  
12 you witness any ditch overtopping?

13 WITNESS FEILER: No.

14 MS. BRENNER: Are you aware of the last  
15 incident of any ditch overtopping; any anecdotal  
16 evidence?

17 WITNESS FEILER: I could see areas where the  
18 erosion had been caused over the ditch berm through ditch  
19 overtopping or ditch bank failure, berm failure.

20 MS. BRENNER: And did Mr. Fiori examine those  
21 deposition points as well?

22 WITNESS FEILER: To the best of my knowledge.

23 WITNESS ANDERSON: Other anecdotal evidence  
24 would be the 2000 -- is it '14 report by Middle Klamath  
25 Watershed Council that contributed the sedimentation of

1 the Stanshaw Creek pool due to a catastrophic failure of  
2 the Marble Mountain ditch?

3 MS. BRENNER: Is that the restoration project  
4 from --

5 WITNESS ANDERSON: Yeah. Yes.

6 MS. BRENNER: -- the report?

7 WITNESS ANDERSON: Yes.

8 MS. BRENNER: Do you recall what year that that  
9 was alleged, the overtopping was alleged in that report?

10 WITNESS ANDERSON: I -- if you pulled up the  
11 report we could further confirm and nail down the exact  
12 year.

13 MS. BRENNER: Did you see anything in that  
14 report that showed direct evidence that the overtopping  
15 caused the sediment -- the overtopping of the ditch  
16 caused the sediment in the pool?

17 WITNESS ANDERSON: No.

18 MS. BRENNER: Did either of you calculate a --  
19 any sediment budget on the ditch system, the Marble  
20 Mountain ditch system?

21 WITNESS FEILER: No.

22 MS. BRENNER: Did you calculate any sediment  
23 budget on Stanshaw Creek?

24 WITNESS FEILER: No.

25 MS. BRENNER: Do you know how many miles

1 Stanshaw Creek is?

2 WITNESS ANDERSON: I know the square mileage of  
3 the watershed. But as far as like the length of the  
4 stream as a -- like a crow fries? (sic) No.

5 MS. BRENNER: Okay. Do you know what I mean  
6 when I say a stream system is diurnal? It's a diurnal  
7 stream system?

8 WITNESS ANDERSON: Yes.

9 MS. BRENNER: Can you tell me what that means?

10 WITNESS ANDERSON: It means it's going to have  
11 -- it behaves differently from night to day.

12 MS. BRENNER: Behaves differently in what way?

13 WITNESS ANDERSON: There'd be fluctuations.

14 MS. BRENNER: In flow?

15 WITNESS ANDERSON: Yes.

16 MS. BRENNER: Is Stanshaw Creek a diurnal  
17 system?

18 WITNESS ANDERSON: I don't believe that's in my  
19 testimony nor am I an expert at classifying stream  
20 systems.

21 MS. BRENNER: Okay. Mr. -- I'm sorry --  
22 Feiler?

23 WITNESS FEILER: Yes.

24 MS. BRENNER: Thank you. Can we go back to  
25 your testimony about July 1st, 2009; do you recall that

1 testimony?

2 WITNESS FEILER: Yes.

3 MS. BRENNER: And you produced a graph  
4 regarding the flows from that date, correct?

5 WITNESS FEILER: No.

6 MS. BRENNER: No? You didn't use this -- this  
7 table or graph or -- I don't -- what you --

8 WITNESS FEILER: Yes, I did. But that's not  
9 flows.

10 MS. BRENNER: What is that?

11 WITNESS FEILER: It's temperature.

12 MS. BRENNER: That's temperature, correct.

13 Thank you. But you did produce this as part of your  
14 testimony regarding temperature in July 1st, 2009?

15 WITNESS FEILER: Yes.

16 MS. BRENNER: Okay. And where did you derive  
17 this data?

18 WITNESS FEILER: From the Karuk and U.S. Forest  
19 Service data that I was provided.

20 MS. BRENNER: And do you know the methodology  
21 they utilized to collect that temperature data?

22 WITNESS FEILER: I believe the temperature data  
23 was collected with a data sonde placed in the Stanshaw  
24 Creek pool.

25 MS. BRENNER: Do you know where in the pool it

1 was placed?

2 WITNESS FEILER: No, I do not. Toz Soto is  
3 here today though and he can perhaps clarify that for  
4 you.

5 MS. BRENNER: Yeah. I just want to talk about  
6 your interpretation of that data. Did you -- did you  
7 look at the other -- the days preceding the July 1st,  
8 2009 temperature data?

9 WITNESS FEILER: Yes. I looked at a lot of  
10 data.

11 MS. BRENNER: And what did the days prior  
12 indicate as to -- as with regard to that temperature of  
13 the pond?

14 WITNESS FEILER: The days prior indicated that  
15 the --it looked like there was still water going in the  
16 pool. There wasn't any air-temperature readings on the  
17 data sonde.

18 MS. BRENNER: What do you mean by air  
19 temperature data?

20 WITNESS FEILER: So the elevated temperature  
21 you see on that graph indicates more than likely the pool  
22 went dry or the data sonde was exposed to the air.

23 MS. BRENNER: So on July 1st something occurred  
24 to expose the data logger to the air temperature,  
25 correct?

1                   WITNESS FEILER:  It appears that on July 1st  
2 flows dropped low enough to where the data sonde was  
3 exposed to air temperatures or the pool was completely  
4 dried up, depending on where the --

5                   MS. BRENNER:  Do you know --

6                   WITNESS FEILER:  -- data sonde was placed.

7                   MS. BRENNER:  -- where the data logger was  
8 placed in the pond?

9                   WITNESS FEILER:  I'm going to refer you to Toz  
10 Soto again, because he's the person --

11                  MS. BRENNER:  I just want to know what you  
12 know.

13                  WITNESS FEILER:  I don't know.  No.

14                  MS. BRENNER:  But it's your testimony that that  
15 -- so are -- are you stating that the air temperature  
16 went to 106 or the pond temperature went to 106 on July  
17 1st, 2009?

18                  WITNESS FEILER:  The data sonde read a  
19 temperature of about 107 degrees Fahrenheit on that day.

20                  MS. BRENNER:  Would that likely be the  
21 temperature of the pond on that day?

22                  WITNESS FEILER:  Evidently if the data sonde  
23 was placed in the pond.  Yes, it would be the temperature  
24 of the pond on that day.

25                  MS. BRENNER:  So it's your testimony that the

1 pond temperature went from 63 degrees to 106.9 degrees in  
2 a matter of an hour?

3 WITNESS FEILER: That's what the data showed.

4 MS. BRENNER: Okay. Do you have any indication  
5 of what could have caused the decrease in pond level,  
6 such to expose the data logger?

7 WITNESS FEILER: As I stated in my presentation  
8 the flows on that day were measured. And it showed that  
9 the diversion was active and there was 0.5 cfs below the  
10 Highway 96 Bridge in Stanshaw Creek. And I believe it  
11 was 1.8 cfs in the diversion outfall at -- before it  
12 enters the tributary to Irving Creek.

13 MS. BRENNER: Was that the same case the day  
14 before?

15 WITNESS FEILER: I would have to look at the  
16 data. The data's not consistently measured every day for  
17 flow, so I don't -- I can't testify to that without  
18 looking at the data.

19 MS. BRENNER: So you're assuming that the  
20 diversion caused this decrease in flow?

21 WITNESS FEILER: It was evident that the  
22 diversion was active, and the temperature change  
23 happened.

24 MS. BRENNER: That was just --

25 WITNESS FEILER: That's one possible cause of



1 that happening.

2 MS. BRENNER: That's one possible cause.

3 WITNESS FEILER: I'm having trouble thinking of  
4 any others, to be honest.

5 MS. BRENNER: Are you aware that there's rocks  
6 piled along the pond area at times to keep the water in  
7 the pond?

8 WITNESS FEILER: No.

9 MS. BRENNER: You're not aware of that?

10 WITNESS FEILER: No, not the -- along the pond  
11 area. No.

12 MS. BRENNER: Are you aware of berms diverting  
13 water into the pond, rock berms diverting water into the  
14 pond?

15 WITNESS FEILER: I saw images yesterday of rock  
16 berms diverting water into the pond. Yes.

17 MS. BRENNER: But you weren't there in 2 --  
18 July 1st, 2009 to observe anything directly, were you?

19 WITNESS FEILER: No.

20 MS. BRENNER: Somebody could have removed rock  
21 berms and released water from the pond. And that would  
22 lower the temp -- lower the level of the pond level. Or  
23 the water level, correct?

24 WITNESS FEILER: I am not aware of any rock  
25 berms on the pond that would be removed by somebody

1 manually or --

2 WITNESS ANDERSON: That would also be dependent  
3 on the level of the Klamath River, if water is going to  
4 flow in or out when you remove rocks.

5 MS. BRENNER: What's the flow of the Klamath  
6 River usually in July?

7 WITNESS ANDERSON: Not a hundred percent sure.  
8 It changes every year.

9 MS. BRENNER: Um-hmm.

10 WITNESS ANDERSON: That's what we heard  
11 yesterday.

12 MS. BRENNER: The data from 2009 that you  
13 reviewed indicates that the temperature decreased within  
14 hours, correct?

15 WITNESS FEILER: Over about nine hours.

16 MS. BRENNER: Like it can -- consistently  
17 decrease from that temperature suggesting that the pond  
18 level, if your assumption is correct, went back up?

19 WITNESS FEILER: After about four or five hours  
20 it looked like there might have been water going back in  
21 the pond based on the temperature data.

22 MS. BRENNER: So if it was caused by the Marble  
23 Mountain diversion they would have had to increase and  
24 then decrease their diversion at that, within those few  
25 hours?

1 WITNESS FEILER: I don't honestly know what  
2 happened, but I do know the data shows that happening.

3 MS. BRENNER: Yeah. Do you know the lethal  
4 temperature for fish, water temperature for fish?

5 MR. PETRUZZELLI: We're going to object to the  
6 specificity of that question. Perhaps you could more  
7 specifically identify the type of fish temperature,  
8 lethal temperatures you're asking about?

9 HEARING OFFICER MOORE: Sustained.

10 MS. BRENNER: Is 107 degrees water temperature  
11 lethal for fish?

12 WITNESS FEILER: Yes.

13 MS. BRENNER: Are you aware of the ambient  
14 temperature on July 1st, 2009 at the Marble Mountain  
15 Ranch at the Stanshaw pool area?

16 WITNESS FEILER: Not specifically for that day,  
17 no.

18 MS. BRENNER: In the days prior to the July  
19 1st, 2009, did you look at the data for those dates as  
20 well?

21 WITNESS FEILER: Yes.

22 MS. BRENNER: Was the water -- the pond  
23 temperature during those previous days pretty consistent?

24 WITNESS FEILER: Relatively, there is some  
25 fluctuation.

1 MS. BRENNER: How about the dates after July 1,  
2 2009?

3 WITNESS FEILER: The data record for that year  
4 ends shortly after July 1, 2009.

5 MS. BRENNER: There was no more data collected  
6 after July 2nd, 2009?

7 WITNESS FEILER: I would need to look at my  
8 data records to answer that question.

9 MS. BRENNER: Did you produce the full set of  
10 data that you were provided as part of your exhibits for  
11 this hearing from the Karuk Tribe?

12 WITNESS FEILER: Yes, I believe so.

13 MS. BRENNER: Okay. You're not aware of any  
14 other temperature or volume, velocity data for 2009, in  
15 August for instance?

16 WITNESS FEILER: No, I looked, and I couldn't  
17 find any.

18 MS. BRENNER: Okay.

19 WITNESS FEILER: Well, let me clarify that.  
20 I'm not aware of any temperature data for 2009 in August.  
21 I'm aware of flow data for that period though.

22 MS. BRENNER: Okay. Are you aware of any fish  
23 data during 2009 in the Stanshaw Creek pond?

24 WITNESS FEILER: I'm aware of the emails  
25 regarding the fish kill that Mr. Anderson mentioned

1 earlier.

2 MS. BRENNER: Is that the fish kill that the  
3 Karuk Tribe has documented as occurring in 2009, July  
4 2009?

5 WITNESS FEILER: Yes.

6 MS. BRENNER: And are you aware that at that  
7 time -- at that same time that there was an excess of 100  
8 fish in the Stanshaw Creek pond?

9 WITNESS FEILER: No.

10 MS. BRENNER: Are you aware that Mr. Fiori  
11 evaluated the ditch stream crossing, the -- the unnamed  
12 tributary at Stanshaw Creek. Did he inspect it, that  
13 particular fallout?

14 WITNESS FEILER: Yes. And NOV Number 3  
15 provides a response to Mr. Fiori's report for the record  
16 for the -- from the Regional Water Board that is quite in  
17 depth in terms of our disagreements and our agreements.

18 MS. BRENNER: That's fair. You definitely  
19 disagree?

20 WITNESS FEILER: I can pull up the NOV if you'd  
21 like, and show you specifically what the Regional Board  
22 decided to state about that issue.

23 MS. BRENNER: No, I'm interested in the  
24 engineering geologist's report and what you know about  
25 what their full evaluation of the system. Do you know

1 how many days Mr. Fiori was -- spent at the Marble  
2 Mountain Ranch inspecting his diversion system?

3 WITNESS FEILER: I'd need to look at his  
4 report.

5 MS. BRENNER: Okay.

6 Could I have just one minute?

7 HEARING OFFICER MOORE: Yes. Yes, you can take  
8 a minute. Please stop the timekeeping.

9 (Pause in proceedings.)

10 MR. PETRUZZELLI: Mr. Vice Chair, while we're  
11 taking this brief break I've been informed that one of my  
12 witnesses requires a natural break.

13 (Laughter.)

14 HEARING OFFICER MOORE: Let's take five  
15 minutes. And we'll resume the hearing at 17 after.

16 (Recess taken at 10:12 a.m.)

17 (Proceedings resumed at 10:16 a.m.)

18 HEARING OFFICER MOORE: Ok, are we ready to  
19 reconvene? And thank you. I wanted to offer a couple of  
20 suggestions just to improve the transcript and the flow  
21 of -- and the understandability of the discussion. So we  
22 want to do our best to identify which person you're  
23 asking, just for the record, so that when we look at the  
24 transcript we have a good sense of which person has  
25 responded.

1           And also, during the last -- during the  
2 questioning there were some references to some exhibits.  
3 And if we could do our best to identify exhibits as we've  
4 enumerated them, in -- for in preparation for the hearing  
5 it would be very helpful. Then we can even bring it up  
6 onscreen if you're talking about specific language. So,  
7 just some suggestions to improve the hearing.

8           Anything else?

9           MS. BRENNER: So --

10          MS. WEAVER: It makes it much easier for us  
11 when we go to write the Order, so --

12          MS. BRENNER: Right.

13          MS. WEAVER: -- we'd appreciate it.

14          MS. BRENNER: And so we can identify the Fiori  
15 Geosciences Report that was submitted as part of Marble  
16 Mountain Ranch's exhibits. And then the Karuk Tribe  
17 data. I believe that was submitted by the Karuk Tribe.  
18 And we can identify that particular exhibit.

19          Kerry, do you have those exhibit references  
20 handy?

21          MS. FULLER: (Indiscernible)

22          MS. BRENNER: The temperature data that Mr.  
23 Feiler was relying upon from the Karuk Tribe.

24          MS. FULLER: Oh, that. Yes, (indiscernible)

25          MS. BRENNER: Of the Prosecution Team. And the

1 Fiori Geoscience report is Marble Mountain Ranch -- what  
2 exhibit number?

3 MS. FULLER: It's 12.

4 MS. BRENNER: Thank you.

5 I have no further questions.

6 HEARING OFFICER MOORE: Okay.

7 MS. WEAVER: So just to confirm with the  
8 microphones, it was -- the graph was PT-190?

9 HEARING OFFICER MOORE: Can you confirm?

10 MS. FULLER: That one was PT-191.

11 MS. WEAVER: 191?

12 HEARING OFFICER MOORE: PT-191.

13 MS. FULLER: It's WR.

14 HEARING OFFICER MOORE: Sorry, WR.

15 MS. WEAVER: Yeah, that's right.

16 HEARING OFFICER MOORE: Yep.

17 UNIDENTIFIED SPEAKER: That's just the graph.

18 MS. WEAVER: And then the exhibit --

19 WITNESS ANDERSON: But the exhibit, to clarify  
20 that's only the graph, not the actual data.

21 MS. WEAVER: Right. But there's a specific  
22 graph that Ms. Brenner held up and asked questions of the  
23 Panel though, that was PT-191.

24 MS. BRENNER: Correct.

25 MS. WEAVER: Okay.



1 MS. BRENNER: And do you know the data?

2 MS. FULLER: That's 190.

3 MS. BRENNER: That's 190? So the data set is  
4 190.

5 HEARING OFFICER MOORE: WR-190

6 MS. BRENNER: WR-190.

7 MR. WEAVER: Thank you.

8 MS. BRENNER: That's it, yeah.

9 MS. FULLER: Oh, and then the Fiori Report is  
10 MMR-12.

11 MS. BRENNER: Right. The Fiori report is MMR-  
12 12.

13 MS. WEAVER: Thank you.

14 HEARING OFFICER MOORE: Great. And so, that  
15 concludes the cross-examination?

16 MS. BRENNER: Correct.

17 HEARING OFFICER MOORE: Okay. Thank you.

18 So, at this time we'd offer up a cross-  
19 examination of the --

20 WITNESS FEILER: Hold on. We're going to get  
21 your exhibit number for the -- NOV Violation Number 3  
22 from the Regional Water Board, which was also brought up.

23 MS. BRENNER: Do you remember what date that  
24 was issued?

25 WITNESS FEILER: No.

1 HEARING OFFICER MOORE: Well, while we're  
2 waiting for that the next opportunity for cross-  
3 examination is from National Marine Fisheries Service. No  
4 questions?

5 MS. BRENNER: So it's 167.

6 HEARING OFFICER MOORE: California Department  
7 of Fish and Wildlife.

8 MR. PUCCINI: (Indiscernible)

9 HEARING OFFICER MOORE: Can you please approach  
10 and let's get the name tag and now the identification of  
11 exhibits.

12 MR. PETRUZZELLI: NOV Number 3 is WR-167.

13 WITNESS MURANO: Yeah, that was the first one.

14 UNIDENTIFIED SPEAKER: (Indiscernible) name  
15 again?

16 MR. PUCCINI: Stephen Puccini.

17 HEARING OFFICER MOORE: All right. Thank you  
18 for the administrative task.

19 And Mr. Puccini?

20 CROSS-EXAMINATION BY

21 MR. PUCCINI: Thank you.

22 This is for the panel. Is there anything in  
23 the NFMS flow recommendation that was not raised or  
24 discussed in some fashion during various stakeholder  
25 meetings with the Coles or the Consultants, to your

1 knowledge?

2 WITNESS ANDERSON: No.

3 HEARING OFFICER MOORE: And that was Mr.  
4 Anderson.

5 WITNESS ANDERSON: And actually the -- the  
6 original recommendation from NFMS was augmented to the  
7 Coles' requests. And so NFMS went back and reconfigured  
8 their recommendation to something that the Coles  
9 requested and was more conducive for their diversion  
10 operations.

11 MR. PUCCINI: When was that request made  
12 approximately?

13 WITNESS ANDERSON: I believe that request was  
14 at the second stakeholder meeting that occurred in 2000 -  
15 - January 2016.

16 MR. PUCCINI: So at least at that time the  
17 Coles or his -- their consultants were familiar with  
18 that, the flow recommendation as it stood that time?

19 WITNESS ANDERSON: Yes.

20 MR. PUCCINI: Is there anything in your NOV's,  
21 CAO or the Draft Order that was not previously raised or  
22 discussed with Mr. Cole or his consultants prior to  
23 issuance?

24 WITNESS ANDERSON: Prior to issuance of the  
25 Draft Order the Coles had received a Report of

1 Inspection, which outlined the same corrective actions  
2 that were documented in the Draft Order.

3 MR. PUCCINI: Is it fair to say that Mr. Cole  
4 or Marble Mountain Ranch should not be surprised in terms  
5 of the recommendations for contents of any of the  
6 documents I just described?

7 WITNESS ANDERSON: No. And to add, that 2002  
8 inspection by the Division of Water Rights contained  
9 about, I would say, 80 to 90 percent of the same  
10 corrective actions that the 2015 Report of Inspection  
11 contained.

12 MR. PUCCINI: Is it true that the State Water  
13 Board issued a total of three Notices of Violation  
14 against the Coles and Marble Mountain Ranch?

15 WITNESS FEILER: The North Coast Regional Water  
16 Board issued three Notice of Violations and Rights, the  
17 Cleanup and Abatement Order.

18 MR. PUCCINI: Is it true that their first NOV  
19 was issued on December 3rd, 2015 following inspections in  
20 December 2014 and February 2015?

21 WITNESS FEILER: I believe so.

22 MR. PUCCINI: Is it true that the CAO and Draft  
23 Order was issued in August 2016?

24 WITNESS ANDERSON: That is correct.

25 MR. PUCCINI: No further questions.

1 HEARING OFFICER MOORE: Thank you.

2 Next, offer the opportunity to cross-examine to  
3 Karuk Tribe.

4 CROSS-EXAMINATION BY

5 MR. HUNT: Good morning. There was a series of  
6 questions related to possible causes of the temperature  
7 changes in the pond. And I'm curious whether you all are  
8 aware of when the enhancement work in the pond area first  
9 began?

10 WITNESS ANDERSON: By enhancement do you mean  
11 the restoration project that was conducted by Mid Klamath  
12 Watershed Council or?

13 MR. HUNT: Yes.

14 WITNESS ANDERSON: I believe that was conducted  
15 in 2013. For an exact date I would need to reference the  
16 exhibit.

17 MR. HUNT: You mean it was conducted or it  
18 began?

19 WITNESS ANDERSON: Again, I would need to  
20 reference the report. From my understanding it was  
21 completed, I guess, let's say in 2013. When it began I'm  
22 unsure.

23 MR. HUNT: And do you know if there's continued  
24 efforts since then to maintain it?

25 WITNESS ANDERSON: To -- to be clear on that I

1 haven't been in correspondence with anyone regarding what  
2 the continued efforts are to maintain it.

3 MR. HUNT: Okay. Thank you. That's all.

4 HEARING OFFICER MOORE: Thank you.

5 Next, for cross-examination is Old Man River  
6 Trust, Mr. Fisher?

7 CROSS-EXAMINATION BY

8 MR. FISHER: The calculations you all stated to  
9 determine consumptive water use at Marble Mountain Ranch,  
10 was that a standard practice of -- standard calculation  
11 used by the State Water Board? I don't need the exact  
12 number I just wanted like in general is that how the  
13 State Water Board determines how much water is  
14 reasonable.

15 WITNESS ANDERSON: Are you referring to the  
16 refined calculations?

17 MR. FISHER: Yes. Of consumptive water, yes.

18 WITNESS ANDERSON: Yes. I was in  
19 correspondence of Joey Howard and Will Harling. They had  
20 asked for some direction. I directed them to the  
21 California Coda Regulations, Title 23, Section 297, which  
22 has identified uses for different irrigation types and  
23 stock watering, things of that manner.

24 MR. FISHER: Great. And had anyone done that  
25 before to your knowledge?

1 WITNESS ANDERSON: I don't believe so.

2 MR. FISHER: Thank you.

3 HEARING OFFICER MOORE: Okay. Thank you.

4 Next, Klamath River Keeper have any questions  
5 for the Prosecution Team witnesses?

6 MR. KIBEL: No questions.

7 HEARING OFFICER MOORE: Thank you.

8 California Sportfishing Protection Alliance?

9 MR. SHUTES: No questions.

10 HEARING OFFICER MOORE: Thank you.

11 Pacific Coast Federation of Fishermen's  
12 Associations? No.

13 And at this time does the Prosecution Team have  
14 any redirect questioning?

15 MR. PETRUZZELLI: Yes.

16 HEARING OFFICER MOORE: Okay. Please approach  
17 the bench over there. Not this bench, that bench.

18 REDIRECT EXAMINATION BY

19 MR. PETRUZZELLI: So, Mr. Feiler, you know,  
20 since -- you know this is a water right -- since this is  
21 a water right hearing can you maybe talk about just what  
22 a Cleanup and Abatement Order is, what it seeks to  
23 achieve, and why a Regional Board would issue a Cleanup  
24 and Abatement Order?

25 MS. BRENNER: I'm going to have to object. I'm

1 going to object. This goes beyond the scope of my cross-  
2 examination.

3 MR. PETRUZZELLI: And Ms. Brenner asked  
4 numerous questions about the Cleanup and Abatement Order,  
5 when it was issued, why it was issued. And, you know,  
6 since this is a Water Right Hearing and a Cleanup and  
7 Abatement Order is not something we're used to seeing I  
8 believe this is a relevant question to inform the people  
9 here just what a Cleanup and Abatement Order is, why a  
10 Regional Board issues one, and what a Cleanup and  
11 Abatement Order seeks to do.

12 HEARING OFFICER MOORE: Can you repeat the  
13 question?

14 MR. PETRUZZELLI: Thank you.

15 Mr. Feiler, can you describe what a Cleanup and  
16 Abatement Order is, what a Cleanup and Abatement Order  
17 seeks to achieve and why a Regional Board would seek --  
18 would issue a Cleanup and Abatement Order?

19 MS. BRENNER: Again, I'm going to object. It  
20 goes beyond the scope of my cross-examination. My -- my  
21 questions were very narrow as to time of issuance, just  
22 to set a timeline of events.

23 HEARING OFFICER MOORE: I'll sustain the  
24 objection.

25 MS. BRENNER: Thank you.



1           MR. PETRUZZELLI: Mr. Anderson, on -- during  
2 the investigation did you attempt to find out what the  
3 operating threshold of the Pelton wheel was?

4           WITNESS ANDERSON: Yes. I corresponded with  
5 Joey Howard. And he also was unaware of what the minimum  
6 operating threshold was of the Pelton wheel.

7           MR. PETRUZZELLI: So, we -- so you never really  
8 got a good answer to that?

9           WITNESS ANDERSON: No, I did not.

10          MR. PETRUZZELLI: But you tried to get one?

11          WITNESS ANDERSON: Yes, we did.

12          MR. PETRUZZELLI: Okay.

13          Mr. Feiler, when the Regional Board issues a  
14 Cleanup and Abatement Order is a physical solution  
15 normally required before the Regional Board, which issues  
16 such an order?

17          WITNESS FEILER: No. The order is issued to  
18 get at a physical solution, finding the best alternatives  
19 to fix something to find -- that -- that's a problem or a  
20 violation, basically of the Water Code.

21          MR. PETRUZZELLI: And does a Cleanup and  
22 Abatement Order -- does a Cleanup and Abatement Order  
23 include findings identifying failures and over-toppings  
24 of the ditch?

25          WITNESS FEILER: Yes.

1                   MR. PETRUZZELLI:   Okay.   And is that a final  
2 order?

3                   WITNESS FEILER:   Yes.

4                   MR. PETRUZZELLI:   This question could be for  
5 either Mr. Anderson or probably Mr. Murano.   Do you  
6 recall meetings or conference calls prior to the issuance  
7 of the August 3rd, 2016 flow recommendation from NFMS  
8 discussing the flow recommendation?

9                   WITNESS ANDERSON:   Yeah, I believe -- or sorry,  
10 yes.   We met with the Coles and their legal counsel, NFMS  
11 and representatives from the Mid Klamath Watershed  
12 Council, the Diverters engineers on May 13th to discuss  
13 the proposed instream flow recommendation that we  
14 received from the National Marine Fisheries Service.

15                  MR. PETRUZZELLI:   On -- and do you recall the  
16 extent that we -- that it was discussed with them?

17                  WITNESS ANDERSON:   We discussed how Marble  
18 Mountain Ranch's diversions would be affected by the  
19 recommendation when nonconsumptive diversions or --  
20 excuse me, diversions for just consumptive uses are  
21 occurring, when diversions for consumptive and  
22 nonconsumptive uses are occurring in all seasons of the  
23 year.

24                  MR. PETRUZZELLI:   So, before the recommendation  
25 was issued there was discussion of it with the Coles or

1 with their consultants or legal counsel?

2 WITNESS ANDERSON: Yes. Multiple discussions  
3 on two different flow recommendations.

4 MR. PETRUZZELLI: Mr. Feiler, do you recall  
5 when the Draft Cleanup and Abatement Order came out?

6 WITNESS FEILER: December 3rd, 2015.

7 MR. PETRUZZELLI: All right. And on -- do you  
8 recall how the final order may have differed from that  
9 draft?

10 WITNESS FEILER: I don't think it differed  
11 except for changes in dates or setting dates for  
12 compliance deadlines, directives, to meet directives.

13 MR. PETRUZZELLI: Okay.

14 No further questions for them.

15 HEARING OFFICER MOORE: Okay. Thank you.

16 And at this time I offer the opportunity for  
17 any re-cross examination to Marble Mountain Ranch.

18 MS. BRENNER: We'll accept.

19 HEARING OFFICER MOORE: Sure.

20 RE-CROSS-EXAMINATION BY

21 MS. BRENNER: Mr. Anderson, you testified that  
22 in May of 2016 there was a stakeholder meeting amongst  
23 the Stanshaw Creek group?

24 WITNESS ANDERSON: Yes.

25 COURT REPORTER: Use your microphone.

1 WITNESS ANDERSON: Yes.

2 MS. BRENNER: And did you attend that meeting?

3 WITNESS ANDERSON: Yes. That meeting was at  
4 the Division of Water Rights at the CalePA.

5 MS. BRENNER: It was at the CalePA?

6 WITNESS ANDERSON: Yes.

7 MS. BRENNER: Was Mr. Harling in attendance at  
8 that meeting?

9 WITNESS ANDERSON: No, I believe they called  
10 in.

11 MS. BRENNER: Okay. Had the bypass flow  
12 recommendation been issued at that point?

13 WITNESS ANDERSON: No, it had not. But it had  
14 been the -- the changes that were requested by the  
15 diverters had been incorporated into NFMS's instream flow  
16 recommendation. And it was in draft form at that time,  
17 but that was the recommendation that NFMS was moving  
18 forward with on getting that signed and approved.

19 MS. BRENNER: Was there any -- any indication  
20 by the Coles at that time that they wouldn't be able to  
21 comply with that bypass?

22 WITNESS ANDERSON: There was indication that  
23 the Coles would -- were unaware of the -- the full  
24 ramifications of the NFMS flow recommendation.

25 MS. BRENNER: Okay.

1 I'm sorry Taro, I cannot say your last name.

2 Is it Mr. Murano?

3 WITNESS MURANO: Correct.

4 MS. BRENNER: Thank you. Do you recall in your  
5 testimony that following the January 14th, 2000 meeting  
6 in Orleans, the Division requested technical assistance  
7 from NFMS and DFW to develop bypass flow recommendations?

8 WITNESS MURANO: That's correct.

9 MS. BRENNER: Okay. This was a -- something  
10 that was in flux. Is that safe to say?

11 WITNESS MURANO: Can you explain?

12 MS. BRENNER: It was change -- it was dynamic  
13 at that time; there was nothing set in stone as to what  
14 the --

15 WITNESS MURANO: The cooperation or the --

16 MS. BRENNER: The bypass flow recommendation.

17 WITNESS MURANO: It -- I mean, it was being  
18 considered by NFMS.

19 MS. BRENNER: Okay.

20 I have nothing further.

21 HEARING OFFICER MOORE: Okay. Okay, thank  
22 you.

23 Any other recross examination from the  
24 different parties? That would be National Marine  
25 Fisheries, Fish and Wildlife, Karuk Tribe, Old Man River

1 Trust, Klamath Riverkeeper, Support Fishing Alliance,  
2 PCFFA?

3 All right. Thank you. So now that we've  
4 completed this phase, I request that --

5 MS. WEAVER: (Whispers) Staff might have  
6 questions.

7 HEARING OFFICER MOORE: Or are -- is there any  
8 staff questions or --

9 MS. WEAVER: We can just check them for a  
10 minute.

11 HEARING OFFICER MOORE: Okay. Well, we'd like  
12 to take five minutes to confer among the Hearing Team  
13 staff and we'll return at 10:42.

14 (Recess taken at 10:37 a.m.)

15 (Proceedings resumed at 10:44 a.m.)

16 HEARING OFFICER MOORE: Thanks everyone. We  
17 have a couple of questions we'd like to ask the  
18 witnesses. And are we going to start?

19 RECROSS-EXAMINATION BY

20 MS. WEAVER: So I have a question for  
21 Mr. Feiler. Do you recall a line of questioning during  
22 cross about lethal temperatures to fish?

23 WITNESS FEILER: Yes.

24 MS. WEAVER: What kinds of fish communities  
25 were you talking about in your answer?

1 WITNESS FEILER: Salmonids.

2 MS. WEAVER: Salmonids. Okay. Any --

3 WITNESS FEILER: So --

4 MS. WEAVER: -- geographic information or just  
5 salmonids?

6 WITNESS FEILER: Salmonids. Essentially, if  
7 you have a 40-degree temperature increase in a pool  
8 you're going to see mortality of pretty much everything  
9 in there.

10 MS. WEAVER: Thank you. And then I have a  
11 question about some of the photographs that were used in  
12 the slideshow presentation for Mr. Petruzzelli's opening  
13 statement, if we could pull that up? It'll be page 9.

14 (Document uploaded to screen.)

15 MS. WEAVER: So, we haven't been able to  
16 identify where in the record this photograph came from.

17 WITNESS ANDERSON: That photograph was an  
18 attachment in an email received from Toz Soto, I believe  
19 it was February 12, 2015. If I could have -- kind of  
20 look through the exhibit list to give you guys the exact  
21 exhibit number if that would be helpful. But I do know  
22 that the email was received in February 2015.

23 MS. WEAVER: Okay. So this --

24 MR. PETRUZZELLI: And this, I believe that  
25 those photos are also included in the water right --

1 investigation report.

2 MS. WEAVER: Okay. We can check that. On  
3 this, so this is a photograph that was sent to Water  
4 Rights Enforcement staff by the Karuk Tribe?

5 WITNESS ANDERSON: That is correct.

6 MS. WEAVER: Do you happen to know who took  
7 this picture?

8 WITNESS ANDERSON: No, I do not.

9 MS. WEAVER: Anyone else on the panel?

10 WITNESS FEILER: I believe it was Toz Soto, but  
11 I'm not sure.

12 MS. WEAVER: Okay. And that's based on him  
13 having sent the email or something more specific?

14 WITNESS FEILER: Conversations with him that --  
15 that he'd told me he'd documented that fish kill.

16 MS. WEAVER: Okay. And do you know who? I  
17 mean, I'm an attorney, so fish all kind of look the same  
18 to me. I should let you talk though.

19 WITNESS MURANO: I was just going to reference  
20 as to why we thought -- we believe it was Toz Soto.  
21 There's another photo that he included in his email that  
22 shows him present during the same time when this fish was  
23 pictured.

24 MS. WEAVER: Okay, thank you.

25 Who identified this fish as a Coho salmon?



1 WITNESS ANDERSON: I believe that was Toz Soto.

2 MS. WEAVER: Okay. So none of you, other than  
3 someone reporting to Water Rights staff that this is in  
4 fact a Coho salmon, none of you -- have any of you  
5 independently confirmed that applying your knowledge as  
6 environmental scientists?

7 WITNESS ANDERSON: Yes. I've relied on the  
8 other individuals in the Division of Water Rights to help  
9 educate me on identifying fish species, those individuals  
10 working in the Public Trust Unit. And the salmonids such  
11 as the Coho here have parr marks on them, which are an  
12 indication, which be -- can be used as an indication of  
13 the type of species. The parr marks are those oval,  
14 darker coloration that almost kind of look like stripes  
15 on the fish.

16 MS. WEAVER: Okay. Are there other fish  
17 species in this kind of Northern California freshwater  
18 ecosystem that could have these kinds of markings that we  
19 can see in the photograph or would that be unique to  
20 salmonids or to Coho, specifically?

21 WITNESS ANDERSON: These specific -- parr marks  
22 in the -- that are specific to Coho salmon.

23 MS. WEAVER: Okay. And so that's based on your  
24 --

25 WITNESS ANDERSON: That's based on using --

1 NOAA had a chart that I found online that showed  
2 steelhead, Coho and Chinook salmon; all of which I think  
3 are the salmonids that you're going to find in this  
4 stretch of the Klamath River. And you use, looking at  
5 that diagram and comparing the diagram to the fish, and  
6 also relying on other more fisherly -- or excuse me,  
7 fishery-educated staff in the Division, they confirmed it  
8 was a Coho salmon.

9 WITNESS FEILER: Red fins are also a good  
10 indicator it's a Coho. You can see the red fins in the  
11 image.

12 MS. WEAVER: Okay. And to the extent that the  
13 panel has testified about things they were told by other  
14 division staff who aren't here and haven't taken the oath  
15 I'll simply note that's hearsay. I want to make sure  
16 we're being fair in giving folks some chance to object.

17 MS. BRENNER: We did file objections as part of  
18 our -- some of the briefing that we did prior to the  
19 hearing, objecting to the numerous amount of hearsay  
20 evidence that's being relied upon in this hearing. And  
21 we continue to object that the hearsay evidence should  
22 not be used as direct evidence against the Coles and  
23 Marble Mountain Ranch.

24 MS. WEAVER: I have no further questions for  
25 the panel.

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RECROSS-EXAMINATION BY

MS. IRBY: Could we please bring up Slide 3 of Skylar Anderson's PowerPoint Presentation?

(Slide 3 uploaded to the screen.)

MS. IRBY: Thank you.

This is a question for Skylar. Could you please explain using this diagram where the flow measurements were taken? There were three that were described.

WITNESS ANDERSON: So the first flow measurement was approximately 50 feet downstream of the point of diversion just below the outfall structure, the first outfall structure. The second location was in between the penstock --

HEARING OFFICER MOORE: Point.

WITNESS ANDERSON: Oh, here. I'll make this easy. So you should -- approximately here. Approximately here.

MS. IRBY: So that was one. And two was right above the penstock?

WITNESS ANDERSON: Yeah, so I'll go in order.

HEARING OFFICER MOORE: We'll let the record show that he's pointing to the red line --

WITNESS ANDERSON: Okay, so --

HEARING OFFICER MOORE: -- which is the

1 diversion ditch.

2 WITNESS ANDERSON: -- yeah, at this location in  
3 the diversion ditch, approximately this location in the  
4 diversion ditch, approximately this location in the  
5 diversion ditch.

6 MS. IRBY: So when you described calculating  
7 conveyance loss are you considering the water that was  
8 consumptively used by the water treatment facility?

9 WITNESS ANDERSON: Yes. I'd also like to kind  
10 of further clarify that the locations that we used were  
11 locations in which there has been structures installed  
12 that are of uniform shape of the channel. They are steel  
13 boxes. So these sites were used, because having a  
14 uniform bottom and also a laminar top section is a  
15 preferable location to take flow measurements.

16 And kind of getting back at your question, the  
17 inspection was done during February, which is the slow  
18 season for the Coles. Diversions to the water treatment  
19 facility are very passive. If I get this correct the  
20 Coles use what they refer to as a schmutzdecke treatment  
21 facility, which is, if I understand that translates to,  
22 slow sand filtration. So water is diverted and passively  
23 will stay in the pipe, go into the diversion tanks, is  
24 filtered through the sand. And as it's filtered and  
25 purified it then flows to other holding tanks that are

1 then used for the drinking water and I think for some  
2 irrigation and some organic vegetables.

3           So it's not like there was a constant rate of  
4 diversion of 2 c -- or of whatever the velocity would be  
5 for the gravity-fed diversion in a two-inch PVC pipe.

6           MS. IRBY: Okay.

7           WITNESS ANDERSON: So for example if the tanks  
8 were full and that, the bottom tanks holding the purified  
9 water, there would be no diversion coming through. So as  
10 they use water it's going to create more space. Then  
11 more is going to -- slowly would filter through the sand,  
12 add to the tanks.

13           MS. IRBY: So at the time of your inspection  
14 you felt that there was not a large amount of flow going  
15 to the water treatment facility?

16           WITNESS ANDERSON: Yes. And I also felt that  
17 taking stream velocity measurements in the engineered  
18 locations would have gave a more accurate flow velocity  
19 measurement than taking them in the channel that's going  
20 to have other variables such as the bottom's not going to  
21 be consistent. And there could be other anomalies such  
22 as stones or just uneven variations in the channel will  
23 lead to less accurate depths -- or excuse me, to less  
24 accurate velocity measurements.

25           MS. IRBY: Right. I'm concerned only about the

1 calculation of conveyance loss. And it sounds like you  
2 feel confident that subtracting .1 from .2 at the time of  
3 inspection would accurately assess conveyance loss.

4 WITNESS ANDERSON: Could you clarify the 0.1 to  
5 0.2?

6 MS. IRBY: The flow measurement taken near the  
7 POD from the --

8 WITNESS ANDERSON: I believe the flow  
9 measurement, if my recollection is correct, it was 2.23  
10 at the first location and it was 1.63 at the second  
11 location. That was for a conveyance loss of 0.6. The  
12 application file also indicates numerous inspections in  
13 which other Division staff went out and conducted stream  
14 flows. And they documented the same conveyance losses.  
15 Actually, to be fair, theirs was 0.5.

16 I'd also like to add that the applications  
17 submitted by the Youngs identified that there was a known  
18 conveyance loss of 0.5 from the POD. Further, that's why  
19 3 cfs is required, and as noted earlier the penstock has  
20 a capacity of 2.5. So the need for diverting 3 is  
21 because the loss is known and is well- documented in the  
22 file.

23 MS. IRBY: Okay.

24 WITNESS ANDERSON: At different times of year,  
25 yeah, you -- the loss could be different, could

1 fluctuate.

2 MS. IRBY: Thank you.

3 I have one question for Mr. Feiler. In your  
4 written testimony you describe that your inspection was  
5 incomplete. Could you explain in what way?

6 WITNESS FEILER: Can you reference where I  
7 stated that in my testimony, please?

8 MS. IRBY: Yes. It was Number 25 on Page 8.

9 WITNESS FEILER: Yes, I can clarify that. So  
10 I'm there for a limited amount of time in one day doing  
11 an inspection and basically, as a Regional Board staff,  
12 looking for compliance with the Porter-Cologne Water  
13 Quality Control Act we regulate the discharges of waste.  
14 So what I'm doing is I'm looking at the diversion works  
15 in the ranch and I'm looking for places where waste can  
16 be getting into waters.

17 And so as you progress through your inspection  
18 basically when I start out I walk the ditch and I look at  
19 it. And I say, okay. There's some problems here, here  
20 and here. And then as I return from the -- on the ditch  
21 I identify and document each one of those spots. But  
22 it's only a -- limited in terms of -- it's not  
23 exhaustive, as I did not walk over the entire ranch. Nor  
24 did I walk up and down Stanshaw Creek on that day,  
25 because of the time limitations for travel and

1 inspection.

2 MS. IRBY: Did you observe the entire ditch?

3 WITNESS FEILER: So it's not physically  
4 possible, really, to walk the penstock. But I've looked  
5 at most of the rest of the ditch, yes.

6 MS. IRBY: Okay. Thank you.

7 HEARING OFFICER MOORE: Go ahead.

8 RECROSS-EXAMINATION BY

9 MR. BUCKMAN: Mike Buckman, I have a question  
10 for Mr. Murano. On Page 12 of 16 of the PDF of your  
11 testimony, which is WR-7, you cite to an exhibit,  
12 Prosecution Team Exhibit WR-200. Can you please clarify  
13 what exhibit you're talking about? It -- it appears from  
14 a review of it, it might WR-193, because there is no WR-  
15 200.

16 MR. PETRUZZELLI: We initially had that exhibit  
17 numbered as 200 and it was later re-numbered to 193.

18 MS. WEAVER: So we've -- we have one more  
19 question.

20 So you showed us on the screen where the  
21 measurement points were. It's a bit of a challenge for  
22 our court reporter to write that down, so we wanted you  
23 to -- we've made a map based on the slide. We wanted you  
24 to confirm whether or not this represents the points you  
25 showed us. And so let me bring it down to you.



1                   WITNESS ANDERSON: Well I don't know if it'd  
2 help, but in my slideshow I had a satellite image that  
3 showed the locations of where the stream velocity was  
4 taken. And it also has text boxes, which show the  
5 measurements. If you pull up my presentation and just  
6 maybe zoom out so you can see all the slides. Just  
7 actually I can probably go through my testimony and  
8 provide you the slide number.

9                   MS. WEAVER: It's Slide 17, it looks like. So,  
10 I mean, that's the actual -- it looks like aerial or  
11 satellite imagery. But --

12                   WITNESS ANDERSON: Yeah. If you prefer to come  
13 down with the map. Whatever's easiest.

14                   MS. WEAVER: Yeah.

15                   WITNESS ANDERSON: Yeah. This is a fair  
16 approximation of the locations of the stream velocity  
17 measurements.

18                   HEARING OFFICER MOORE: Great. Well thank you  
19 for that. That's in the name of clarity and I'd --

20                   MS. WEAVER: So just to be clear, to the best  
21 of your recollection, those are the points you indicated  
22 in response to Ms. Irby's question?

23                   WITNESS ANDERSON: Yes.

24                   MS. BRENNER: I just want to take a look at it  
25 and --

1 MS. WEAVER: Absolutely.

2 MS. BRENNER: -- and indicate -- can we get a  
3 copy of it?

4 MS. WEAVER: So I'm going to propose that this  
5 be entered as a staff exhibit. And then everyone will be  
6 able to refer to it. And then I just note that this is -  
7 - this is only -- this is indicating the points that Mr.  
8 Anderson showed us in response to our questions.

9 MS. BRENNER: Correct.

10 WITNESS ANDERSON: Yes, you're -- okay.

11 MR. PETRUZZELLI: And the Prosecution Team  
12 would also like to state that the diagram was intended  
13 for demonstrative purposes and it's not drawn to a  
14 precise scale. So --

15 HEARING OFFICER MOORE: Understood.

16 MR. PETRUZZELLI: Yes.

17 HEARING OFFICER MOORE: So schematic, in  
18 nature.

19 MS. WEAVER: Mr. Anderson are you able to  
20 confirm, since you've taken the oath, that this schematic  
21 is not to scale, it's demonstrative?

22 WITNESS ANDERSON: Yes.

23 MS. WEAVER: No objection to your Counsel's  
24 characterization?

25 WITNESS ANDERSON: No.

1 MS. WEAVER: Okay.

2 HEARING OFFICER MOORE: All right, very good.

3 Anything further from staff? No. Okay.

4 So at this time I would like to request the  
5 Prosecution Team offer exhibits into evidence.

6 MR. PETRUZZELLI: At this time the Prosecution  
7 Team does offer its exhibits and case into evidence.

8 HEARING OFFICER MOORE: And do the parties have  
9 any objections?

10 MS. BRENNER: Yes.

11 HEARING OFFICER MOORE: And okay, so -- oh yes.  
12 Please.

13 MS. BRENNER: I'll just continue to reiterate  
14 my objections as to hearsay evidence and any evidence  
15 referencing pre-'14 water rights or any challenge to the  
16 pre-'14 water rights.

17 HEARING OFFICER MOORE: Okay, so noted. We  
18 have addressed those issues in our Ruling Letter of  
19 October 31st.

20 Okay. So the exhibits are entered into the  
21 record.

22 (State Water Resources Control Board, Division  
23 Of Water Rights Prosecution Team Exhibits WR-1  
24 through WR-193 moved and received into  
25 evidence.)

1 HEARING OFFICER MOORE: And thank you to the  
2 witnesses. And we are now completed with this part of  
3 the hearing. And you're free to go.

4 And we'll now hear Klamath Riverkeeper's  
5 opening statement and direct testimony, followed by  
6 cross-examination in the order I've previously  
7 identified. Redirect and re-cross examination of the  
8 witnesses then may then be permitted.

9 MS. BRENNER: Oh, wait.

10 HEARING OFFICER MOORE: Counselor?

11 MS. BRENNER: Before we get started I just want  
12 to note that I'm not sure how to handle this testimony.  
13 There is no testimony, so perhaps this is a policy  
14 statement? But without any witness testimony submitted,  
15 no witnesses, my understanding is you're not going to  
16 call any witnesses today. Correct?

17 MR. KIBEL: We'll be making it -- it's on --  
18 we're going to be making an opening statement to clarify  
19 and identify the main concerns of Klamath Riverkeeper in  
20 connection with this hearing. And to highlight those  
21 aspects of the written and oral evidence that's been  
22 submitted that we believe authorize the Water Board to  
23 curtail the diversions.

24 MS. BRENNER: The written and -- testimony from  
25 who?

1 MR. KIBEL: Of all the parties.

2 MS. BRENNER: Okay. So this doesn't provide an  
3 opportunity for me to cross-examine anybody with regard  
4 to the allegations or argument that's being made. And  
5 again, I'd suggest perhaps this is a policy statement,  
6 but it can't be accepted as anything other than that.

7 MS. WEAVER: It would be helpful if you could  
8 clarify this. Are you planning to present argument or  
9 are you proposing to testify as to matters of fact?

10 MR. KIBEL: We're not proposing to present  
11 argument, but we are proposing to do an opening statement  
12 that clarifies and highlights the concerns of Klamath  
13 Riverkeeper as it relates to the matters of this hearing  
14 in the same way that attorneys representing the  
15 Prosecution Team or representing the Marble Mountain  
16 Ranch have presented opening statements. And I don't  
17 think there was any objection to those being provided.

18 MS. BRENNER: And as indicated at the beginning  
19 of the hearing yesterday the opening statements is set  
20 forth, so that you can provide an opportunity of what's  
21 going to be presented as evidence, not just an open  
22 statement.

23 So again, if we want to make a policy  
24 statement, that's one thing. But if you're going to say  
25 that you've got an opening statement then you usually

1 rely on particular evidence that allows someone like the  
2 Coles to cross-examine. Otherwise, you have a very one-  
3 sided statement. Quite prejudicial, I might add.

4 HEARING OFFICER MOORE: Well, we've indicated  
5 that there'll be opportunity for cross-examination.

6 HEARING OFFICER MOORE: Okay. All right.

7 MS. WEAVER: Give us one second.

8 MR. KIBEL: Okay. I will add that I'm  
9 certainly available to answer any questions relating to  
10 the opening statement, that it's not a general policy  
11 statement. It's specific to the matters and evidence for  
12 this hearing.

13 HEARING OFFICER MOORE: Okay. We're going to  
14 confer on the matter. Thank you for bringing it to our  
15 attention.

16 (Whereupon, Hearing Team Panel confers in  
17 sidebar.)

18 MR. KIBEL: If possible, I would appreciate the  
19 opportunity to make two comments. But I can wait until  
20 after if that's appropriate.

21 HEARING OFFICER MOORE: So this -- yeah. There  
22 -- this has created some confusion. And so we want to be  
23 clear or give you the opportunity to make an opening  
24 statement. But if you -- but anything you -- things that  
25 are subject to cross, you know, you need to be able to --

1 you have to take the oath. And then be ready to -- to  
2 take questioning.

3           So I'm uncomfortable, because we're conflating  
4 a couple of roles here. And so I'm going to ask Legal  
5 Counsel to explain your choices at this point.

6           MR. KIBEL: Sure.

7           MS. WEAVER: So there -- and then this is  
8 something that we've kind of been wondering about too and  
9 are glad to have the opportunity to resolve it. You have  
10 the option of either presenting a policy statement, which  
11 would just be "Argument."

12           If you wanted to submit testimony or move  
13 exhibits into the record you would need to take the oath.  
14 You would need to give some foundation for your exhibits.  
15 And then you would be subject to cross-examination by the  
16 parties. If you just want to give a policy statement  
17 that's one of your choices, but then you wouldn't be able  
18 to introduce your other exhibits, because you'd have no  
19 one testifying to substantiate them.

20           And then, you know, we need to give all the  
21 parties the opportunity for cross --

22           MR. KIBEL: Right.

23           MS. WEAVER: -- on factual matters.

24           MR. KIBEL: Okay. Thank you. The only exhibit  
25 that I will be presenting is the PowerPoint slides, which

1 I've already given a copy of. So there's going to be no  
2 other introduction of exhibits beyond that. But I would  
3 like to make myself available to answer any questions, so  
4 I am prepared to take the oath and do that as a witness  
5 if that would enable that.

6 Two other just quick comments I just wanted to  
7 pass along. And I appreciate your thoughtfulness in  
8 approaching the situation. The first is that this issue  
9 was first brought to my attention, this objection, about  
10 ten minutes ago. And it seems to me that it was evident  
11 that we hadn't -- we didn't have any witnesses that were  
12 being called. That's been known for some time. I do  
13 feel that raising it on such short notice by Marble  
14 Mountain Ranch is -- I have some questions about that in  
15 terms of timing. But also, when it was discussed with me  
16 orally the objection was that it was going to be legal  
17 argument. And it seems to me that if the objection is  
18 I'm a lawyer and therefore I can't make an opening  
19 statement, but if I happen to be the Executive Director  
20 of Klamath Riverkeeper, it's fine. That doesn't seem  
21 appropriate.

22 MS. WEAVER: So I don't see anything about you  
23 being an attorney that would disqualify you from  
24 testifying as a witness if that's what makes sense  
25 between you and your clients. It's just a matter of you



1 know, look, we have two clear paths. Either you give  
2 legal arguments. Or you give testimony under oath and  
3 are cross-examined. And, you know, we can't go up the  
4 middle.

5 MR. KIBEL: Uh-huh, so I'm happy to go with the  
6 second. Let me, if I could have just a minute to confer  
7 with my client, but I think the section -- second option  
8 sounds better.

9 MS. WEAVER: Okay. And if we could just  
10 scroll down to the MMR -- and I don't mean MMR, I mean  
11 Klamath Riverkeeper?

12 COURT REPORTER: K-KR-KR?

13 MS. WEAVER: To many "Ks" and "Rs." You had  
14 submitted other documents. I mean, we -- it looks like  
15 we numbered these as exhibits and posted them.

16 MR. KIBEL: Yes, prior to the hearing.

17 MS. WEAVER: So if you want these to be  
18 evidence in the record then you would need to put on a  
19 witness. You can authenticate them and provide  
20 foundation for them and then that witness would be  
21 subject to cross-examination.

22 If you are -- and if you don't want these to be  
23 in the record or you're indifferent then you wouldn't  
24 need to put on a witness. But we're -- we'd have to  
25 strike these, I think, if there isn't someone testifying

1 for them.

2 MR. KIBEL: Okay. May I consult with my  
3 client?

4 MS. WEAVER: Absolutely.

5 MR. KIBEL: Okay.

6 MS. BRENNER: I'd just like to raise a couple  
7 of points.

8 The idea is that there would be written  
9 testimony submitted ahead of time, so that we have an  
10 opportunity to see what that testimony is. And then it's  
11 a summary here. I'm not aware of a PowerPoint being  
12 submitted as an exhibit. All I recall is -- is a --  
13 basically a legal brief, what amounts to a legal brief  
14 being submitted. So I was confused. I wasn't sure what  
15 was going on, assumed it was just something along the  
16 lines of a policy statement.

17 So again, it's very unfair and prejudicial  
18 against Marble Mountain to allow all of a sudden a  
19 witness to come up that has never been identified and we  
20 don't have any written testimony submitted. So I'm going  
21 to object and indicate that that is quite prejudicial and  
22 should not be allowed.

23 HEARING OFFICER MOORE: Okay. Well, we're  
24 going to take that under consideration right now.

25 MR. KIBEL: Yeah.

1 HEARING OFFICER MOORE: Hold on.

2 MR. KIBEL: Can I make, sorry, just one  
3 clarification?

4 HEARING OFFICER MOORE: Just -- just not yet,  
5 please.

6 MR. KIBEL: Okay.

7 (Whereupon, Hearing Team Panel confers in  
8 sidebar.)

9 MS. BRENNER: I just want to add another point  
10 that a large portion of these arguments are relative to  
11 challenging the pre-1914 Water Rights, which are not at  
12 issue in this hearing as you have ruled.

13 HEARING OFFICER MOORE: Right. Yes, we are not  
14 considering those aspects.

15 (Continued pause while Hearing Team Panel  
16 confers in sidebar.)

17 HEARING OFFICER MOORE: Okay. I'm going to  
18 sustain the objection about submitting -- about the  
19 PowerPoint, because it wasn't given in advance. And the  
20 parties weren't given the privilege of reviewing it  
21 before the hearing. But you did provide exhibits and the  
22 parties have been aware of those, so the PowerPoint is  
23 not accepted.

24 And at this point you've indicated you want to  
25 take the second path and testify under oath. And so at

1 this point will you please stand -- and you are -- and  
2 raise your right hand?

3 MS. WEAVER: He can do an opening statement  
4 too.

5 HEARING OFFICER MOORE: And you may do an  
6 opening statement, too.

7 MR. KIBEL: Okay. Yes.

8 PAUL KIBEL

9 called as a witness for Klamath Riverkeeper,  
10 having been previously duly sworn, was examined  
11 and testified further as hereinafter set forth:

12 MR. KIBEL: Yes I do.

13 HEARING OFFICER MOORE: Thank you.

14 MR. KIBEL: My client, Executive Director of  
15 Klamath Riverkeeper, wanted to speak.

16 MR. FISHER: I just want to point out this may  
17 become the same issue with mine. And the Notice of  
18 Intent to Appear, I mean it had a couple of check boxes  
19 and I've spoken with staff about what the different  
20 pathways means, but the way you're explaining the pathway  
21 is not clear from that, so I think it's stemming from  
22 that.

23 My intent is still as landowner, to provide  
24 evidence that can be on record and take the oath.

25 HEARING OFFICER MOORE: Okay. So do you --

1 MR. FISHER: Just as -- just as --

2 HEARING OFFICER MOORE: So do you want to take  
3 the oath?

4 MR. FISHER: When it is my turn to speak. I  
5 want to make sure that we -- this same issue may apply.

6 MS. BRENNER: Again, we have no written  
7 testimony by either one of these people.

8 MR. FISHER: I submitted everything. It's on  
9 the website.

10 MS. BRENNER: You didn't submit any written  
11 testimony.

12 MR. FISHER: My letter is my testimony.

13 MS. BRENNER: It wasn't submitted as such.  
14 It's submitted as an exhibit.

15 MR. FISHER: Well, this --

16 MS. BRENNER: I mean, all the other parties had  
17 to submit their testimony. And this is a summary of  
18 their testimony. Not, all of a sudden, a whole set of  
19 testimony we don't know anything about.

20 HEARING OFFICER MOORE: Yes. And there is some  
21 confusion here. You know, this is not a Board meeting.  
22 This is an evidentiary hearing and you have to provide  
23 your written testimony ahead of time. And there's rules.

24 MR. FISHER: I understand. And Barbara was on  
25 an email chain talking about who was going to get how

1 much time to talk. There are different explanations of  
2 this process.

3 MS. WEAVER: The Hearing Notice and the Board's  
4 regulations and the applicable sections of the Government  
5 Code and the Evidence Code detail the process quite  
6 thoroughly. And we rely on counsel and folks who are  
7 represented by counsel to make themselves aware of these  
8 things.

9 HEARING OFFICER MOORE: Yeah, I think it would  
10 make good sense to take a break at this time. And for  
11 the Hearing Team to confer on these issues. We  
12 appreciate you bringing up the procedural matters. And  
13 we'll take them under consideration at this time.

14 How about just ten minutes sounds?

15 MR. KIBEL: Vice Chair?

16 HEARING OFFICER MOORE: Ten minutes and we'll  
17 return at 11:35. Thank you.

18 (Recess taken at 11:23 a.m.)

19 (Proceedings resumed at 11:40 a.m.)

20 HEARING OFFICER MOORE: Thanks everyone  
21 allowing us a little time to sort through some things.  
22 So I want to try to be as clear as we can.

23 For Mr. Kibel, you can -- you're offered the  
24 opportunity, as all parties are, to give an opening  
25 statement. And then when you're done with that, move

1 over to the -- to witness area to give any witness  
2 testimony that is subject -- that is based on facts and  
3 is subject to cross-examination. And that'll apply to  
4 all the parties and it's something we commonly do in  
5 Water Board hearings. So with that, you're free to make  
6 an opening statement.

7 MR. KIBEL: Thank you very --

8 MS. WEAVER: And I guess, just let me just  
9 quickly clarify that your -- as is explained in the rules  
10 governing this proceeding your testimony as a witness  
11 will be limited to the scope of your brief that we're  
12 accepting as your written testimony. So parties can of  
13 course object if they feel that you're exceeding that  
14 scope.

15 MR. KIBEL: Okay. And thank you very much for  
16 your sort of thoughtful consideration of these issues. I  
17 realize that it was complex. I also just wanted to  
18 mention I did contact Water Board staff in advance about  
19 the PowerPoint and asked about that. And was advised at  
20 that point and time that if I brought three copies and on  
21 disc that I could use it. So I'm just letting you know  
22 that I made efforts to try and deal with that.

23 Okay. So a core objective admission of Klamath  
24 Riverkeeper is focused on the maintenance and restoration  
25 of salmon and steelhead fisheries in the Klamath as it

1 relates to tribes, as it relates to commercial fishermen,  
2 as it relates to recreational fishermen. In the interest  
3 of time I'm going to avoid covering what is largely  
4 already set forth in the written materials. And really  
5 limit myself to clarifications that relate to some of the  
6 written testimony that was submitted by others in  
7 connection in the hearing, particularly as it relates to  
8 submissions by Marble Mountain Ranch.

9           So I can't use the PowerPoint that I submitted,  
10 that's okay?

11           HEARING OFFICER MOORE: You can use it, just  
12 like any person can use a pad of paper that --

13           MR. KIBEL: Okay.

14           HEARING OFFICER MOORE: -- has summary points.  
15 But we're not going to present it as -- and I sustained  
16 the objection, because of --

17           MR. KIBEL: I can proceed without it.

18           So there were sort of five main concerns that  
19 Klamath Riverkeeper was interested in covering for the  
20 purpose of this hearing. The first was to sort of  
21 highlight the issue of connectivity as it relates to  
22 Stanshaw Creek as a cold water refuge. The other issues  
23 relate to reasonable use, public trust, economic  
24 feasibility and the relationship between reasonable use  
25 evaluations and how they relate to the lawfulness of



1 permitted uses, which was set forth in the slide. Okay.

2           So some of the written and oral testimony that  
3 was submitted, particularly on behalf of Marble Mountain  
4 Ranch, focused quite a bit on the extent to which  
5 Stanshaw Creek does or does not serve as spawning grounds  
6 for steelhead and for salmon. And the view of Klamath  
7 Riverkeeper is that this focus on Stanshaw Creek as a  
8 spawning ground is somewhat misplaced, because the true  
9 value of Stanshaw Creek doesn't hinge simply on its role  
10 as a spawning ground.

11           As the Prosecution Team and as NFMS has  
12 testified, for salmon and steelhead, they're cold water  
13 fisheries. And as cold water fisheries, when  
14 temperatures move into the high '50s they begin to  
15 struggle; when they're above 60 degrees they're usually  
16 dead. So the importance of Stanshaw Creek is primarily  
17 as a cold water refuge for salmon and steelhead that are  
18 migrating upstream and downstream on the Klamath River,  
19 so that when temperatures get hot they have a place that  
20 they can go to where they're safe.

21           And the reason Stanshaw Creek is unique has to  
22 do with the fact that nearly the entire length they have  
23 a very dense canopy of trees and a vegetation that keep  
24 water temperatures particularly cool in Stanshaw Creek,  
25 even when they're warmer. So we wanted to really

1 highlight, Klamath Riverkeeper, this issue of  
2 connectivity and stay focused on that more so somewhat  
3 than the spawning issues.

4           The second point relates to reasonable use,  
5 which obviously is within the scope of what we're looking  
6 at. A significant amount of testimony, both written and  
7 oral, was submitted related to the condition of the  
8 offstream earthen ditch as it related to sediment and  
9 water quality. We heard quite a bit of testimony about  
10 that this morning. What Klamath Riverkeeper wanted to  
11 emphasize is that the condition of the offstream earthen  
12 ditch, while important, is really not at the heart of the  
13 reasonable use issues that are for the hearing today.

14           This is because with reasonable use provisions,  
15 yes they relate to offstream conditions, transporting  
16 usage, so that the ditch is within the scope of them.  
17 But reasonable use also relates to the instream impacts  
18 of diversions. And that the primary focus and concern  
19 related to the diversions on Stanshee -- Stanshaw Creek  
20 by Marble Mountain Ranch really relates to the instream  
21 impacts, in particular these issues of connectivity in  
22 their impacts on steelhead and their impacts on salmon.

23           There is a long line of decisions, both by the  
24 Water Board and by the California courts, that have  
25 focused in on these instream impacts of reasonable use.

1 I'm just going to mention a couple of them.

2           One, 1986, the "Racanelli decision" dealt with  
3 the issue of diversions' impact on salinity levels. And  
4 the California Court of Appeal upheld reliance on  
5 reasonable use to deal with the instream salinity impacts  
6 of diversion.

7           1980, California Supreme Court rules on  
8 *Environmental Defense Fund versus East Bay Municipal*  
9 *Utility District* about whether alternative points of  
10 diversion could reduce the impacts on salmon fisheries in  
11 the American River, a case that I think is particularly  
12 pertinent to our situation with Stanshaw Creek.

13           And then finally we've had a set of cases  
14 dealing with frost protection and direct frost protection  
15 diversions and their impacts on downstream users and  
16 their impacts on salmon fisheries. This is the 1976  
17 *Forni* case and the 19 -- 2014 *Light* case. Cites for this  
18 were provided in the PowerPoint, which I've submitted  
19 hardcopies of. I would be showing them right now if I  
20 could.

21           So I wanted to highlight this, because it  
22 seemed like some of the testimony and the evidence was  
23 really focusing in on the ditch and the offstream  
24 impacts. And that in terms of understanding whether the  
25 Water Board has an appropriate basis to move forward with

1 the curtailments that are under consideration, the  
2 diversion curtailments, there is a long and consistent  
3 line of cases that deal specifically just with instream  
4 impacts. And we wanted to highlight that.

5           The third point relates to the public trust  
6 issues that are also mentioned in the notice of the  
7 hearing, so therefore within the scope of it. Some of  
8 the written testimony submitted for this hearing  
9 suggested that the public trust, or the public trust  
10 doctrine, only applies to post-1914 appropriative water  
11 rights. Klamath Riverkeeper wanted to emphasize that it  
12 believes that statement is incorrect. The *National*  
13 *Audubon* case -- the seminal, sort of California Supreme  
14 Court case -- the holding there was that all diversions  
15 from navigable waters or tributaries to navigable waters  
16 are subject to the public trust. Yes, the facts of that  
17 case dealt with a post-1914 appropriative water right,  
18 but there's nothing in the holding of that case that in  
19 any way limited it.

20           And subsequent cases have borne that out. Most  
21 recently, 2014, we had a decision in *Environmental Law*  
22 *Foundation versus State Water Board* over the Scott River.  
23 This in -- this was a case that involved groundwater  
24 pumping, not even surface water diversions, groundwater  
25 pumping that was impacting flows in the Scott River and

1 salmon and steelhead fisheries in the Scott River. The  
2 court did not hesitate to apply *National Audubon* and the  
3 public trust and find that even that groundwater pumping,  
4 which is a --not even a surface water right, was  
5 implicated.

6           So we just wanted, Klamath Riverkeeper, to  
7 emphasize that that very narrow and restrictive reading  
8 of *National Audubon*, suggesting that the public trust  
9 only applies to post-1914 appropriative water rights is  
10 really -- has no foundation and law is inconsistent with  
11 the cases that are out there.

12           The next issue -- I will just keep moving  
13 forward -- relates to the question of economic  
14 feasibility, which is obviously very, very important for  
15 all the parties concerned, including Marble Mountain.  
16 And so far there's been considerable testimony and  
17 discussion over the costs associated with arranging for  
18 return flow. And that evidence and that testimony has  
19 been framed as if the costs are deemed excessive. Or  
20 that that really goes to whether it's economically  
21 feasible to move forward with some of the curtailments or  
22 recommendations.

23           In the NFMS report what Klamath Riverkeeper  
24 wanted to emphasize is that -- that organization's view  
25 is that this focus on the costs associated with return

1 flow is in fact somewhat misplaced. Because the real  
2 issue in terms of the impacts on Marble Mountain Ranch is  
3 their need for a supply of electricity. They need a  
4 power source and they currently rely on the current  
5 configuration for that power source.

6           So as Klamath Riverkeeper views this the  
7 appropriate inquiry regarding whether it's feasible  
8 economically is whether or not there are economically  
9 feasible alternative ways for Marble Mountain Ranch to  
10 maintain the necessary electricity supply. And there are  
11 a host of alternative arrangements out there that don't  
12 necessarily involve return flow at all. And we simply --  
13 we mentioned some of these in the written materials that  
14 we submitted. But one is to move the point of diversion  
15 further upstream, so that the flows for generating the  
16 hydropower return to the watershed naturally. You  
17 wouldn't need to arrange return flow if you changed the  
18 point of diversion.

19           Another alternative is to have a more updated,  
20 efficient micro-hydropower system that would require less  
21 water to begin with rather than dealing with this sort of  
22 older, antiquated model that they have.

23           A third alternative is that many people in the  
24 area, in the Klamath Basin, don't rely on hydro at all.  
25 They rely on a combination of diesel generation or some

1 integrated diesel-solar generation. And the costs that  
2 appear to be associated with those alternatives appear to  
3 be well, well below the costs associated with arranging  
4 for return flow.

5           Now, I'm not going to be an expert that can  
6 testify as to -- I'm not -- those costs. But our point  
7 is simply that as though -- as the Water Board and the  
8 Hearing Officer is thinking about the question of  
9 economic feasibility, Marble Mountain Ranch is really  
10 trying to focus on the return-flow issue. We think it  
11 needs to be broader. And it needs to look at whether  
12 there are alternatives.

13           And when you look at the reasonable use and  
14 public trust, State Water Board decisions and cases that  
15 are out there, they've all focused on alternatives,  
16 whether there is an alternative. So you think of --  
17 there's this case and I have a cite to it in my  
18 PowerPoint, but since I can't put it up -- this 1935  
19 *Tulare Irrigation* case, the gopher-drowning case. The  
20 court said, "You don't need -- you don't need to drown  
21 your fields, flood your fields, to manage gophers and  
22 rabbits and other pests, because there are other  
23 alternatives."

24           The *Erickson* case about -- 1971 case - it's  
25 also in my materials, so I did cite to it -- deals with

1 loss of water in an earthen canal to evaporation and  
2 transpiration. The court, in finding that unreasonable  
3 said, "You could put it in a pipe or you could line it."

4           And with the frost diversion cases, which I  
5 already mentioned, the court essentially upheld that  
6 regulation of direct diversions. Because they said, "Why  
7 don't you just get offstream ponds, so you're not  
8 diverting? Why don't you consider that before moving to  
9 direct diversions?"

10           So what Klamath Riverkeeper wanted to emphasize  
11 is that in looking at reasonable use the issue of  
12 available alternatives to meet the needs of the property  
13 owner and the water rights holder has always been a part  
14 of that analysis. So what we're suggesting, looking at  
15 alternative sources of energy supply for electricity, is  
16 very much in line with when -- we're not expanding  
17 reasonable use at all.

18           In terms of public trust the State Water Board  
19 issued a sort of a landmark decision in 1994 -- 1631,  
20 over the Mono Lake cases -- one of the things that they  
21 looked at is they found that to implement what they were  
22 considering there would be an 18 percent reduction for  
23 the Los Angeles Department of Water and Power. The State  
24 Water Board looked at that and said, "You know what?  
25 Between additional water recycling, water efficiency and



1 better groundwater management we're convinced that you  
2 can find a way to make up that 18 percent." And on that  
3 basis they sort of upheld the restriction on diversions.

4 I think that situation with Decision 1631 is  
5 highly analogous to what we're dealing with, with Marble  
6 Mountain Ranch and Stanshaw Creek. Which is that it's  
7 not necessarily the place of the Water Board to order any  
8 landowner how they -- what electric -- what electrical  
9 power system they have. But I do think it's within the  
10 scope of the Water Board to say if we're trying to  
11 consider what level of curtailments are there feasible  
12 alternatives to electricity that mean that the  
13 curtailments that you want to do to protect the fish are  
14 feasible? I think Decision 1631 is very much on point.

15 And one last, and then I'll sit down and ask  
16 what -- hear what questions you have, in the pre-hearing  
17 ruling there was an objection that was made to certain  
18 written testimony related to the pre-1914 appropriative  
19 water right. And the Vice Chair or the Hearing Officer  
20 agreed, and I think correctly, that for purposes of this  
21 hearing a finding could be made that the diversions are  
22 unreasonable. Because in particular of their impacts on  
23 -- instream impacts on the fisheries without making any  
24 finding whatsoever as to whether or not the uses of the  
25 water are consistent with the pre-1914 right. And I

1 believe that is absolutely correct. And I think that  
2 ruling was in response to evidence that Klamath  
3 Riverkeeper had submitted, suggesting that the 1867  
4 Notice only listed mining and agriculture and didn't  
5 include offstream hydro.

6 But what Klamath Riverkeeper just wanted to  
7 note, for the record, is the fact that for purposes of  
8 this hearing an unreasonableness finding could be made  
9 without getting into the question of the lawfulness of  
10 the uses. I think that is absolutely correct. The  
11 question of whether or not it's lawful does bear on the  
12 question of unreasonableness.

13 And I wanted to just explain as a closing point  
14 why. And it relates specifically to a case called  
15 *Orchard v. White*, which I have on my PowerPoint slide and  
16 I'm happy to give a cite to, this is a California Court  
17 of Appeal Case, 1950. Very traditional reasonable use  
18 fact pattern. Two farmers irrigating their lands using  
19 pumped groundwater. The groundwater table is going down.  
20 And one overlying farmer sues another farmer saying, "I  
21 think your pumping is excessive and is unreasonable."

22 But there was a wrinkle in this case. The  
23 wrinkle was that the defendant, one of the farmers, had a  
24 pipeline installed and was taking the water off of the  
25 overlying properties and using it on non-overlying

1 parcels. So in addressing the reasonable use question,  
2 and I'm happy to give you the cite for *Orchard v. White*  
3 if you want it, the court first looked at whether the use  
4 of the pumped groundwater was lawful on the non-overlying  
5 parcels. And the court actually said in terms of how it  
6 framed its reasonable use analysis -- and I'll quote from  
7 the case and this is all in the PowerPoint:

8           "An owner or any other person having a legal  
9 right to surface or groundwater may take only such  
10 amounts as he reasonably needs."

11           It's that focus on the legal right that in  
12 *Orchard v. White* there is an example of the court not  
13 actually being -- the court determining that it couldn't  
14 undertake reasonable use analysis as to the amount and  
15 quantity of the pumping without first looking at whether  
16 part of the use was in fact unlawful, because it wasn't  
17 on overlying.

18           I believe and the Klamath Riverkeeper believes  
19 that that holding in *Orchard v. White* is very much on  
20 point for our hearing today. Because we have a situation  
21 where some of the diversions for Marble Mountain Ranch  
22 are being used -- a significant portion, most of them --  
23 for offstream hydropower generation under a pre-1914  
24 appropriative water right. But that pre-1914  
25 appropriative water right doesn't list offstream hydro

1 use. It's limited to mining.

2           So I'll leave it up to the Hearing Officer to  
3 decide how to proceed, but the point we wanted to make is  
4 it seemed that in some of the written submissions there  
5 was this view that the determinations of unreasonable use  
6 or wasteful use under Section 100 of the Water Code are  
7 somehow completely unrelated to issues of lawfulness.

8           And how we would frame it is it's absolutely  
9 possible to make an unreasonableness determination  
10 without getting into this at all. We agree with that,  
11 but they also are related. They are related. And I  
12 think if you take a look at the *Orchard v. White*  
13 decision. You'll sort of see an example of how the  
14 reasonable use inquiry and the evaluation of whether or  
15 not it's a permitted use in certain situations -- and I  
16 think it's the case in this one -- have a connection.

17           So with that I am happy to take a chair and  
18 answer questions. Once again, just to clarify, I am not  
19 here as an expert for the solar industry or the diesel  
20 generator industry, so if there are questions relating to  
21 those matters -- those exhibits, I'm not going to be in a  
22 position to answer them.

23           Okay. Thank you.

24           HEARING OFFICER MOORE: All right. Thank you,  
25 Mr. Kibel.

1 MR. KIBEL: Should I sit?

2 HEARING OFFICER MOORE: Sure. Thank you.

3 Maybe -- or can you grab your name tag, because you're on  
4 video and audio?

5 MR. KIBEL: Yes.

6 HEARING OFFICER MOORE: Thank you.

7 MR. KIBEL: Thank you very much.

8 HEARING OFFICER MOORE: Okay, so that concludes  
9 the opening statement. And Klamath Riverkeeper is  
10 available for cross-examination.

11 First, or --

12 (Whereupon, Hearing Team Panel confers in  
13 sidebar.)

14 HEARING OFFICER MOORE: -- first, yeah anything  
15 you would call direct testimony at this point?

16 MR. KIBEL: No.

17 HEARING OFFICER MOORE: Yeah, I didn't think  
18 so.

19 So first offer for questioning is Division of  
20 Water Rights Prosecution Team. Do you have any  
21 questions?

22 Second, Marble Mountain Ranch. Do you have any  
23 questions for Mr. Kibel?

24 MS. BRENNER: You don't need to -- I'll only be  
25 here a minute. I don't have any questions. I'm going to

1 go ahead and make a motion and object to this as  
2 testimony. This was all legal argument and no evidence  
3 was submitted. And request that all exhibits referenced  
4 and his submittal, that Klamath Riverkeeper's submittal,  
5 be stricken from the record.

6 MR. KIBEL: May I respond to just one of those  
7 points about the exhibits?

8 HEARING OFFICER MOORE: Go ahead.

9 MR. KIBEL: After the written testimony was  
10 submitted there were objections filed by Marble Mountain  
11 Ranch to those same exhibits on hearsay grounds, which  
12 were overruled by the Hearing Officer. So it feels like  
13 this objection actually, which appears to be sort of a  
14 hearsay objection, was already submitted and ruled upon.

15 HEARING OFFICER MOORE: Yeah. And -- and I  
16 thought I was trying to be clear to be -- or Counsel was  
17 clear that you can object to anything that you believe is  
18 outside of the written products that were submitted and  
19 were accepted by me in this hearing.

20 MS. BRENNER: Well, the entire statement or  
21 testimony or whatever you're going to call it was legal  
22 argument. There's nothing. There's no testimony,  
23 there's no evidence referencing those exhibits, there's  
24 nothing about those exhibits. They've been submitted  
25 without any testimony associated with them. So not only

1 are they hearsay, but they're not authenticated, they're  
2 not -- they're not -- there's nothing, no testimony about  
3 them, other than they're just being submitted.

4 HEARING OFFICER MOORE: That's -- okay.

5 MR. KIBEL: Yeah. Amongst the exhibits that we  
6 submitted was a brief prepared by me that outlined a lot  
7 of these legal issues. And most of the issues that I  
8 spoke to today in my remarks related to that exhibit,  
9 which was already submitted.

10 MS. BRENNER: But that's not evidence. That's  
11 legal argument, right? So if you want to submit a brief,  
12 but you -- you --

13 MR. KIBEL: It was an exhibit. You can  
14 characterize it how you want to.

15 HEARING OFFICER MOORE: Yeah. And I'm  
16 concerned here we're dealing with semantics. You know,  
17 for the purposes of the Water Board hearings we ruled on  
18 this issue of what had been submitted as exhibits on  
19 October 31st. We overruled your objection in that case.  
20 And so I'm only interested -- if you can point out to  
21 specifics within what his testimony was today that are  
22 not included in the written testimony that he submitted  
23 and we accepted into the record.

24 MS. BRENNER: What I'm referencing are Exhibits  
25 2, 3, 4, 5 and 6 of the Klamath Riverkeepers. And I will

1 just reemphasize my objection as failure to authenticate,  
2 failure to even rely upon it. He indicated that he can't  
3 answer any of the questions regarding solar estimates  
4 that are submitted, so there's nobody to cross-exam with  
5 regard to any of that exhibit. In fact, there's no  
6 testimony referencing any of those exhibits, just a legal  
7 argument.

8 HEARING OFFICER MOORE: Okay. Overruled.

9 MS. BRENNER: So that -- that's fine.

10 HEARING OFFICER MOORE: Thank you. Okay?  
11 We're -- you're welcome to ask any questions, but if you  
12 don't want to that's fine.

13 HEARING OFFICER MOORE: Next, National Marine  
14 Fisheries Service.

15 MR. KEIFER: Nothing.

16 HEARING OFFICER MOORE: Department of Fish and  
17 Wildlife?

18 MR. PUCCINI: No questions.

19 HEARING OFFICER MOORE: Karuk Tribe?

20 MR. HUNT: No questions.

21 HEARING OFFICER MOORE: Old Man River Trust?

22 MR. FISHER: No questions.

23 HEARING OFFICER MOORE: California Sportfishing  
24 Protection Alliance?

25 MR. SHUTES: No questions.



1 HEARING OFFICER MOORE: Pacific Coast  
2 Federation of Fishermen's Associations? No? Okay. And  
3 --

4 MS. WEAVER: It'd be redirect, but there's  
5 nothing.

6 HEARING OFFICER MOORE: So yeah. You didn't  
7 add -- offer any direct, so I don't know about redirect.  
8 And I'm looking at the clock.

9 Let's see, I would just request that Klamath  
10 Riverkeeper offer any exhibits into evidence.

11 MR. KIBEL: Other than the PowerPoint, but I'm  
12 a little confused about its status. I -- I -- the  
13 PowerPoint did provide some citations to cases that I  
14 discussed. And I feel for the benefit of Marble  
15 Mountain's Counsel, in case they want to address it in  
16 their closing post-hearing brief, that I would like that  
17 to be made available, if it can.

18 MS. WEAVER: So your -- your PowerPoint has not  
19 been accepted. We talked about that. I mean, we -- we  
20 have --

21 MR. KIBEL: Okay.

22 MS. WEAVER: -- the three copies that you  
23 handed staff. None of us have looked at them. I was  
24 going to request that when you're done you meet one of us  
25 over there and we'll give them back to you. And then,

1 you know, well whatever you want to do with your three  
2 copies is your business. But we're not --

3 MR. KIBEL: Fair enough.

4 MS. WEAVER: -- accepting them, we haven't  
5 looked at them. They're --

6 MR. KIBEL: Okay.

7 MS. WEAVER: -- we'll get them back to you.

8 MR. KIBEL: One point of clarification. If, as  
9 I know it's common to do sort of a post-hearing closing  
10 brief sometimes, if I wanted to include that PowerPoint  
11 just for the benefit of the parties would that be  
12 permissible? If the answer is no that's fine, but I'm  
13 really doing this so that everyone has the benefit of it.  
14 I don't know what your view on that would be.

15 HEARING OFFICER MOORE: We're going to accept  
16 closing briefs.

17 MR. KIBEL: Okay. So I'll make it available  
18 then.

19 Okay. Thank you very much.

20 HEARING OFFICER MOORE: So at this time, as we  
21 said at the beginning of the proceeding -- wait, do you  
22 guys want to confer?

23 (Whereupon, Hearing Team Panel confers in  
24 sidebar.)

25 HEARING OFFICER MOORE: All right, just as a

1 point of order we've accepted the exhibits as moved by  
2 Klamath Riverkeeper.

3 (Klamath Riverkeepers Exhibits KR-1  
4 through KR-6 were moved and received  
5 into evidence)

6 HEARING OFFICER MOORE: And I wanted to do a  
7 time check. So are we -- if we're at a point where we're  
8 moving on in the proceeding to the Karuk Tribe portion of  
9 the proceeding I was going to suggest that we take a  
10 break. Unless you have a schedule constraint?

11 MR. HUNT: You mean lunch break?

12 HEARING OFFICER MOORE: Yes.

13 MR. HUNT: We don't -- there's no constraint  
14 that requires we don't take a break here now.

15 HEARING OFFICER MOORE: Okay.

16 MR. HUNT: Just for clarification, I didn't do  
17 a great job listening apparently this morning. What is  
18 -- what's the proceeding? Are you asking or -- I'm  
19 expecting that I'm just presenting the testimony of Mr.  
20 Hillman.

21 HEARING OFFICER MOORE: No. As with all of the  
22 parties you're to make your opening statement --

23 MR. HUNT: Okay.

24 HEARING OFFICER MOORE: -- and direct testimony  
25 of Leaf Hillman, followed by any cross-examination.

1                   MR. HUNT:  And then I'll save my other  
2 witnesses for when I would have shown up in the hearing  
3 had it not gone out of order?

4                   HEARING OFFICER MOORE:  That's how we have it  
5 set up.  Yes.

6                   MR. HUNT:  Okay.  Thank you.

7                   HEARING OFFICER MOORE:  Okay.  Well I think  
8 it'd be a great idea to take a lunch break, so let's --  
9 it's 12:10.  Let's resume the proceeding at 1:10.  Thank  
10 you.

11                   (Luncheon recess was taken at 12:11 p.m.)

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1 Tuesday, November 14, 2017

1:11 P.M.

2 P R O C E E D I N G S

3 ---000---

4 HEARING OFFICER MOORE: Okay everybody  
5 according to my clock it's 1:11 so we should probably get  
6 under way. Again, I'm Steven Moore, Hearing Officer for  
7 these proceedings. And the next part of our proceedings,  
8 we'll let Peter get up here. Thank you Peter. Great. We  
9 will now hear the Karuk Tribe's opening statement and  
10 direct testimony of Leaf Hillman, followed by any cross-  
11 examination in the order I previously identified.

12 So Mr. Hunt, please come up.

13 MR. HUNT: Thank you, Vice Chair Moore and the  
14 Hearing Team for addressing this important issue here in  
15 the last -- yesterday, today, tomorrow, hopefully not too  
16 much past that.

17 The Karuk Tribe is participating in this  
18 hearing, because Stanshaw Creek provides critical thermal  
19 refugia and other rearing habitat for Coho salmon and  
20 other species that define their cultural identity.

21 Protecting the cold waters of Stanshaw Creek is  
22 essential to ensuring the Coho salmon have the habitat  
23 they need to complete the rearing portion of their life  
24 cycle before heading out to sea. And for the Karuk,  
25 protecting Stanshaw Creek is tantamount to ensuring a

1 niece or nephew has food on their plate and clothes on  
2 their back, so they can successfully navigate childhood  
3 and adolescence and enter society as a functional adult.  
4 The Karuk people view salmon as a cornerstone of their  
5 culture. And unreasonable diversion from Stanshaw Creek  
6 strips it of its ecological functions and deprives the  
7 ability for salmon to complete its life cycle and return  
8 to the river year after year.

9           In my mind it's unfortunate that much of the  
10 testimony we've heard from Marble Mountain Ranch so far,  
11 pertaining to fish and fish habitat has focused on a  
12 single observation on a single day, such as that from Mr.  
13 Cramer. Or to a single fish kill event. This misses the  
14 point -- sorry, I lost my place -- this misses the point.  
15 The fact of the matter is that Stanshaw Creek cold water  
16 refugia must be considered in the context of the Klamath  
17 ecosystem as a whole and its context in time.

18           We know that Coho and other fish rely on cold  
19 water refugia provided by Stanshaw Creek; in some years  
20 more so than others, depending on annual hydrologic  
21 conditions and weather variations. Although any given  
22 day you may find 1, 50, 100, 200 fish in the pond that  
23 doesn't mean that's how many fish need or use that pond.  
24 The individual fish using the pond one day are not the  
25 same individuals using it -- not necessarily the same

1 individuals using it the next day provided the pond  
2 maintains connectivity to the river.

3           And this depends on Stanshaw Creek and the  
4 Klamath River flows. It depends on both. It's like a  
5 rest stop on I-5, if you could picture it. Although  
6 there may be 50 people at the rest stop at any given time  
7 thousands of people use that rest stop over the course of  
8 the year. Stanshaw Creek and thermal refugia like that  
9 serve that purpose for salmon up and down the Klamath  
10 River.

11           When Stanshaw Creek drop -- flows drop so low  
12 that the pond is no longer connected to the river fish  
13 cannot leave the pond. They may not all die at that  
14 moment, they are great -- though they may not all die at  
15 that moment they are at greater risk of predation. If  
16 temperatures rise they are, in fact, at risk of thermal  
17 shock. If dissolved oxygen drops too low they will  
18 suffocate. That is why maintaining connectivity to the  
19 river as well as the creek is critically important.

20           In recent decades, and especially since the  
21 1964 flood, there has been a loss of this sort of off-  
22 channel pond habitat in the Klamath as a whole.  
23 Following the '64 flood many of these off-channel type  
24 areas were diked and ensured to -- to protect property  
25 interests, so where there may have been many in the past

1 or more than there are now, very few remain. There are  
2 really not that many places like that left on the Klamath  
3 River. And that's why the Karuk are so adamant that this  
4 particular area be protected.

5 To ensure the protection and our participation  
6 in the hearing we also want to just clarify that we're  
7 joining arguments and issues addressed by the Prosecution  
8 Team, the California Deficient -- Department of Fish and  
9 Wildlife, NOAA Fisheries, Old Man River Trust, the  
10 Klamath Riverkeeper, California Sportfishing Protection  
11 Alliance, and the Pacific Coast Federation -- Pacific  
12 Coast Federation of -- I can't remember what it all  
13 stands for --PCFFA.

14 HEARING OFFICER MOORE: Fishermen's  
15 Associations.

16 MR. HUNT: Thank you.

17 HEARING OFFICER MOORE: That was -- that was  
18 the hardest one.

19 MR. HUNT: Somebody will clear it up for us  
20 later. So with that I'd like to turn now for a moment to  
21 the two main legal principles underlying the questions in  
22 this hearing.

23 The first is the reasonable use doctrine.  
24 Under the California Constitution, Article 10, Section 2,  
25 it commands that the waste and unreasonable use or



1 unreasonable method of use of water be prevented. And  
2 that the conservation of such waters -- these are the  
3 waters of the state -- is to be exercised with a view to  
4 the reasonable and beneficial use thereof in the  
5 interests of the people and for the public welfare.

6           It goes on to state that the right to water or  
7 to use of flow of water in or from any natural stream or  
8 water course in this state is, and shall be limited to  
9 such water as be reasonably required for the beneficial  
10 use to be served. And such right does not and shall not  
11 extend to the waste or unreasonable use or unreasonable  
12 method of use or unreasonable method of diversion.

13           Shortly after this was adopted into the  
14 California Constitution, the California Supreme Court  
15 recognized that the rule limiting use to that "reasonably  
16 necessary" applies to all water under whatever right they  
17 may be enjoyed. This applies to 19 -- pre-1914 rights,  
18 such as those asserted by MMR.

19           And the reasonable -- reasonableness of a use  
20 and a method of diversion is not static in time. What  
21 was once reasonable may not be reasonable in light-of-  
22 changed circumstances. Whatever the reasonableness of  
23 MMR's water right may have been in the past, dutiful  
24 application of the doctrine of reasonableness compels a  
25 conclusion that the current use and method of diversion

1 are not reasonable.

2 Pursuant to this constitutional requirement and  
3 the Water Code, Section 275, the State Water Board has  
4 the authority -- and I emphasize from our perspective --  
5 the duty to take action to prevent the misuse of water.

6 The second legal principle relevant to the  
7 hearing is the public trust doctrine. Under the public  
8 trust doctrine the state holds waters of the state in a  
9 public trust for the benefit of state residents. Again,  
10 this is a public -- applicable to the public as a whole  
11 and it's all of our right that the state is responsible  
12 for protecting. The California Supreme Court has held  
13 that public trust doctrine extends to the preservation of  
14 water's function as natural habitat, not just the water  
15 itself.

16 There's a potential conflict here arguably  
17 between public trust and reasonableness, but it's  
18 reconciled as such by the California Supreme Court, which  
19 in the *Audubon* case held that the public trust doctrine  
20 and the doctrine of reasonableness prevent any party from  
21 requiring a vested right to appropriated water in a  
22 manifold harm -- in a manner harmful to the interests  
23 protected by the public trust. They also found that the  
24 state has an affirmative duty to take the public trust  
25 into account in the planning out and allocation of water

1 resources. And to protect public trust uses whenever  
2 feasible.

3           The evidence that's been presented so far and  
4 the evidence that will be presented in written testimony  
5 in the exhibits that have been submitted and oral  
6 testimony at the hearing by all parties demonstrates that  
7 while MMR may have a right to divert up to 3 cfs of water  
8 from Stanshaw Creek this right is not unconditional. The  
9 doctrine of reasonableness and public trust condition the  
10 MMR right to divert the water. And the evidence  
11 demonstrates that such action is required to ensure  
12 Stanshaw Creek and all its public trust resources will be  
13 protected to benefit the people of the state.

14           Specific evidence presented by the Karuk Tribe  
15 today, and maybe tomorrow, will demonstrate that there  
16 has been a harm to the public trust and tribal trust  
17 resources. And this evidence includes the following.  
18 Tribal uses of the Klamath River, which include cultural  
19 uses and fish consumption are impaired by the lack of  
20 suitable habitat to sustain salmon resources on the  
21 Klamath River. The Klamath River is impaired due to  
22 excessively high temperatures. Floodplain thermal  
23 refugia, such as that provided -- such as that provided  
24 by cold water flows from Stanshaw Creek are essential to  
25 successful rearing of Coho salmon, which is an endangered

1 species. Tribal uses of the Klamath River, which include  
2 cultural uses and fish consumption -- I already said  
3 that, I'm sorry. That's what you get for reading. Fish  
4 from throughout the Mid Klamath River use Stanshaw Creek.  
5 And by "Mid Klamath River" we're talking about from the  
6 confluence of the Trinity River to the base of Iron Gate  
7 Dam.

8           The floodplain pool at Stanshaw Creek provides  
9 important year-round habitat for salmonids, including the  
10 Coho salmon. The floodplain pool is naturally occurring.  
11 It does not depend on human intervention to serve its  
12 ecological function. And if anything it is the  
13 diversions by Marble Mountain Ranch that have created the  
14 need for enhancement efforts to ensure that the very  
15 limited water available in the Stanshaw Creek today is  
16 maximized to assist with fish rearing and production.

17           And finally, the tribe and others have  
18 attempted to meet with Marble Mountain Ranch to develop a  
19 collaborative physical solution to this problem. The  
20 evidence shows that that wasn't able to be accomplished.  
21 And in fact from our perspectives action by the State  
22 Board is necessary to ensure that this occurs.

23           As a final point I'd like to note that the harm  
24 to the public trust resource is not, as MMR asserts in  
25 its briefing, insignificant. Marble Mountain Ranch

1 asserts that Stanshaw Creek, including its floodplains,  
2 do not provide significant habitats for salmonids. The  
3 evidence does not support this assertion. They assert  
4 the floodplain pool is not naturally sustainable. Again  
5 the evidence demonstrates this is false. And the  
6 evidence demonstrates that Marble Mountain Ranch  
7 diversions degrades and otherwise harms the public trust  
8 resources.

9           So with that I'd like to bring up Mr. Leaf  
10 Hillman to testify. Thank you.

11           HEARING OFFICER MOORE: Good.

12           Mr. Hillman, please approach. Thank you. We  
13 have a seat for you right here. Can you all see each  
14 other there?

15           WITNESS HILLMAN: Is this fine?

16           HEARING OFFICER MOORE: Yeah. So you can --  
17 you can move over one. Yeah.

18           COURT REPORTER: There you go.

19           HEARING OFFICER MOORE: There we go. We have a  
20 name tag for you there for the Web. There we go. Thank  
21 you. Great.

22           All right, please proceed with the direct  
23 testimony of Leaf Hillman. Thank you.

24           UNIDENTIFIED SPEAKER: (Indiscernible.)

25           HEARING OFFICER MOORE: Oh, thanks for the

1 reminder.

2                   So you are going to do direct testimony, so  
3 we're going to have you take the oath.

4                   Could you please stand and raise your right  
5 hand?

6   LEAF HILLMAN

7                   called as a witness for Karuk Tribe,  
8                   having been previously duly sworn, was examined  
9                   and testified further as hereinafter set forth:

10                   HEARING OFFICER MOORE: Thank you. Please be  
11 seated.

12   DIRECT EXAMINATION BY

13                   MR. HUNT: Good afternoon, Mr. Hillman. Can  
14 you please tell us your role with the Karuk Tribe?

15                   WITNESS HILLMAN: Yes. Thank you for the  
16 opportunity to provide this testimony today. My role  
17 with the Karuk Tribe, I currently serve as the Director  
18 of Natural Resources and Environmental Policy for the  
19 Karuk Tribe; a position that I've held more or less for  
20 the past 30 years. And in addition to that I am an  
21 enrolled tribal member and a hereditary owner of the  
22 sacred White Deerskin Dance, a trained world renewal  
23 priest and a ceremonial leader, as well.

24                   MR. HUNT: Can you describe for us quickly --  
25 I'd -- you mentioned that you were a trained world

1 renewal priest. What does the training for that involve?

2 WITNESS HILLMAN: The training as a world  
3 renewal priest, I began that training as a very young  
4 man. And have served as a practicing world renewal  
5 priest for over 19 years. That includes an annual 10-day  
6 actual period of fasting and going in the -- to the  
7 mountains alone. And similar to a vision questing-type  
8 situation where I'm without food or water for several  
9 days on end and communing with our relatives in the  
10 natural world.

11 MR. HUNT: So can you tell us how long have you  
12 lived in Klamath Basin?

13 WITNESS HILLMAN: Yes. I was born in Orleans  
14 where I currently reside today and I've lived there my  
15 entire life.

16 MR. HUNT: And how long have you been familiar  
17 with Stanshaw Creek?

18 WITNESS HILLMAN: I guess most of my entire  
19 adult life. Yeah, just as soon as I was old enough to be  
20 aware of it. Stanshaw Creek is located near Somes Bar.  
21 And all of our river communities are, you know, small,  
22 tight-knit communities that have not a lot of -- we have  
23 more trees than people. And so I'm very familiar with  
24 the area and I would say intimately familiar with it.

25 MR. HUNT: Can you tell us the importance of

1 the Klamath River to the Karuk culture?

2           WITNESS HILLMAN: Yes. We consider ourselves  
3 not only fix-the-world people, but we consider ourselves  
4 part of a reciprocal community that is depending --  
5 dependent on one other for our survival. And we consider  
6 ourselves as salmon people, as salmon has been one of our  
7 primary subsistence foods for countless generations that  
8 -- in the place where we have our aboriginal roots, so we  
9 say from time immemorial.

10           MR. HUNT: Can you give us a little bit more  
11 information about the importance of this, the salmon in  
12 particular, to the Karuk's culture?

13           WITNESS HILLMAN: The salmon, not only do we  
14 rely on and have relied on the past, continue to rely on  
15 to the extent that salmon still persist in the Basin.  
16 But we continue to rely on salmon for not only our  
17 subsistence use, but also have been used in our  
18 ceremonies as well as our basic identity is tied very  
19 closely to the salmon. And we consider salmon to be a  
20 very close relative of ours and therefore are obliged to  
21 take care of them much as we are obliged to take care of  
22 our relations; human relations as well as our nonhuman  
23 relations, as well.

24           MR. HUNT: Is there any -- or can you explain  
25 the importance of salmon to the health and the economy of



1 the Karuk? And any changes that you've seen attributed  
2 to the availability of salmon?

3 WITNESS HILLMAN: Yes. And unfortunately in my  
4 lifetime I've seen a fairly precipitous decline in the  
5 salmon resources available in the Klamath Basin. And I'm  
6 well familiar with the direct impact that that has on the  
7 health -- and the general health and wellbeing of Karuk  
8 people. And because of our close dependence on salmon we  
9 have -- we've conducted a number of studies dating back  
10 to, I believe the first one was conducted about 1995 that  
11 provides direct correlation between the lack of salmon in  
12 the diets of our tribal members today to the physical  
13 health and the prevalence of heart disease and many other  
14 -- diabetes and other related illnesses that are directly  
15 related to lack of salmon in the diet of contemporary  
16 Karuk people.

17 MR. HUNT: Okay. Thanks for that overview and  
18 background. I'd like to turn specifically to Stanshaw  
19 Creek here and ask you, are you familiar with the  
20 diversion from Stanshaw Creek to the Marble Mountain  
21 Ranch?

22 WITNESS HILLMAN: Yes, I am.

23 MR. HUNT: And what is your opinion of the  
24 impacts of the diversion on these uses of salmon and the  
25 Klamath River generally that you've described? What's

1 the diversion of this impact to those uses?

2           WITNESS HILLMAN: I'm familiar with the  
3 diversion, the ditch diversion. And have, I think, most  
4 recently toured that, I think maybe in 2016 or '15, with  
5 Doug Cole. It's been either '15 or '16, but so I am  
6 familiar with the diversions to the Marble Mountain  
7 Ranch. And I believe that the amount of diversion of  
8 water is -- does have an impact on the stream habitat and  
9 the summer refugia that is provided by that, by Stanshaw  
10 Creek. Particularly at the -- that area at the mouth of  
11 the stream, its confluence with the Klamath River. And I  
12 believe that those impacts, depending on the time of year  
13 can be, you know, severe impacts, I believe.

14           MR. HUNT: And those impacts then translate  
15 into impacts on the tribe's uses and -- of the fish and  
16 the river?

17           WITNESS HILLMAN: Sure. You know, I've -- in  
18 my professional life or capacity as a Natural Resources  
19 Director, we have limited capacity to deal with issues  
20 and certainly have to prioritize on issues that we spend  
21 time and resources trying to address. But, you know,  
22 we've, you know -- Stanshaw Creek and it's -- is a unique  
23 system and that thermal refugia that's provided at the  
24 mouth for juvenile Coho, in particularly -- specifically,  
25 is a unique attribute of that system. And because of

1 that we have, and continue to invest resources in trying  
2 to take care of that place and monitoring that place,  
3 because of its significance to the survival of juvenile  
4 Cohos.

5           It provides one of those unique habitats that  
6 is fairly restricted in the Klamath. There's not --  
7 there are a few places that we call these critical cold  
8 water refugias, and it certainly is one of them.

9           MR. HUNT: So you referenced that you had some  
10 meeting with Mr. Cole. Why did you -- why did you go and  
11 meet with Doug Cole and Marble Mountain Ranch folks?

12           WITNESS HILLMAN: As I believe I've met with  
13 the Coles, I believe that the public -- what do you --  
14 the share or stakeholder meeting that was convened in  
15 Orleans -- maybe in 2015 -- and subsequently met with  
16 Doug. And actually was gracious enough to tour his  
17 property and -- as well as his diversion and his use of  
18 water. And so those are the only two occasions I  
19 believe, that I've met with the Coles.

20           But the reason for -- on those occasions is the  
21 same, is we do view the Coles and Marble Mountain Ranch,  
22 they are part of our community. Our communities are  
23 small and close-knit communities. And while we -- people  
24 don't always get along or share the same opinions about  
25 things, we all understand that we live in the same

1 community and we try to work things out at a local level  
2 and try to resolve conflicts. And certainly in my  
3 meetings, any times I have met regarding this issue is  
4 for that purpose. Is to try to seek resolution to issues  
5 that we believe are important to resolve. And we'll  
6 continue to work with folks to resolve issues as best  
7 that we can.

8 MR. HUNT: Okay, thank you.

9 That's all the questions I have for now.

10 HEARING OFFICER MOORE: Okay. Thank you.

11 And then at this point I would like to offer  
12 opportunity for folks to cross-examine Mr. Hillman.  
13 First, the Division of Water Rights Prosecution Team?

14 MR. PETRUZZELLI: We have no questions for him.

15 HEARING OFFICER MOORE: No questions from the  
16 Prosecution Team. And Marble Mountain Ranch?

17 MS. BRENNER: No questions.

18 HEARING OFFICER MOORE: No questions.

19 National Marine Fisheries Service?

20 MR. KEIFER: No questions.

21 HEARING OFFICER MOORE: And Department of Fish  
22 and Wildlife?

23 MR. PUCCINI: No questions.

24 HEARING OFFICER MOORE: And Old Man River  
25 Trust?

1           And Klamath Riverkeeper?

2           California Sportfishing Protection Alliance?

3           MR. SHUTES: No, thank you.

4           HEARING OFFICER MOORE: And PCFFA, who I don't  
5 think is here. And staff?

6           Since there was or -- and obviously there'll be  
7 no redirect testimony or recross, we're checking to see  
8 if staff may have any questions for you. Be right with  
9 you.

10           (Whereupon, Hearing Team Panel confers in  
11 sidebar.)

12           HEARING OFFICER MOORE: All right. And we're  
13 great.

14           And Mr. Hillman, thank you so much for making  
15 the trip here to testify today as part of these  
16 proceedings and appreciate your being here.

17           WITNESS HILLMAN: Thank you.

18           HEARING OFFICER MOORE: Thank you.

19           Well, with that let's keep moving. And we will  
20 now continue Marble Mountain Ranch's remaining Direct  
21 Testimony. And then that would be followed by any cross-  
22 examination in the order I previously identified.  
23 Redirect and recross examination of the witnesses may  
24 then be permitted after that point.

25           And so I'll give you time to come up Ms.

1 Brenner. And we have a new witness.

2 MS. BRENNER: Yes. This is Jeff Meyer.

3 HEARING OFFICER MOORE: Very good. Welcome.

4

5 HEARING OFFICER MOORE: Okay. And so Mr. Meyer  
6 will be the witness. Are you going to call any other  
7 witnesses?

8 MS. BRENNER: We'll be calling Douglas Cole  
9 after Mr. Meyer.

10 HEARING OFFICER MOORE: Very good.

11 MS. BRENNER: We would like to do them  
12 individually, not as a panel.

13 HEARING OFFICER MOORE: That's fine. That's  
14 your choice.

15 MS. BRENNER: I would also like to indicate  
16 that Mr. Meyer is not -- testimony, direct testimony is  
17 fairly short. And I'd like to reserve any of his extra  
18 time for Mr. Cole that has a lot more areas to cover.

19 HEARING OFFICER MOORE: Okay. That will be  
20 fine.

21 I know you were standing up, I -- could you  
22 please stand up again? I -- we're going to take the oath  
23 before your testimony.

24 JEFFREY K. MEYER

25 called as a witness by the Diverters, having

1           been previously duly sworn, was examined and  
2           testified further as hereinafter set forth:

3           WITNESS MEYER: Yes, I do.

4           HEARING OFFICER MOORE: Thank you. You may be  
5 seated. Counsel you may proceed.

6                                   DIRECT EXAMINATION BY

7           MS. BRENNER: Thanks.

8           Can you go ahead and state your name for the  
9 record and your place of employment?

10           WITNESS MEYER: Yes, my name is Jeffrey K.  
11 Meyer. I go by Jeff. I work at ECORP Consulting where I  
12 serve as the Director of Water Resources. And I've been  
13 at ECORP for almost 15 years and have 27 years of  
14 experience in this field.

15           MS. BRENNER: Can you just explain what you  
16 mean by "in this field?" Your qualifications.

17           WITNESS MEYER: My qualifications include  
18 hydrology development, operations modeling, water rights,  
19 water transfers. I can go on, but that I think embodies  
20 most of what I do.

21           MS. BRENNER: Okay. And were you asked to take  
22 a look at the Marble Mountain Ranch diversion system and  
23 the data associated with that diversion and make any  
24 conclusions?

25           WITNESS MEYER: Yes. I was asked to analyze

1 the water needs of Marble Mountain Ranch and did review  
2 mostly Joey Howard's data, but other data as well.

3 MS. BRENNER: Okay. Could you go ahead and  
4 summarize your testimony in that regard?

5 WITNESS MEYER: Yes. I started with Joey  
6 Howard's evaluation of the consumptive needs of Marble  
7 Mountain Ranch. I reviewed his method -- methodology and  
8 confirmed that he used the state's Title 23, Section 697  
9 suggested demands for various uses. And when I reviewed  
10 his data it was the -- I believe it was the June 2016  
11 analysis. I've since heard yesterday that he's updated  
12 that. I wasn't aware until yesterday that he updated  
13 that.

14 After I reviewed his -- his analysis I -- I  
15 interviewed Mr. Cole and wanted to update anything that  
16 Joey may have missed or that has been changed since his  
17 analysis. And so I had several exchanges with Mr. Cole.  
18 And I can summarize those if you're interested in the  
19 details. But Mr. Cole indicated to me that this effort  
20 was quite costly and that he was thinking about changing  
21 his business plan, which was an expansion of the services  
22 that he currently has. Thereby opening up some RV  
23 spaces, some more tent campsites. It would require  
24 additional horses and livestock and just a general  
25 expansion of what he already provides.



1                   So I took all those things into account and I  
2 did my own analysis using the same method that Joey did.  
3 And I came up with a slightly higher estimate of what the  
4 consumptive uses would -- or consumptive needs would be  
5 for the ranch. Later to find out that Joey came up with  
6 the exact same number I did yesterday, which is about a  
7 quarter cfs at peak use in the summertime.

8                   MS. BRENNER: And that's just the consumptive  
9 use, correct?

10                  WITNESS MEYER: Just the consumptive use.

11                  MS. BRENNER: Okay. Did you take a look at the  
12 hydro -- the hydropower use as well?

13                  WITNESS MEYER: I did. I asked Mr. Cole to  
14 take a picture of the nameplate and send that to me on  
15 the generating unit, so that I knew what the peak  
16 generation of that unit would be. And that is 40  
17 kilowatts. I then used some LiDAR data that was in the  
18 Fiori report to determine what the head is. I made an  
19 estimate of the efficiency of the unit and came up with a  
20 flow that that unit would need to generate at its peak  
21 efficiency. And I came up with about 2.8 cfs.

22                  MS. BRENNER: For the hydropower use?

23                  WITNESS MEYER: At peak efficiency and peak  
24 generation.

25                  MS. BRENNER: Peak demand?

1 WITNESS MEYER: Yes.

2 MS. BRENNER: Have you -- are you familiar with  
3 open-ditch systems in other parts of Northern California?

4 WITNESS MEYER: Yes. For about the past 20  
5 years it's really been my focus is to work for the  
6 Foothill and Sierra Water Districts. I'm a member of the  
7 Mountain Counties Water Resources Association. And my  
8 clients have made use of old mining ditches to serve as  
9 conveyance systems for their delivery; it's part of their  
10 delivery system at this point and time.

11 MS. BRENNER: Can you just name us some of  
12 those delivery systems that you've worked on?

13 WITNESS MEYER: Sure. Nevada Irrigation  
14 District, Placer County Water Agency, Georgetown Divide  
15 Public Utility District, El Dorado Irrigation District,  
16 Grizzly Flat Community Services District, Calaveras  
17 County Water District, Calaveras Public Utility District  
18 and Utica Water and Power Authority.

19 MS. BRENNER: So your experience includes miles  
20 and miles of open-ditch systems?

21 WITNESS MEYER: Hundreds of miles, yes.

22 MS. BRENNER: And do you have a experience with  
23 amount of ditch loss that can be -- in the range of ditch  
24 -- ditch loss that can be found in those various  
25 conveyance systems?

1           WITNESS MEYER: Yes. I've seen a wide variety  
2 of losses, depending on how the ditches were constructed  
3 and in what soils, types they were constructed. But it  
4 can range from a low of maybe about 15 percent to -- I  
5 recently found a document that illustrates an 84 percent  
6 loss in a ditch.

7           MS. BRENNER: Did -- certainly -- well, and is  
8 ditch loss of approximately 27 percent atypical for this  
9 type of open-ditch system?

10          WITNESS MEYER: No, it's fairly typical, fairly  
11 common.

12          MS. BRENNER: So -- and you're familiar that  
13 that's what's been calculated at the Marble Mountain  
14 Ranch ditch system, is approximately 27 percent ditch  
15 loss?

16          WITNESS MEYER: I did see an estimate: 4/10ths  
17 of a cfs to 1 cfs. 1 cfs is about a 33 percent loss if  
18 you're diverting 3 cfs, 4/10ths I think is about 15  
19 percent. So yeah, it's reasonable I think.

20          MS. BRENNER: Pretty common?

21          WITNESS MEYER: Yeah.

22          MS. BRENNER: In this type of open-ditch  
23 operation have you -- have you -- are you familiar with  
24 ditch failures?

25          WITNESS MEYER: Oh, yes. Yeah, that happens

1 often, especially in very wet winters.

2 MS. BRENNER: Can you just explain some of your  
3 experience with those ditch failures? What -- what  
4 we're--  
5 describe what we're talking about?

6 WITNESS MEYER: There can be -- there's many  
7 different types that I'm aware of. Sometimes there are  
8 slides that fill the ditch and then cause the ditch to be  
9 overtopped. Trees can fall and damage the ditch. Rocks,  
10 rockslides. And occasionally there are just failures  
11 over time where the downstream-side berm will fail and,  
12 you know, spill water down the hillside.

13 MR. PETRUZZELLI: I'm going to object to this  
14 testimony on the basis that it's not in Mr. Meyer's  
15 written testimony.

16 MS. BRENNER: I believe it is.

17 MR. PETRUZZELLI: Placer County Water District,  
18 that's in his written testimony?

19 MS. BRENNER: Well, those are just examples of  
20 his experience.

21 HEARING OFFICER MOORE: Yeah. Okay. I'll  
22 overrule the objection. It's relevant to your  
23 experience.

24 MS. BRENNER: In your experience what are the  
25 barriers to converting these types of open ditches to

1 piped or lined ditches, or covered somehow to prevent  
2 overtopping or failures?

3 WITNESS MEYER: They're expensive. There's  
4 usually a permitting process that has to happen. And  
5 when that does happen oftentimes it's done a section at a  
6 time and spread out over long periods of time. Mostly  
7 because these ditches are so long. And the effort to  
8 line them or pipe them is significant, especially on  
9 hillsides.

10 MS. BRENNER: Steep hillsides like that found  
11 in the Marble Mountain Ranch's ditch?

12 WITNESS MEYER: Yes.

13 MS. BRENNER: It's difficult work?

14 WITNESS MEYER: It can be.

15 MS. BRENNER: Did you do an estimate of -- or  
16 your office prepare an estimate of the permitting costs  
17 associated with returning flows to Stanshaw Creek --

18 WITNESS MEYER: Yes.

19 MS. BRENNER: -- from the hydro flows?

20 WITNESS MEYER: Yes. Yeah, we did prepare an  
21 estimate for all the environmental permits. We did not  
22 include a grading permit in that.

23 MS. BRENNER: And what was that cost estimate?

24 WITNESS MEYER: We had a range of 100 -- I  
25 think it was 196,000 to about 235 I believe; \$235,000.

1 MS. BRENNER: And what type of environmental  
2 documentation did that assume?

3 WITNESS MEYER: I have it here. And I can pull  
4 that out if you give me a moment. There was some  
5 question whether we needed NEPA or not. We think we do,  
6 because we're crossing Forest Service land. And so that  
7 would include an initial study minute -- mitigated  
8 negative -- Neg. Dec., an NPDES permit; special use  
9 permit from the Forest Service for cultural surveys;  
10 Cultural Resource Inventory Report; AB 52 Tribal  
11 Consultation and Section 106 Tribal Consultation; a  
12 special use permit for construction from the Forest  
13 Service.

14 And then some that were potentially required,  
15 we weren't sure yet: biological assessment in support of  
16 Section 7 consultation, process between the Forest  
17 Service and National Marine Fisheries Service; U.S. Army  
18 Corps of Engineers Clean Water Act, Section 404 permit;  
19 State Water Resource Control Board 401, Water Quality  
20 Certification; California Department of Fish and Wildlife  
21 1602, Streambed Alteration Agreement; State Water  
22 Pollution Prevention Plan; and site inspections for  
23 construction.

24 MS. BRENNER: So not all those permits are  
25 contained within that cost estimate, correct?

1 WITNESS MEYER: They are. They are.

2 MS. BRENNER: And is that -- but it does not  
3 include a full Environmental Impact Report?

4 WITNESS MEYER: No. We thought we might be  
5 able to do an ISMND, an Initial Study Mitigating Negative  
6 Dec.

7 MS. BRENNER: Do you know what the increase  
8 costs if you were -- needed to do a full EIR?

9 WITNESS MEYER: Significant.

10 MS. BRENNER: Double?

11 WITNESS MEYER: Yes.

12 MS. BRENNER: At least?

13 WITNESS MEYER: Yes.

14 MS. BRENNER: Is there anything else in your --  
15 that you'd like to summarize from your testimony today?

16 WITNESS MEYER: The only thing we didn't talk  
17 about, and I don't know if it's pertinent here, but I  
18 spent some time talking to Mr. Cole about the fire camp  
19 and what's required during forest fires where he provides  
20 a base camp for the firefighters. And, as I understand  
21 it, the firetrucks that come and fill their tanks at the  
22 pond.

23 He tells me -- and he can confirm this in his  
24 testimony -- but he'll open the diversion ditch at 3 cfs  
25 to help fight fires, both to serve the firefighters and

1 to support the firefighting effort --

2 MS. BRENNER: So at time --

3 WITNESS MEYER: -- by filling trucks.

4 MS. BRENNER: So at times the -- up to a full 3  
5 cfs is used to fight fires --

6 WITNESS MEYER: Yeah.

7 MS. BRENNER: -- as well as consumptive use?

8 WITNESS MEYER: Right.

9 MS. BRENNER: Anything else?

10 WITNESS MEYER: That's it.

11 MS. BRENNER: Okay. I have nothing further.

12 HEARING OFFICER MOORE: Okay.

13 At this time is it okay we're going to do  
14 cross. That way we'll do this way as an -- and then Mr.  
15 Cole.

16 MS. BRENNER: Uh-huh.

17 HEARING OFFICER MOORE: Okay, very good. Thank  
18 you.

19 So for cross-examination, first the Prosecution  
20 Team for Division of Water Rights, you're welcome to come  
21 up and ask Mr. Meyer questions.

22 MR. PETRUZZELLI: So just while we're getting  
23 set up, so at the end of yesterday on -- it was stated  
24 that we would have -- for cross-examination we would have  
25 an hour per witness or per panel. So do we have an hour



1 to cross-examine Mr. Meyer?

2 HEARING OFFICER MOORE: Yeah, up to an hour.

3 MR. PETRUZZELLI: Okay, thank you.

4 CROSS-EXAMINATION BY

5 MR. PETRUZZELLI: So, Mr. Meyer, I wanted to  
6 ask you about your written testimony, starting on Page 1.  
7 And you reference a Statement Number 16375; is that  
8 correct?

9 WITNESS MEYER: Yes.

10 MR. PETRUZZELLI: Okay. But you don't  
11 reference a Statement 15022; is that correct?

12 WITNESS MEYER: That's correct.

13 MR. PETRUZZELLI: Okay. So you don't discuss  
14 that statement in your written testimony?

15 WITNESS MEYER: No.

16 MR. PETRUZZELLI: Okay.

17 On -- and then asking about Mr. Howard's work,  
18 so Mr. Howard evaluated current uses at the ranch. Is  
19 that --

20 WITNESS MEYER: As far as I know.

21 MR. PETRUZZELLI: Okay. And you generally  
22 agreed with his assessment of that?

23 WITNESS MEYER: I do.

24 MR. PETRUZZELLI: Okay. And I think that was  
25 0.18 without a fire crew roughly, and about 0.235 with

1 the fire crew?

2 WITNESS MEYER: Yeah. The document I had said  
3 0.18 to I think it's 0.20 or 0.22 possibly.

4 MR. PETRUZZELLI: Okay.

5 WITNESS MEYER: Close enough.

6 MR. PETRUZZELLI: Fairly close.

7 WITNESS MEYER: Yeah.

8 MR. PETRUZZELLI: All right. Do you recall his  
9 -- in reviewing his work did you review his general  
10 characterization of the point of diversion?

11 WITNESS MEYER: I did not.

12 MR. PETRUZZELLI: Okay. Have you inspected the  
13 point of diversion?

14 WITNESS MEYER: I have not.

15 MR. PETRUZZELLI: Okay. So you can't say that  
16 you're familiar with it in the sense that you've actually  
17 been out and done a personal and -- onsite inspection of  
18 the point of diversion?

19 WITNESS MEYER: That's correct.

20 MR. PETRUZZELLI: Okay. Have you inspected the  
21 ditch system?

22 WITNESS MEYER: No.

23 MR. PETRUZZELLI: Okay. So you haven't  
24 actually walked the ditch system?

25 WITNESS MEYER: I have not.

1           MR. PETRUZZELLI: Okay, so does most of your  
2 information regarding the ditch system come from Mr. Cole  
3 and also, I believe, also the LiDAR images that you  
4 referenced?

5           WITNESS MEYER: Yes.

6           MR. PETRUZZELLI: Okay.

7           WITNESS MEYER: I've also seen some photos from  
8 some inspections.

9           MR. PETRUZZELLI: Okay. And you can tell me if  
10 you don't have enough information for this, Mr. Howard  
11 characterized the PO -- the point of diversion as  
12 diverting continuously throughout the year at the maximum  
13 rate possible in operating independent of demand. From  
14 what you've seen would you generally agree with that?

15          WITNESS MEYER: That's not the way I understand  
16 it, but if -- again, I have not been there -- I've had  
17 discussions with Mr. Cole. And he tells me that he has  
18 limited diversion, so that there is no discharge to  
19 Irving Creek. And that he's only meeting consumptive use  
20 in the summer months.

21          MR. PETRUZZELLI: Okay. And he modifies his  
22 diversion rate by modifying the rocks and the outfall.  
23 Is that -- is -- in your understanding?

24          WITNESS MEYER: That's correct.

25          MR. PETRUZZELLI: Okay. So he can't turn a

1 knob --

2 WITNESS MEYER: That's what I understand.

3 MR. PETRUZZELLI: -- on a notice and change his  
4 diversion rate?

5 WITNESS MEYER: That's my understanding.

6 MR. PETRUZZELLI: Okay. And the current method  
7 of altering the diversion, would you say it's probably  
8 pretty time-and-labor intensive?

9 WITNESS MEYER: More so than others I've seen.

10 MR. PETRUZZELLI: Okay.

11 MS. BRENNER: I'm just going to object. It  
12 goes beyond the scope of his direct testimony.

13 HEARING OFFICER MOORE: Overruled.

14 MR. PETRUZZELLI: Okay.

15 And then I'd like to ask you about your  
16 Approach Number 2. This assessed potential future  
17 operations for the ranch; is that correct?

18 WITNESS MEYER: That's correct.

19 MR. PETRUZZELLI: So those are not uses that  
20 exist at present?

21 WITNESS MEYER: Correct.

22 MR. PETRUZZELLI: Okay. And --

23 WITNESS MEYER: Some are. I mean, it's an  
24 expansion of his current use.

25 MR. PETRUZZELLI: But insofar as your

1 assessment and approach to indicate some expansion or  
2 addition to use, that is a contemplated future use and  
3 not an existing use?

4 WITNESS MEYER: Correct.

5 MR. PETRUZZELLI: Okay. And on -- I think you  
6 -- in your sources of information I think you reference  
7 emails or conversations with Mr. Cole. I think you  
8 reference an email or two from Mr. Howard and Mr.  
9 Harling?

10 WITNESS MEYER: Correct.

11 MR. PETRUZZELLI: Did you consult any  
12 additional information to assess those demands?

13 WITNESS MEYER: Other than what Joey Howard had  
14 done and the Section 697 of the Water Code, no.

15 MR. PETRUZZELLI: Okay. And for ditch loss you  
16 estimated 0.4 to 1.0. Is that correct?

17 WITNESS MEYER: No, that's not correct.

18 MR. PETRUZZELLI: Oh.

19 WITNESS MEYER: I actually got that from Joey's  
20 report.

21 MR. PETRUZZELLI: Okay.

22 WITNESS MEYER: His estimate of the ditch loss.

23 MR. PETRUZZELLI: Okay. So that was his  
24 estimate?

25 WITNESS MEYER: His estimate.

1           MR. PETRUZZELLI: Okay. On, for that kind of  
2 range, would the lower end of that range generally  
3 correspond to a lower rate of diversion?

4           WITNESS MEYER: Yes.

5           MR. PETRUZZELLI: So if they're diverting more  
6 water then there's -- I'm not an engineer, so I'm  
7 probably going to grossly over-exaggerate -- over-  
8 generalize this question, but if there's a greater  
9 diversion rate is it -- would you normally expect to see  
10 losses closer to the upper end of that estimate?

11          WITNESS MEYER: Yes.

12          MR. PETRUZZELLI: Okay. So if they're only  
13 diverting for consumptive use demands then you would  
14 expect to see losses towards the lower end of that  
15 estimate?

16          WITNESS MEYER: Yes.

17          MR. PETRUZZELLI: And if they're diverting up  
18 to their full claimed 3 cfs right, you would expect to  
19 see losses closer to the upper end of that estimate?

20          WITNESS MEYER: Correct.

21          MR. PETRUZZELLI: Okay. And their consumptive  
22 use estimates were 0.18 to 0.2, 0.25, roughly?

23          WITNESS MEYER: Correct.

24          MR. PETRUZZELLI: Okay. So the 0.4 loss would  
25 apply even at those rates of diversion?

1                   WITNESS MEYER: Well 0.4 is more than 0.25, so  
2 that can't happen.

3                   MR. PETRUZZELLI: Okay. But it was an  
4 estimate?

5                   WITNESS MEYER: Yes. I would maybe stick more  
6 to the percent of the loss rather than --

7                   MR. PETRUZZELLI: Okay.

8                   WITNESS MEYER: -- the absolute value of the  
9 loss --

10                  MR. PETRUZZELLI: All right.

11                  WITNESS MEYER: -- in that estimate.

12                  MR. PETRUZZELLI: Okay. I'd like to ask you  
13 next about your hydropower discussion. You mentioned  
14 that Mr. Cole sent you a photo of the Pelton wheel. And  
15 I believe you evaluated LiDAR -- LiDAR photos. And you  
16 used -- did you use that information to determine the --  
17 characteristics like "head" and "drop?"

18                  WITNESS MEYER: Yes. I actually had him send  
19 me a photo of the nameplate, which gives some information  
20 about what the generator can produce. And I used the  
21 LiDAR data in the Fiori Report to estimate the change in  
22 elevation from the top of the penstock to the hydropower  
23 facility.

24                  MR. PETRUZZELLI: Did you personally inspect  
25 the hydropower system?

1 WITNESS MEYER: No, I didn't.

2 MR. PETRUZZELLI: So you haven't actually  
3 inspected the Pelton wheel?

4 WITNESS MEYER: No.

5 MR. PETRUZZELLI: Or the penstock?

6 WITNESS MEYER: No.

7 MR. PETRUZZELLI: Okay. Do you know whether  
8 the Marble Mountain actually measures its power  
9 generation?

10 WITNESS MEYER: I don't know.

11 MR. PETRUZZELLI: Okay.

12 Do you know whether they measure their power  
13 consumption?

14 WITNESS MEYER: I don't know.

15 MR. PETRUZZELLI: And you said that the 40  
16 kilowatts is essentially the maximum rating for the  
17 Pelton wheel itself?

18 WITNESS MEYER: For the generating unit.

19 MR. PETRUZZELLI: For the generating, okay.  
20 But that isn't necessarily what they generate with that?

21 WITNESS MEYER: That would be the maximum.

22 MR. PETRUZZELLI: Okay.

23 WITNESS MEYER: So if they have a lower  
24 electrical demand then they can generate at a lower rate.

25 MR. PETRUZZELLI: Okay. So if they're actual



1 electrical demand is less than 40 kilowatts then the  
2 Pelton wheel, it probably actually generates less than 40  
3 kilowatts?

4 WITNESS MEYER: Yes.

5 MR. PETRUZZELLI: Okay.

6 Is that, your equation used for generating  
7 kilowatts, is that generally a linear equation?

8 WITNESS MEYER: The equation is linear.

9 MR. PETRUZZELLI: Okay.

10 WITNESS MEYER: The terms that are in the  
11 equation are not necessarily --

12 MR. PETRUZZELLI: All right. Okay.

13 WITNESS MEYER: -- linear.

14 MR. PETRUZZELLI: But you know, let's -- if  
15 they -- less flow would mean less power generated; is  
16 that correct?

17 WITNESS MEYER: Yes.

18 MR. PETRUZZELLI: Okay. And for 2. -- I think  
19 in your written testimony you calculated 2.87 cfs  
20 necessary to generate 40 kilowatts. Was that --

21 WITNESS MEYER: It was close.

22 MR. PETRUZZELLI: -- correct? Okay.

23 WITNESS MEYER: Yeah.

24 MR. PETRUZZELLI: Would -- to actually support  
25 that amount of flow, would the diversion have to divert

1 for ditch loss in addition to that?

2 WITNESS MEYER: To achieve that? Probably.

3 MR. PETRUZZELLI: Okay. So it would be --  
4 let's say they want to generate 40 kilowatts and it's 2.8  
5 -- and 40 kilowatts occurs at 2.87 cfs. They would need  
6 to divert 2.87 cfs plus whatever the ditch loss is going  
7 to be on that day?

8 WITNESS MEYER: Yeah, that's approximately  
9 correct. I wouldn't hold on to that number. But I made  
10 an estimate of the efficiency of the unit. It's an older  
11 unit, efficiency rates can vary. But yes, in general you  
12 have the right concept.

13 MR. PETRUZZELLI: Are newer units usually more  
14 efficient?

15 WITNESS MEYER: Generally.

16 MR. PETRUZZELLI: Okay. And you said that the  
17 generating capacity of the Pelton wheel is not  
18 necessarily their actual demand; is that correct?

19 WITNESS MEYER: The peak generating capability  
20 of the Pelton wheel is not necessarily always their --

21 MR. PETRUZZELLI: Again, forgive me --

22 WITNESS MEYER: -- demand.

23 MR. PETRUZZELLI: -- I'm a little outside the  
24 scope of my -- outside my wheelhouse, raising these  
25 questions.

1           WITNESS MEYER:  There -- it has the ability to  
2 generate at a range of flows and can produce less than 40  
3 kilowatts.

4           MR. PETRUZZELLI:  Okay.

5           WITNESS MEYER:  It doesn't always produce 40  
6 kilowatts.

7           MR. PETRUZZELLI:  Do you know what the minimum  
8 of the range of flows is that it can generate?  A  --

9           WITNESS MEYER:  I don't know --

10          MR. PETRUZZELLI:  -- useful amount of power?

11          WITNESS MEYER:  -- the exact number.  There --  
12 efficiencies drop off where it can no longer generate.  
13 And there's probably a minimum value that I would guess  
14 is 1.5 cfs?  I'm guessing, but that's an educated guess.

15          MR. PETRUZZELLI:  So, educated guess around  
16 maybe 1.5 you said?  Okay.

17          WITNESS MEYER:  Yeah, approximately.

18          MR. PETRUZZELLI:  All right.  Did you evaluate  
19 the flow capacity for the penstock?

20          WITNESS MEYER:  I did not.  I took a look at  
21 losses that could occur in the penstock.  And it seemed -  
22 - I didn't do that analysis specifically, but what I did  
23 do is I determined that losses are very low, so I would  
24 imagine it could pass up to 3 cfs and maybe more.

25          MR. PETRUZZELLI:  So you believe that the -- so

1 are you testifying that you believe the flow capacity of  
2 the penstock is up to 3 cfs?

3 WITNESS MEYER: Sure.

4 MR. PETRUZZELLI: Okay. So that's --. Okay.

5 But you haven't actually inspected the --

6 WITNESS MEYER: No I have not.

7 MR. PETRUZZELLI: -- penstock?

8 WITNESS MEYER: I got some dimensions from Mr.  
9 Cole and used those in my calculations.

10 MR. PETRUZZELLI: Okay. So I think Mr. Howard,  
11 previously in his report, he indicates that peak demand  
12 occurs in the summer in roughly hot, midafternoon. Would  
13 -- is that probably -- would you generally agree with  
14 that?

15 WITNESS MEYER: Are we talking --- well, my  
16 answer is yes. Are you talking about peak electrical  
17 demand or peak consumptive demand?

18 MR. PETRUZZELLI: Ah, I apologize, peak  
19 electrical demand.

20 WITNESS MEYER: I would agree with that,  
21 because that's their peak season. They have the most  
22 guests there. I would imagine that that's probably a  
23 true statement.

24 MR. PETRUZZELLI: Yeah. I think in one of our  
25 -- well, I won't testify. But at other times of the year

1 the peak power demand would be lower?

2 WITNESS MEYER: The power demand would be lower  
3 in years where there are -- portions of the year where  
4 they're not -- when they don't have as many guests, yes.  
5 That makes sense to me.

6 MR. PETRUZZELLI: Okay.

7 So outside of their busy season they would  
8 probably have lower power demands?

9 WITNESS MEYER: Yes.

10 MR. PETRUZZELLI: Okay. And do you recall that  
11 Doug estimated his busy -- has indicated his busy season  
12 is from April 1 to December 1?

13 WITNESS MEYER: I didn't ask him about when  
14 that was.

15 MR. PETRUZZELLI: Okay. Okay.

16 WITNESS MEYER: I wouldn't be surprised if it's  
17 in there somewhere.

18 MR. PETRUZZELLI: All right. Do you know how  
19 many people are at the ranch, roughly, in the offseason?

20 WITNESS MEYER: I believe I have some  
21 information about that. Right. I think he has six full-  
22 time residents in the offseason.

23 MR. PETRUZZELLI: Okay. With six full-time  
24 residents in the offseason would you anticipate his peak  
25 power demands in the offseason to be substantially lower

1 than they are in the summer, in his busy season?

2 WITNESS MEYER: Yes.

3 MR. PETRUZZELLI: Okay. And to meet those peak  
4 power demands would you say he needs less than -- he  
5 would need to divert less than 3 cfs to generate the  
6 power necessary to meet those demands?

7 WITNESS MEYER: Probably.

8 MR. PETRUZZELLI: Can you -- do you -- can you  
9 estimate how much less?

10 WITNESS MEYER: I don't know. I'm sure he has  
11 different types of needs in the wintertime where he's  
12 going to have heat -- needs for heat that he doesn't have  
13 in the summertime. I don't know what his wintertime  
14 demands are. I just learned today that they get quite a  
15 bit of snow there and I wasn't aware of that. So I'm not  
16 sure.

17 MR. PETRUZZELLI: All right. Have you looked  
18 at flow patterns in Stanshaw Creek?

19 WITNESS MEYER: No, I have not.

20 MR. PETRUZZELLI: Okay. So you're not familiar  
21 with whether say flows are higher in the morning and  
22 lower in the afternoon or anything like that?

23 WITNESS MEYER: You're getting at a diurnal --

24 MR. PETRUZZELLI: Yes.

25 WITNESS MEYER: -- discussion; you're asking me

1 a question about diurnal?

2 MR. PETRUZZELLI: Yeah.

3 WITNESS MEYER: I don't have any data to  
4 confirm that. My experience tells me yes I'm sure there  
5 is a diurnal fluctuation both in the winter and the  
6 summer. The -- the -- more so in the spring runoff  
7 period where the snow is melting. Daytime temperatures  
8 would increase the melt rate. Overnight temperatures  
9 would decrease the melt rate. In the summertime you have  
10 evapotranspiration in the riparian corridor. And that's  
11 going to suck up in hot -- the hot periods of the day  
12 it's going to suck up more water than it would in the  
13 overnight temperatures.

14 MR. PETRUZZELLI: All right.

15 WITNESS MEYER: So you're going to see that.  
16 I'm sure of that, but I have no data to substantiate  
17 that.

18 MR. PETRUZZELLI: Okay. So let's -- assuming  
19 that Stanshaw has a diurnal flow pattern. Is it possible  
20 that at times of the year flows could be -- in the  
21 morning flows could be sufficient to exceed the operating  
22 threshold of the Pelton wheel? And then later in the day  
23 not sufficient to meet the operating threshold of the  
24 Pelton wheel?

25 WITNESS MEYER: At its peak -- I mean, they're

1 going to go up and down.

2 MR. PETRUZZELLI: Yes.

3 WITNESS MEYER: So depending on what the flow  
4 is I suppose that can happen.

5 MR. PETRUZZELLI: Okay. And to match their  
6 diversion rate to their actual demand they -- would they  
7 then need to go out and probably rearrange the rocks and  
8 other characteristics at the point of diversion?

9 WITNESS MEYER: I suppose.

10 MR. PETRUZZELLI: Okay. And then I believe the  
11 last questions I have for you involve Attachment A, where  
12 you estimate permitting costs. This is the only  
13 alternative you estimate permitting costs for; is that  
14 correct?

15 WITNESS MEYER: Yes. I had a -- I guess it's  
16 part of a plan that was developed in 2004. It shows a  
17 3,200-foot-long pipeline to return flows from the  
18 hydropower unit to Stanshaw Creek.

19 MR. PETRUZZELLI: Okay. But you didn't  
20 evaluate other alternatives?

21 WITNESS MEYER: This is the only one I'm aware  
22 of.

23 MR. PETRUZZELLI: Okay.

24 WITNESS MEYER: Yes. That's correct.

25 MR. PETRUZZELLI: Okay. And this estimate it



1 doesn't -- it only -- it's only for permits. It does not  
2 estimate the cost of the project itself?

3 WITNESS MEYER: There's no construction costs  
4 in here, just permitting.

5 MR. PETRUZZELLI: Okay. So it doesn't include  
6 materials, labor or anything like that?

7 WITNESS MEYER: Nope.

8 MR. PETRUZZELLI: Okay. Okay.

9 So those are all questions we have.

10 HEARING OFFICER MOORE: Thank you, Mr.  
11 Petruzzelli.

12 Next, would the National Marine Fisheries  
13 Service be interested in asking any questions?

14 MR. KEIFER: No questions.

15 HEARING OFFICER MOORE: Department of Fish and  
16 Wildlife?

17 MR. PUCCINI: We do.

18 HEARING OFFICER MOORE: Karuk Tribe? Oh, wait.  
19 You do have questions?

20 MR. PUCCINI: Yes.

21 HEARING OFFICER MOORE: Sorry. My apologies.  
22 Thank you, so Department of Fish and Wildlife.

23 CROSS-EXAMINATION BY

24 MR. PUCCINI: It's just a quick question.

25 What's the source of information in your testimony

1 regarding fire protection in particular on Page 6 under  
2 the heading, "Fire Suppression" or "Fire Protection,"  
3 excuse me.

4 WITNESS MEYER: This information came from Mr.  
5 Cole.

6 MR. PUCCINI: So you didn't independently  
7 verify that?

8 WITNESS MEYER: I did not.

9 MR. PUCCINI: Okay. Thank you.

10 WITNESS MEYER: Uh-huh.

11 HEARING OFFICER MOORE: Thank you.

12 Karuk Tribe? Karuk Tribe, please, Mr. Hunt.

13 CROSS-EXAMINATION BY

14 MR. HUNT: Hi, thanks. Another question about  
15 the fire prevention. In your testimony you said that the  
16 pond is used for fire -- for filling water for  
17 firetrucks. I was wondering if you know whether there  
18 was a fire at or near the Marble Mountain Ranch this past  
19 summer?

20 WITNESS MEYER: I understood there was two.

21 MR. HUNT: Okay. And did you -- do you know  
22 where the firetrucks filled their tanks during that fire?

23 WITNESS MEYER: My understanding is the pond.

24 MR. HUNT: And what's your -- how do you have  
25 that understanding?

1 WITNESS MEYER: Mr. Cole.

2 MR. HUNT: But you've never seen the fire crews  
3 take water from the pond?

4 WITNESS MEYER: I have not.

5 MR. HUNT: Okay. I was just curious. When you  
6 were testifying you said that in response to a question  
7 about whether a full EIR/EIS was required that it would  
8 double the cost of obtaining the permits, did you  
9 actually do a calculation?

10 WITNESS MEYER: That's just an estimate. I did  
11 not do a calculation.

12 MR. HUNT: Is it just speculation?

13 WITNESS MEYER: It is.

14 MR. HUNT: Early in your testimony you were  
15 talking about various other open ditch conveyances that  
16 you'd evaluated and performed work related to.

17 It's my understanding that that testimony is  
18 solely for the purposes of establishing his work  
19 experience and relevant expertise. But any testimony  
20 related to actual ditch conveyance losses in those  
21 situations is not factual evidence related to the  
22 reasonableness -- reasonable use analysis in the case.  
23 Nonetheless I'd still like to ask how many of those  
24 systems that you're evaluating are -- obtain their water  
25 from streams that provide thermal refugia for endangered

1 salmonids?

2 WITNESS MEYER: I'm going to say none of them.

3 MR. HUNT: Okay. And are there any of those  
4 ditch systems that are on streams that have and are used  
5 by Endangered Species Act-listed salmon?

6 WITNESS MEYER: I don't believe so.

7 MR. HUNT: And are there any on streams that  
8 have current tribal uses that depend on salmon?

9 WITNESS MEYER: No. Most of the work I do is  
10 above what we call rim reservoirs.

11 MR. HUNT: Okay. So it's probably fair to say  
12 that none of those streams have a current designation  
13 under a basin plan as being thermal refugia for  
14 salmonids?

15 WITNESS MEYER: No. None of them would be.

16 MR. HUNT: Okay, thank you. That's all.

17 HEARING OFFICER MOORE: Okay, thank you.

18 Old Man River Trust? Mr. Fisher.

19 CROSS-EXAMINATION BY

20 MR. FISHER: In your professional experience  
21 are there alternative hydropower systems that could  
22 generate the given amount of electricity with less water?

23 WITNESS MEYER: I don't know. I don't design  
24 them I evaluate them. There may be. I wouldn't be  
25 surprised if there are.

1           MR. FISHER: In your professional opinion would  
2 it be possible to produce more power with a given -- a  
3 given amount of electricity with less water if one were  
4 to say -- using a more efficient system or have more  
5 head, i.e. more fall; would that allow one to produce --  
6 to use less water for a given amount of electricity?

7           WITNESS MEYER: Yes.

8           MR. FISHER: Did you evaluate such systems or  
9 were you asked to evaluate such systems?

10          WITNESS MEYER: I was not.

11          MR. FISHER: Okay. Are you familiar with them?

12          WITNESS MEYER: Systems that have more head?

13          MR. FISHER: Systems that use higher head, more  
14 efficient turbines --

15          WITNESS MEYER: I don't --

16          MR. FISHER: -- thereby producing more with  
17 less.

18          WITNESS MEYER: I know of systems that you --  
19 that have more head on them. I can't say that I have  
20 compared them to this particular one. I have not done  
21 that.

22          MR. FISHER: Okay. So I mean -- yeah. Thank  
23 you. Could you elaborate on the barriers you cited to  
24 piping water from Stanshaw Creek to the place of use?

25          MS. BRENNER: I don't recall him testifying to

1 that.

2 MR. FISHER: Barriers to piping water, you did  
3 not testify to that?

4 MS. BRENNER: For the return flow?

5 MR. FISHER: In the context of -- no, no, from  
6 the creek to the place of use we were the context of  
7 conveyance losses.

8 WITNESS MEYER: What?

9 MR. FISHER: I believe you indicated there were  
10 barriers to piping the water.

11 WITNESS MEYER: Yes, what's your question?

12 MR. FISHER: Could you elaborate on what the  
13 barriers are to piping the water, rather than having a  
14 leaky ditch?

15 WITNESS MEYER: You want me to say them again?  
16 So you can gunite the ditches, you can pipe them, you can  
17 line them. And you're talking about barriers, so things  
18 that would --

19 MR. FISHER: Whatever you meant by barrier. I  
20 don't know if it was financial or physical or permitting.

21 WITNESS MEYER: So all of the above.

22 MR. FISHER: Okay. Have you built or advised  
23 people who are building gravity-fed systems that divert  
24 from a creek into -- with a pipe?

25 WITNESS MEYER: Have I advised them to do what?

1           MR. FISHER: Are you familiar with -- have you  
2 worked with systems that rely on diverting water from a  
3 creek using a pipe rather -- pipe and gravity rather than  
4 a ditch?

5           WITNESS MEYER: Yes. I've seen that.

6           MR. FISHER: Okay. Are you aware that that's  
7 the common practice in the area of Marble Mountain Ranch?

8           MS. BRENNER: I'd object as to "common  
9 practice." In what area, common to who?

10          MR. FISHER: Within 100 miles of Marble  
11 Mountain Ranch. It is -- I would -- are you aware that  
12 that's the most common practice rather than open  
13 conveyance ditch?

14          WITNESS MEYER: No, I'm not aware of that.

15          MR. FISHER: In your experiences with  
16 conveyance ditches anywhere have you evaluated ditches  
17 that are on this steep of a hillside?

18          WITNESS MEYER: Yes.

19          MR. FISHER: And have you noticed that ditches  
20 on this steep of a hillside sometimes wash out, creating  
21 mudslides?

22          WITNESS MEYER: Yes.

23          MR. FISHER: And to the width of the ditch, are  
24 you familiar with ditches that are designed to convey  
25 roughly this amount of water that are as wide as Marble

1 Mountain Ranch's ditch?

2 WITNESS MEYER: Yes.

3 MR. FISHER: Could you estimate, if the water  
4 were to be piped, how big of a pipe it would be and how  
5 much it might cost?

6 WITNESS MEYER: No. That's a little bit out of  
7 my ---- I don't have the information to do all that.

8 MR. FISHER: Okay. So Mr. Cole did not ask you  
9 to evaluate alternatives that could accomplish the same  
10 goal with less water?

11 WITNESS MEYER: No.

12 MR. FISHER: Thank you.

13 HEARING OFFICER MOORE: Thank you.

14 And next, Klamath Riverkeeper. Any questions?  
15 I'm not sure if he's still here.

16 CSPA? Mr. Shutes.

17 CROSS-EXAMINATION BY

18 MR. SHUTES: Good afternoon. Chris Shutes, for  
19 the California Sportfishing Protection Alliance.

20 Good afternoon Mr. Meyer.

21 WITNESS MEYER: Good afternoon Mr. Shutes.

22 MR. SHUTES: I'd like to talk a little bit  
23 about some of the other projects that you've worked on.  
24 And you represented that they were similar in many  
25 respects to the facilities at Marble Mountain Ranch; is



1 that correct?

2 WITNESS MEYER: In that they are Gold Rush era  
3 ditches used to convey water, yes.

4 MR. SHUTES: Right. So in your experience do  
5 the operators of these ditches have regular sort of ---  
6 not only maintenance, but upgrade kinds of plans that  
7 they implement over the long term in order to avoid some  
8 of the problems you discussed?

9 WITNESS MEYER: Yes.

10 MR. SHUTES: And as you indicated I believe  
11 that they do this sort of on a chunk-by-chunk or area-by-  
12 area basis? Would that be a fair characterization?

13 WITNESS MEYER: Yes, that's correct.

14 MR. SHUTES: And if you were advising one of  
15 these operators regarding the long-term implementation of  
16 upgrades or just simply maintenance, how would you advise  
17 them to consider the -- their planning in terms of  
18 relatively being proactive or being a reactive?

19 MS. BRENNER: I object as vague and beyond the  
20 scope.

21 HEARING OFFICER MOORE: Yeah. I'd like you to  
22 rephrase the question if you can.

23 MR. SHUTES: Okay. If they have a relatively -  
24 -- if an operator has a relatively high ditch loss would  
25 you --- do you think it's a prudent operation for them to

1 implement long-term planning to reduce that loss?

2 WITNESS MEYER: Yes.

3 MR. SHUTES: I think that's all. Thank you.

4 HEARING OFFICER MOORE: Thank you.

5 And is PCFFA in the room? No?

6 Okay. At this point I'd like to provide

7 Counsel the opportunity to do any redirect testimony.

8 MS. BRENNER: No, I don't have anything --

9 COURT REPORTER: Microphone, please?

10 MS. BRENNER: I have no redirect questions.

11 HEARING OFFICER MOORE: Thank you, Ms. Brenner.

12 And how about staff? Any questions? No.

13 All right. At this point then I believe you

14 can call your next witness, Ms. Brenner. And I think we

15 should continue with the proceeding, so thank you.

16 Thank you, Mr. Meyer.

17 And if you -- do you want to take any time? Or

18 do you want to just continue along?

19 MS. BRENNER: If we can take a few minutes,

20 that would be nice.

21 HEARING OFFICER MOORE: Okay. A five-minute

22 break? Okay. We'll reconvene at 2:35.

23 (Recess taken at 2:28 p.m.)

24 (Proceedings resumed at 2:41 p.m.)

25 HEARING OFFICER MOORE: As far as today's

1 schedule goes in the notice we did say we can go till  
2 5:00 p.m. and that will be the plan for today. But if  
3 there's a logical break point before that we'll all  
4 identify it, but at this point we are available to  
5 conduct the Hearing until 5:00 p.m.

6 So with that I'd like to ask Counsel for Marble  
7 Mountain Ranch to call the next witness.

8 MS. BRENNER: I'm calling Mr. Douglas Cole from  
9 Marble Mountain Ranch as the next witness.

10 HEARING OFFICER MOORE: Well, welcome, Mr.  
11 Cole. If I could just ask you to stand and raise your  
12 right hand.

13 DOUGLAS TAYLOR COLE  
14 called as a witness for Douglas and Heidi Cole and Marble  
15 Mountain Ranch, having been previously duly sworn, was  
16 examined and testified further as hereinafter set forth:

17 WITNESS COLE: Yes, I do.

18 HEARING OFFICER MOORE: Thank you. You may be  
19 seated.

20 MS. BRENNER: Can I just ask --

21 HEARING OFFICER MOORE: Counsel?

22 MS. BRENNER: Can I just -- can I just ask  
23 Kerry to come up and assist?

24 MS. FULLER: Yes.

25 MS. BRENNER: Thanks. So this is Kerry Fuller

1 from my office.

2 HEARING OFFICER MOORE: Welcome. Make yourself  
3 comfortable.

4 DIRECT EXAMINATION BY

5 MS. BRENNER: Mr. Cole, can you please state  
6 your full name and where you reside?

7 WITNESS COLE: Douglas Taylor Cole, 92520 State  
8 Highway 96, Somes Bar, California, 95568.

9 MS. BRENNER: And do you own Marble Mountain  
10 Ranch with your wife?

11 WITNESS COLE: I do.

12 MS. BRENNER: And when did you purchase that  
13 ranch?

14 WITNESS COLE: 1994.

15 MS. BRENNER: And who did you purchase it from?

16 WITNESS COLE: Bob and Judith Young.

17 MS. BRENNER: Okay. Can you just give us a  
18 brief history of your ranch ownership? In other words,  
19 what did you walk into in 1994?

20 WITNESS COLE: Bob and Judy Young operated then  
21 Young's Ranch Resort as an RV park and mobile home park,  
22 along with a fishing resort. It was licensed for 55 RV  
23 units and had several other mobile home sites as well as  
24 an addition to roughly a dozen homes and cabins, which I  
25 have since remodeled and upgraded.

1           But that's the infrastructure. The business  
2 model was different than what we operate. Their business  
3 model was primarily as a RV park and a recreational  
4 fishing camp.

5           MS. BRENNER: And your business model?

6           WITNESS COLE: A dude ranch. We decided to  
7 fundamentally change the business model in order to  
8 reduce the footprint of the impact of a business in the  
9 community ecologically. So 55 RV hookups plus mobile  
10 homes plus the permanent residents plus the cabin rentals  
11 and campsites were operated, so that there was a very  
12 large human population on the ranch with a much larger  
13 impact on water consumption, septic management, power  
14 demands and other aesthetic issues that we wanted to  
15 eliminate.

16           And our first decision in changing the business  
17 model was to move to a higher service, lower-population  
18 based business. And so we targeted a multi-use, multi-  
19 aspect dude ranch that was high service and lower in  
20 occupancy.

21           MS. BRENNER: So how many cabins are at the  
22 ranch at this point?

23           WITNESS COLE: We have ten cabins, three rental  
24 homes and numerous outbuildings and permanent residents  
25 for caretaking staff, employees and other family and

1 residents on the ranch.

2 MS. BRENNER: And how many homes does it -- so  
3 you listed how many cabins, how many homes are there?

4 WITNESS COLE: That are occupied full time?

5 MS. BRENNER: Yes.

6 WITNESS COLE: So there's my home and there's my  
7 son's home with his wife. I have a caretaker and his  
8 family. So in the current configuration of our families  
9 there are six individuals; likely to be more as children  
10 are born or elderly parents return home for care.

11 MS. BRENNER: Okay. Can you indicate when you  
12 were first approached by the State Water Board or  
13 California Fish and Wildlife regarding -- or the Regional  
14 Board regarding your diversions at Marble Mountain Ranch?

15 WITNESS COLE: Regarding the -- our first --  
16 the diversions, our first contact was about four years  
17 after we purchased the ranch in 1998.

18 MS. BRENNER: And can you just briefly  
19 summarize what's been going on with the regulator since  
20 that time?

21 WITNESS COLE: I first went into my  
22 relationships with the Water Board and all the regulators  
23 optimistically looking for win-win solutions, pragmatic  
24 answers to problems, and in effect -- and in an attempt  
25 to magnify my calling as a steward over the resources

1 there at Marble Mountain Ranch.

2           My first interaction with the Water Board was  
3 with Tony Wiedemann, actually prior to this, when he  
4 called me from the Redding Office and volunteered his  
5 assistance in establishing a potable water system, which  
6 was absent at the time. Over the years my naiveté has  
7 been unfortunately transmitted -- transformed into jaded  
8 pessimism, as I've had interactions that have turned more  
9 into oppression and a deterrence to my efforts to improve  
10 my -- the resource management at Marble Mountain Ranch.

11           MS. BRENNER: Can you briefly describe to me --  
12 or describe the efforts to maintain and operate the  
13 diversion ditch at Marble Mountain Ranch since you took  
14 ownership?

15           WITNESS COLE: Sure. The ditch, as we  
16 inherited it from the Youngs was largely the same from  
17 what I can tell as what the goldminers left it 100-and-  
18 some-odd years ago. There was a wooden trestle right  
19 near the point of diversion, which carried water across  
20 an unnamed tertiary stream, which has been identified by  
21 Stormer as one of the points of his concern.

22           This wooden trestle was leaky, subject to  
23 falling over, and exposed to impact from falling trees.  
24 It was a critical path that if it failed it would  
25 immediately stop water flow to the ranch. And as our

1 source of only domestic water and power at the time, it  
2 was critical to replace that. So one of our first moves  
3 was to upgrade the system to eliminate the leaky  
4 conveyance over this wooden flume.

5           We also inherited a ditch that had a long  
6 period of time of gravel and sediment accumulation, so  
7 that the freeboard along good sections of the ditch was  
8 low, making it more susceptible to overtopping with  
9 pulses of water that might enter the ditch in a storm  
10 event. Threatening trees were leaning over the ditch and  
11 threatening trees on the out-berm were threatening to  
12 destroy the berm should they fall and have a root ball  
13 remove the outer berm.

14           So, basically, a large amount of inherited,  
15 deferred maintenance. It was everywhere on the ranch,  
16 including on the ditch line.

17           MS. BRENNER: And what efforts have you main --  
18 have you made to upgrade the maintenance and operations  
19 of that ditch system?

20           WITNESS COLE: We didn't have the ability to  
21 tackle any one of the projects on the ranch in full --  
22 renovation all at once -- we didn't have the capital. It  
23 took all of our capital to just land on the ranch rather  
24 than be able to show up and have millions of dollars to  
25 do this project, this projects and that project. So we



1 identified primary points of concern and prioritized  
2 them. As I mentioned the first point of concern was the  
3 wooden trestle, which we replaced.

4           The next point of concern over the years was to  
5 begin improving the berm and its stability. So we would  
6 take accumulated gravel for -- placed there from the  
7 carrying capacity of Stanshaw Creek and move it to the  
8 outer berm. We would take weaker sections of the ditch  
9 line as they would be identified and line them with half-  
10 culverts, improving the chance that -- or improving the  
11 conveyance and reducing ditch loss and improving the  
12 stability of the ditch. So this has been an ongoing, 25-  
13 year project from the day we purchased the ranch, and  
14 continues right now.

15           If you look at images that are presented by the  
16 Water Board taken in 2014 you'll see dramatically  
17 different conditions now in 2017, because of ongoing  
18 maintenance. If you contrast the ditch and its  
19 appearance from the inspection visit in 2015 you would  
20 see that that is a much-improved condition versus 2008.  
21 It's an ongoing and steady effort in order to make the  
22 conveyance capacity stabilized and protected against  
23 natural forces, storms and tree falls, whatever.

24           MS. BRENNER: Did you also create some storage  
25 capacity at the Marble Mountain Ranch?

1                   WITNESS COLE: I did. I must -- the storage  
2 capacity has been based on a modular system that Tony  
3 Wiedemann helped me construct roughly about 1995 the  
4 first year or two after we were there. So we instruct --  
5 we constructed water filtration systems based on slow  
6 sand and gravel, which are a gravity-driven system. And  
7 we had two 3,000-gallon water tanks that we could store  
8 water in, so that in the event we needed to shut off the  
9 ditch to maintain the ditch we could do that and still  
10 have potable water. And also so that we could draw from  
11 a buffer rather than draw directly from the stream. And  
12 have some capacity to have stable supplies of water  
13 rather than being directly dependent on whether or not  
14 the ditch was flowing. There are periods of time when we  
15 need to shut the ditch off. And shutting off the ditch  
16 without that capacity meant we had no consumptive or  
17 domestic water at all.

18                   We've since then improved the capacity of our  
19 storage by adding a total of seven tanks. And now that's  
20 part of our regular potable water treatment system where  
21 we rotate from one tank to the next daily, so that we  
22 have a metered contact time for chlorine in our  
23 production of potable water.

24                   MS. BRENNER: Did you also replace the hydro-  
25 generator system?

1           WITNESS COLE: We did. The hydroelectric plant  
2 that we inherited was based on a Gold Rush era, cast-iron  
3 water wheel, rotating at 60 cycles per second connected  
4 to -- by direct shaft to a generator, which was World War  
5 II era. Producing direct current and modified to produce  
6 alternating current with an -- exciter motor, which was a  
7 modification from the earlier system which produced DC  
8 current and ran the ranch based on old-school knob-and-  
9 tube DC current.

10           So there's been an evolution in the efficiency  
11 and quality of electricity over the years also. I  
12 replaced that system with a modern bronze-ca (phonetic) -  
13 - bronze water wheel 18 inches in diameter, rotating at  
14 18,000 -- 1800 RPM. And driven by belts to a Lima  
15 brushless generator with the capacity of about 40  
16 kilowatts when it's running at full -- a full head of  
17 water.

18           MS. BRENNER: Did -- are there times at the  
19 ranch where you actually -- your energy demand actually  
20 exceeds the 40 kilowatts?

21           WITNESS COLE: Yes, there are.

22           MS. BRENNER: And can you describe those?

23           WITNESS COLE: Those time happen primarily in  
24 the summer when we have full guest capacity and the need  
25 to keep guests comfortable with air-conditioned cabins,

1 with production in the kitchen for feeding, for running  
2 laundry facilities to handle housekeeping needs.

3           In the winter we can run the generator at full  
4 capacity with very little waste, because we have heating  
5 demands but we have less occupancy on the ranch. So we  
6 run the generator at full capacity as long as we are  
7 permitted based on available water and based on occupancy  
8 needs on the ranch.

9           MS. BRENNER: So even in the winter you need up  
10 to 40 kilowatts of power?

11           WITNESS COLE: Absolutely. We -- even though  
12 we had less occupancy in the winter the beneficial uses  
13 for heating draw the capacity to its limit.

14           MS. BRENNER: It snows at Marble Mountain  
15 Ranch?

16           WITNESS COLE: It does.

17           MS. BRENNER: Did -- are you able to adjust the  
18 power production of your generator system?

19           WITNESS COLE: Of the hydroelectric plant?

20           MS. BRENNER: Yes.

21           WITNESS COLE: I am -- by contrast with the  
22 replaced generator, which had one fixed jet this system  
23 has two fixed jets that are available to be switched out  
24 with varying diameter jets, so that the flow can be  
25 adjusted to match the available flow of water to the

1 hydro plant.

2           So typically, we would have a high-flow setup  
3 and a low-flow setup and minor modifications between  
4 that. But in a nutshell, we would go to the largest jets  
5 in the winter when the most available water is available.  
6 And we could run a generator at full capacity to take  
7 advantage of the beneficial uses of heating the ranch and  
8 running all the other electrical needs on the ranch.

9           As the season would progress into the spring  
10 and summer we would switch down and truncate water use  
11 and use smaller jets. The generator runs more  
12 efficiently when you have a small jet with a full  
13 penstock than you do with a large jet and a partially  
14 filled penstock. So efficiency is improved by keeping  
15 the penstock full. And that's done by restricting the  
16 size of the jets as flow availability diminishes.

17           MS. BRENNER: And you change those jets out to  
18 adjust for that correction?

19           WITNESS COLE: Correct.

20           MS. BRENNER: How do you generate the  
21 additional electricity that's demanded at that time?

22           WITNESS COLE: Historically that's with diesel  
23 generators.

24           MS. BRENNER: Have you considered solar energy?

25           WITNESS COLE: I have.

1 MS. BRENNER: And have you given some cost  
2 estimates?

3 WITNESS COLE: I have.

4 MS. BRENNER: What can you -- can you tell us  
5 what those are?

6 WITNESS COLE: Hal Slater from his firm, which  
7 the name I don't recall, gave me an estimate of  
8 approximating half a million dollars to install a solar  
9 plant on the ranch, which would entail felling trees in a  
10 particular spot, installing solar panels and bringing in  
11 a cargo container to fill with battery storages. And  
12 redistributing some power lines around the ranch. So  
13 that initial estimate was \$500,000 approximately, and did  
14 not include ongoing maintenance issues or replacements of  
15 battery packs as they aged or any of the -- any other  
16 long-term maintenance.

17 MS. BRENNER: Did Mr. Cole (sic) consider the  
18 fact that during the wintertime you have snow events?

19 WITNESS COLE: Mr. Slater?

20 MS. BRENNER: I mean, Mr. Slater, sorry.

21 WITNESS COLE: Yeah. We had a discussion on  
22 that point. He seemed to think that there could be some  
23 benefit from a solar plant by, when there was a sunny  
24 day, charging some batteries and then running diesel  
25 during the periods of overcast. And so as a solar

1 salesman he was strong on promoting that it has  
2 beneficial use all the time. And hypothetically I can  
3 see that. The reality of the long periods as overcast  
4 and shorter daytimes was somewhat discouraging for me.

5 MS. BRENNER: In this past month have you  
6 experienced as many as a week with no sun?

7 WITNESS COLE: That's a routine occurrence,  
8 including this past week.

9 MS. BRENNER: So that's not an occurrence just  
10 in the dead of winter?

11 WITNESS COLE: No.

12 MS. BRENNER: Could you briefly describe your  
13 regular maintenance efforts of the ditch?

14 WITNESS COLE: Sure. So the ditch can be  
15 observed indirectly by observing the outflow, which comes  
16 down the ditch and seeing what's happening as the water  
17 goes through the hydro plant. So there's a direct  
18 observation that we can make there as well as to how  
19 effectively the power plant is running when things are  
20 going smooth and there's no flickering in the light, no  
21 diminished power capacity, all things status quo. We  
22 have a general sense that things are okay on the ditch  
23 line, because there's a direct relationship between  
24 what's happening on the ditch and what we see with power  
25 generation on the ranch.

1                   In addition, we do routine walks and  
2 inspection on the ditch. And those change in frequency  
3 based on the season. In the fall when we have leaf fall  
4 sometimes it requires walking the ditch and cleaning our  
5 so-called trash rack at the head of the penstock several  
6 times a day, because of the amount of leaf litter, which  
7 gets conveyed into the ditch falls on the overhead canopy  
8 into the ditch and then gets trapped on to the trash rack  
9 above our penstock.

10                   In the stable seasons midsummer, it might be  
11 required every other day. Get an eye on it if things  
12 look normal. Check on the flows, see what's happening at  
13 the pen -- at the point of diversion. So the frequency  
14 of inspection on the ditch varies depending on the season  
15 of the year and the anticipated weather pattern. If we  
16 know that we've got a storm coming in that's going to  
17 drop an inch-and-a-half of rain in a day we go up and  
18 shut down the ditch or reduce its flow.

19                   So it's based -- our inspection and maintenance  
20 is based on seasonal changes as well as observations of  
21 the weather pattern.

22                   MS. BRENNER: And are there other maintenance  
23 efforts that you employ?

24                   WITNESS COLE: Well, yeah we walk the ditch  
25 regularly to remove branches, leaf litter, obstacles that



1 might have fallen into the ditch. We remove accumulated  
2 gravel and silts that are captured and entrained into the  
3 ditch from Stanshaw Creek. Stanshaw Creek is a high,  
4 high-sediment carrying capacity stream and it acts as a  
5 natural gravel and sediment-capturing tool. And so at  
6 the head of the ditch you will see large cobble the sizes  
7 of grapefruits. As you move farther down the ditch  
8 you'll see captured rock that is the size of a tangerine.  
9 Moving farther down the ditch you'll see rock that's the  
10 size of a large marble to smaller gravel to sand to silt.

11 All of this is entrained by the ditch from  
12 Stanshaw Creek on a normal routine basis and increases in  
13 the spring when the carrying capacity of Stanshaw Creek  
14 increases. And that's the material that we dig out from  
15 the ditch to recapture the freeboard of the berm. And  
16 place on the top of the berm to strengthen it and use it  
17 as building material to support the ditch.

18 So the idea that we can put water in a pipe and  
19 not worry about what's traveling down the pipe is a  
20 concern for me, as I see the ditch managed and the  
21 historical things that we see in the running operation of  
22 the ditch. Because we can't capture water from Stanshaw  
23 Creek and run it three-quarters of a mile down to a  
24 penstock and into a water wheel without putting gravel  
25 into a water wheel. The ditch in its current operation

1 acts as a natural sediment-separation system, so that we  
2 can end up with relatively clean water that impacts a  
3 water wheel and doesn't destroy it. In the matter of an  
4 hour any water wheel will be fully demolished by the  
5 impacts from gravel that would be entrained in a pipe  
6 directly at the head of Stanshaw Creek.

7 MS. BRENNER: Have these ongoing operation  
8 maintenance efforts resulted in stabilizing the ditch  
9 system?

10 WITNESS COLE: Yes. We haven't had an  
11 overtopping in 20 years. And the overtoppings we had  
12 seen in the early years were primarily at issues -- at  
13 places where there was a low freeboard legacy locations  
14 on the ditch that we inherited from our predecessor.

15 I haven't -- I haven't got a single incident  
16 that I can say with confidence resulted in any gravel  
17 from an overtopping ending into -- entering into the  
18 State of California waters.

19 MS. BRENNER: And you indicated that Stanshaw  
20 is a sediment carrying system. What did you mean by  
21 that?

22 WITNESS COLE: Stanshaw Creek is a high-  
23 gradient stream as was testified to earlier. And it has  
24 the ability and the capacity to carry extremely large  
25 amounts of sediment. When I go out to maintain the ditch

1 in the winter I see on the opposite banks from our point  
2 of diversion and downstream, regular slides from the  
3 steep gradients of the canyon that captures Stanshaw  
4 Creek. When we walked the creek recently and in times  
5 past we see regular period -- regular locations where  
6 entire hillsides have sloughed off into Stanshaw Creek,  
7 which is a concern for me as accusations were made that  
8 sediment in the refugial pool is sourced by my diversion.  
9 The capacity to produce gravel being captured by a  
10 refugial pool is far greater, hundreds of thousands of  
11 cubic yards greater than what the capacity of my ditch  
12 could conceive of producing.

13           If it -- so just on normal observations in the  
14 canyon, if you're there in the winter you see landslides  
15 as a natural event in the canyon. And those landslides  
16 happen every single year. They happen predominantly in  
17 larger storms, but larger storms happen in pulse events  
18 yearly. And sometimes I get -- after a larger storm I  
19 have to shut my ditch off in the winter, dig it out in  
20 the top and then reestablish the ditch, so that we can  
21 re-turn the ditch on. Not because anything happened in  
22 the ditch itself, but because Stanshaw Creek planted  
23 gravel and sediments in the ditch in the course of one  
24 storm.

25           MS. BRENNER: Okay. Did you participate in the

1 stakeholders' process for approximately 20 years?

2           WITNESS COLE: I have, voluntarily. I've  
3 encouraged efforts to find proactive solutions to things  
4 that might happen in the ditch, such as possible  
5 overtoppings, proactive attempts to reduce our  
6 consumption on the ranch. And I can identify all our  
7 improvements we've done on the ranch, if you'd like.

8           I have proactively invited consultants and  
9 worked with them to try to find solutions originally, to  
10 return all of our flows back to the anadromous stretch of  
11 Stanshaw Creek.

12           We had a grant proposal prepared and submitted  
13 for -- in 2004. And right when that was to be decided  
14 apparently that grant was denied, because Water Board  
15 could not acknowledge that we had a valid pre-1914 water  
16 right. And funders did not want to be drawn into  
17 threatened lawsuits by funding an improvement that Water  
18 Board didn't want to acknowledge was valid at that time,  
19 which led later on to an attempt to get a third-party  
20 independent law firm, Lennihan Law, to look at our water  
21 rights and determine that in fact we did have a valid  
22 water right.

23           And so we began then with funding capacities to  
24 look at other issues such as alternative energy sources  
25 and pipings of the ditch. And that led to a later grant

1 attempt to run a six-inch pipe down the ditch and convey  
2 consumptive and domestic water without any of the ditch  
3 losses. And that grant was abandoned the day that it was  
4 to be funded when we were told, without any advance  
5 notice, that should we accept this grant and do the  
6 piping that we would be required to abandon our  
7 hydroelectric power water transmissions, as well.

8 I did not want to abandon our hydroelectric  
9 plant. And consulting with my family, we decided that  
10 acceptance of a six-inch conveyance site -- water line at  
11 the cost of losing our hydro plant water was not an  
12 acceptable option. And so that fell apart.

13 MS. BRENNER: You mentioned briefly that you  
14 made improvements on the ranch for more efficiency. Can  
15 you just describe some of those?

16 WITNESS COLE: Yes. When we purchased the  
17 ranch, Marble Mountain Ranch buildings were primarily  
18 buildings constructed 40 years prior to the purchase and  
19 earlier. So at that time the Hayes family had built  
20 buildings to house forest service employees in the 1940s  
21 and '50s. And they had built cabins with very limited  
22 capital assets. And the buildings were uninsulated, they  
23 had single-pane windows, doors without weather stripping,  
24 leaky water systems, poor conveyance of power to their --  
25 to the buildings and unsafe power in the buildings.

1           So we began the process, targeting again, the  
2 most exposed areas of the ranch, in their risk to the  
3 public and in their exposure to misuse of the resource.  
4 We began stripping to the -- the cabins to their frame,  
5 rewiring them, replumbing them, insulating them,  
6 installing new double-pane windows, weather-stripped  
7 doors. And making them so that they could be effectively  
8 heated, safely electrified and more acceptable to the  
9 public that would be wanting to visit a modern dude ranch  
10 rather than live in a squalid fish camp.

11           So we building by building proceeded on that  
12 process, doing the work ourselves as experienced  
13 carpenters and builders. From our past employment and  
14 our own past businesses we carried those skillsets with  
15 us. And so our winter program would be we'd shut down  
16 the ranch and choose the worst buildings and upgrade them  
17 to make them more public-friendly and more efficient.

18           The ranch infrastructure for power  
19 dissemination and distribution was improved a piece at a  
20 time also. During the 150 years of occupancy on the  
21 ranch, no one person had a master plan of what was going  
22 to happen in the year 2017. So wire placements for power  
23 distribution were based on needs of the moment. And so  
24 as we bought the ranch in 1994, we inherited some very  
25 unbalanced power distributions. Power lines that were

1 unsafely placed inadequately in the ground with poor  
2 contacts, so there were ground faults. A lot of energy  
3 loss, both in transport because of distance as well as in  
4 poor contacts and ground faults and inadequate wiring.  
5 So that it took more power to operate the ranch than was  
6 actually needed if you did a hypothetical analysis of  
7 what was actually being done on the ranch.

8           Improvements can still be done on that point.  
9 And I acknowledge that. And I look forward to making  
10 those improvements as well.

11           HEARING OFFICER MOORE: So we've reached that  
12 time. And how much more time do you think you would  
13 need?

14           MS. BRENNER: I think we would need about five  
15 more minutes.

16           HEARING OFFICER MOORE: I'll allow it.

17           MS. BRENNER: Thank you.

18           (Timer reset for five more minutes.)

19           MS. BRENNER: And did you also go in -- did you  
20 -- was the ranch prior to your purchase flood-irrigated?

21           WITNESS COLE: It was. The lower ditch line  
22 downstream of the hydroelectric plant would be blown open  
23 and water flowed out -- encouraged flow out on to the  
24 pastures or gardens. Or diverted and directed by the  
25 secondary or tertiary ditch lines, so that the pastures,

1 gardens and facilities of the ranch were flood-irrigated.

2           We installed a tee off of the base of our hydro  
3 plant penstock to divert water in a pipe, a four-inch PVC  
4 pipe along the back end of the ranch. Truncating to a  
5 three-inch ag line, hook latch, so we can now take  
6 traditional agricultural popups with hook-latch aluminum  
7 lines and run sprinklers to gardens and pastures. And  
8 also provide -- we use that as a fire-prevention base, so  
9 that we have adaptors to put on or use that same line for  
10 fire prevention.

11           MS. BRENNER: Okay. Do you -- I'm going to  
12 just kind of go out and briefly, since you mentioned  
13 fire, this last summer you -- there was two fires within  
14 the area of Marble Mountain Ranch?

15           WITNESS COLE: Right. There was the Marble  
16 Fire and the Haypress Fire, a part of a much larger  
17 complex. And both fires were right on the ranch.  
18 Haypress was not directly on the ranch property, but it  
19 was within a half-to-a-quarter mile of the ranch. The  
20 Marble fire was right on the ranch boundary. Our  
21 irrigation system was used by the firefighting crews to  
22 directly suppress the fires as well as to fill fire  
23 engines as well as to pump from the ditch, so that they  
24 could run sprinklers and run hose lines up the fire break  
25 to the top of the Bald Butte, as well as around the



1 ranch.

2           So the ditch infrastructure and agricultural  
3 infrastructure of the ranch was used as an integral part  
4 of the firefighting efforts in both the Marble fire, the  
5 Haypress fire. And also used in previous fires over the  
6 two decades that the -- two-plus decades that we've been  
7 there.

8           MS. BRENNER: If you had placed any kind of  
9 plastic piping into the ditch system prior to this, last  
10 year -- last summer's fire, would it still exist today?

11           WITNESS COLE: It would have been burnt up.  
12 Other fires in the area that have had pipe -- plastic  
13 pipe they've lost their infrastructure, because it's all  
14 been burnt up.

15           MS. BRENNER: And did you -- can we pull up --  
16 what Exhibit Number is it, Kerry?

17           MS. FULLER: The fire?

18           MS. BRENNER: Yeah.

19           MS. FULLER: It's MMR-10.

20           MS. BRENNER: Can we take a look at MMR-10? Is  
21 that it?

22           MS. FULLER: Yes. That's the beginning of it,  
23 I think.

24           (Exhibit MMR-10 displayed on screen.)

25           WITNESS COLE: Yeah, that's the start of the

1 Marble Fire.

2 MS. FULLER: We can scroll.

3 MS. BRENNER: Can we go to the next slide,  
4 please?

5 Is this -- what's this depicting?

6 WITNESS COLE: These are hose lines are on the  
7 ditch that the firefighting crews are --- they installed  
8 pumps to directly intake water from the ditch line and  
9 pressurize the hose lines if they ran along stock trails,  
10 up firebreak roads and around the ranch perimeter. And  
11 then farther up to the top of the Bald Butte.

12 MS. BRENNER: And that's a depiction, a current  
13 depiction of how the ditch looks today?

14 WITNESS COLE: That's how it looked as of July  
15 2017.

16 MS. BRENNER: Can we go to the next slide  
17 please?

18 WITNESS COLE: This is a pump directly pump --  
19 taking water from the ditch to pressurize the fire hoses  
20 running up the firebreak road at the Bald Butte Trail.

21 MS. BRENNER: Can we go to the next slide  
22 please? I want the winter slide. That -- can you stop  
23 there?

24 This is an evidence of the fire crew at the  
25 Marble Mountain Ranch?

1                   WITNESS COLE: Right. This is one of the  
2 hotshot crews moving up the pre -- staging and preparing  
3 to move up to the ditch line and farther along the stock  
4 trails to place fire hose.

5                   MS. BRENNER: And could you go to the next?  
6 And that's Marble Mountain 10, Photograph Number 6. Can  
7 you stop at 7, please?

8                   Is that a depiction of the devastation of the  
9 fire around Marble Mountain Ranch?

10                  WITNESS COLE: It is. I'd like to note the  
11 width of the berm. I'd like to note that the ditch is  
12 still flowing, that there are no overtoppings. And that  
13 in spite of the high, high intensity fire with burning  
14 debris falling into the ditch, that the ditch is  
15 operational and no sediment or waters from the ditch have  
16 departed from the ditch.

17                  MS. BRENNER: And that's Marble Mountain 10,  
18 Photograph 7. Is that the one in the winter?

19                  HEARING OFFICER MOORE: Okay, are we getting  
20 close?

21                  MS. BRENNER: We're getting close.

22                  (Off mic colloquy regarding slides.)

23                  HEARING OFFICER MOORE: So an additional five  
24 minutes?

25                  MS. BRENNER: An additional five minutes

1 please.

2 HEARING OFFICER MOORE: Okay.

3 (Timer reset for additional five minutes.)

4 MS. BRENNER: Thank you.

5 And we won't need any more of those photos.

6 Can I just take a quick minute?

7 WITNESS COLE: Well, can I offer editorial on  
8 something on this while they're talking?

9 HEARING OFFICER MOORE: Is it building on a  
10 previous point?

11 WITNESS COLE: It is.

12 HEARING OFFICER MOORE: Okay.

13 WITNESS COLE: Prior to the fire the -- this  
14 past winter we had a atypical heavy rain and snowfall  
15 event, which pushed over thousands of trees onto the  
16 ditch, which is what then burnt on top of the ditch. So  
17 the ditch line in its current improved form survived not  
18 only two fires, but also a snow-down event, which was  
19 historical.

20 HEARING OFFICER MOORE: Okay.

21 MS. BRENNER: So let's go back to during the  
22 stakeholder process. Despite the issuance of the Draft  
23 Cleanup and Abatement Order that stakeholder process  
24 continued, correct, in January of 2016?

25 WITNESS COLE: Yes.

1 MS. BRENNER: Was the NFMS flow recommendation  
2 still under discussion during that time?

3 WITNESS COLE: To my understanding, yes.

4 MS. BRENNER: Do you ever recall indicating  
5 during this stakeholder process that 1.5 cfs was adequate  
6 use for you at the ranch?

7 WITNESS COLE: I do not.

8 MS. BRENNER: Do you recall that you would  
9 indicate that 1.5 cfs would be adequate for just  
10 consumptive use?

11 WITNESS COLE: Yes.

12 MS. BRENNER: But that wouldn't have included  
13 hydropower use?

14 WITNESS COLE: No.

15 MS. BRENNER: Do you recall ever accepting or  
16 being able to -- indicating to the stakeholder group that  
17 you would be able to operate under the NFMS bypass flow  
18 recommendations?

19 WITNESS COLE: No.

20 MS. BRENNER: Do you know how often if you had  
21 to divert -- if you were allowed to only divert 10  
22 percent of the Stanshaw flow, how often you'd be able to  
23 divert up to the full 3 cfs?

24 WITNESS COLE: Well that would -- it would be  
25 seasonally doable, but not for much of the year. And so

1 during wet months I could -- if I could hypothetically  
2 take my full cfs there's plenty of water to do that. But  
3 now, the transition time changes on a wet year to a dry  
4 year. So if I had to have 10 percent of 2 cfs, 10  
5 percent would be .2 cfs. And there are years when  
6 Stanshaw is flowing at 1 1/2 cfs. So at 10 percent at 1  
7 1/2 would leave me 1 -- or 0.15 cfs. It's not really  
8 enough to do domestic flows or domestic and consumptive  
9 use.

10 MS. BRENNER: Do you have a sense of -- if, in  
11 order to divert 3 cfs, Stanshaw would be at 30 cfs,  
12 correct?

13 WITNESS COLE: Under that rule, which is pretty  
14 odd. I mean, it gets there in storm pulses. But that  
15 would mean I could only operate my hydro plant during the  
16 largest of storms. And then under that scenario I would  
17 be shutting it off under threat of loss of the ditch.

18 MS. BRENNER: Correct. In high-storm events  
19 you shut it off?

20 WITNESS COLE: Correct.

21 MS. BRENNER: Did you ever contact PG&E and see  
22 if they could provide power?

23 WITNESS COLE: I did. The quote is, as I  
24 recall, is seven-and-a-half to eight-dollars per linear  
25 foot, which is well over a million dollars to bring power

1 to Marble Mountain Ranch from the nearest connecting  
2 point.

3 MS. BRENNER: Were you ever provided any  
4 information on the cost to return the flow to Stanshaw?

5 WITNESS COLE: Well, when we had that grant  
6 proposal at the time we were going to piggyback that with  
7 excavations done by the phone company to install fiber  
8 optic cable. And so all the environmental work had been  
9 done, the construction crews are onsite. And as I  
10 recall, that grant was \$260,000. I could be wrong, but  
11 that's the range that I'm remembering. If we had to do  
12 that now it would be an entirely different story.

13 MS. BRENNER: Do you have an estimate it'd  
14 exceed half a million?

15 WITNESS COLE: No, millions.

16 MS. BRENNER: Have you attempted to secure a  
17 discharge permit to allow you to use Irving Creek  
18 outfall?

19 WITNESS COLE: I have.

20 MS. BRENNER: Have you gotten any response from  
21 the regulatory --

22 WITNESS COLE: No answer. We've had to run  
23 diesel for the last year-and-a-half or two years, because  
24 there's been no response on that.

25 MS. BRENNER: Do you know how much that has

1 cost?

2 WITNESS COLE: An additional \$6,000 a month.

3 MS. BRENNER: And have you proposed to operate  
4 your diversion to allow 2 cfs bypassed at the point of  
5 diversion?

6 WITNESS COLE: I have.

7 MS. BRENNER: And when there's less than 2 cfs  
8 you'd reduce your diversion to 10 percent of the flow?

9 WITNESS COLE: We've had that discussion, yes.

10 MS. BRENNER: And this would allow you to  
11 continue to operate the hydro system and avoid the costs  
12 incurred recently in operating the diesel generator?

13 WITNESS COLE: I'm not sure of the question  
14 again.

15 MS. BRENNER: I said this -- if you were  
16 allowed to divert under a scenario that would bypass 2  
17 cfs, and it was below 2 cfs then just 10 percent of the  
18 flow you could still operate oftentimes your hydro plus  
19 your system?

20 WITNESS COLE: Yes. For example, right now  
21 Stanshaw Creek is flowing well over 5 cfs, so the 2 plus  
22 the 3 is 5. And so I'm approximating we've got flows in  
23 Stanshaw of around 8 to 10 cfs right now, so there's  
24 plenty of -- plenty of water.

25 (Timer sounds.)



1 MS. BRENNER: And I have just one more  
2 question. Have you also proposed piping or lining the  
3 diversion, at least the first -- the first portion of the  
4 diversion ditch?

5 WITNESS COLE: I have.

6 MS. BRENNER: I have nothing further.

7 HEARING OFFICER MOORE: Okay. Well, thank you.  
8 Thanks, Counselor.

9 And at this point the next stage is to offer  
10 Cross-examination and that the first in line is the  
11 Prosecution Team. Are you prepared and ready to come up  
12 and cross-examine the witness?

13 (Brief pause in proceedings.)

14 HEARING OFFICER MOORE: Yeah, since we had that  
15 brief break before I propose we just continue in the name  
16 of efficiency.

17 And the microphone is yours Mr. Petruzzelli.

18 CROSS-EXAMINATION BY

19 MR. PETRUZZELLI: Mr. Cole you just indicated  
20 that flows in Stanshaw were currently well over 5 cfs.  
21 Have you measured that?

22 WITNESS COLE: I haven't gone out and measured  
23 that, no.

24 MR. PETRUZZELLI: Okay. So you haven't  
25 measured that flow?

1 WITNESS COLE: I've observed it.

2 MR. PETRUZZELLI: Are you trained in measuring  
3 flow with -- through visual observation?

4 WITNESS COLE: I have no formal training for  
5 measuring flows, only 25 years of managing the ditch.

6 MR. PETRUZZELLI: Okay. So I'd like to move  
7 into asking you about your written testimony, starting at  
8 the beginning.

9 WITNESS COLE: Okay.

10 MR. PETRUZZELLI: Paragraph 1 you indicate that  
11 you're -- the ranch currently hosts up to 45 guests at a  
12 time?

13 WITNESS COLE: Correct.

14 MR. PETRUZZELLI: Okay. And --

15 WITNESS COLE: Oh, that's in its -- that's in  
16 the normal summer business model absent any other fire  
17 camp or other -- occasionally we get charter groups that  
18 might be larger than that. That's the normal business  
19 model.

20 MR. PETRUZZELLI: Okay. I think -- and Mr.  
21 Meyer, however, in his testimony states you plan to  
22 increase your capacity from 36 to 50. Do you recall that  
23 testimony?

24 WITNESS COLE: I do.

25 MR. PETRUZZELLI: Okay. So is your current

1 guest capacity 36 guests or is it 45?

2 WITNESS COLE: We have a guest capacity at beds  
3 for 45. We tend to keep it around 36 out of a preference  
4 for -- preferred group size. But we have the capacity,  
5 and we advertise it can go up to like 50. That's our bed  
6 count versus what we prefer to operationally operate.

7 MR. PETRUZZELLI: So your preferred limit is  
8 around 36?

9 WITNESS COLE: Yes.

10 MR. PETRUZZELLI: Okay. And in most of your  
11 statements of diversion and use you indicate up to 50  
12 people at the ranch during the busy season; is that  
13 correct?

14 WITNESS COLE: That's the normal status, yes.

15 MR. PETRUZZELLI: Okay. So you know, just  
16 subtracting 36 from 50, are the remaining 14 people  
17 usually family and staff?

18 WITNESS COLE: Family and staff.

19 MR. PETRUZZELLI: Okay. And in your written  
20 testimony you state that you operate seasonally from  
21 April 1 to December 1; is that correct?

22 WITNESS COLE: A slight difference to that  
23 answer. We prefer to shut down soon after Thanksgiving,  
24 but we do occasionally do business through December. It  
25 just depends on the conditions of the river and whether

1 or not we can continue operating our guided fly fishing  
2 business. So we can hypothetically stay in business as  
3 long as the river is fishable, as long as people can get  
4 there. But in a general sense we operate sometimes  
5 earlier than April, like March, because of spring break  
6 for a lot of people -- if weather allows we go earlier or  
7 later.

8 MR. PETRUZZELLI: Okay. But typically when you  
9 refer to your busy season --

10 WITNESS COLE: Yes?

11 MR. PETRUZZELLI: -- typically April 1 through  
12 December 1?

13 WITNESS COLE: Right.

14 MR. PETRUZZELLI: Okay. And that's eight  
15 months; is that correct?

16 WITNESS COLE: Yes.

17 MR. PETRUZZELLI: Okay. And currently you  
18 claim 3 -- a 3 cfs right; is that correct?

19 WITNESS COLE: Yes.

20 MR. PETRUZZELLI: Okay. Have you ever  
21 indicated you could operate with less than that?

22 WITNESS COLE: I probably had discussions with  
23 people that we could operate with less than that given  
24 changes in -- in conveyance changes, other changes to the  
25 -- our system. But under current situations 3 cfs is

1 what we need.

2 MR. PETRUZZELLI: After the Lennihan Report  
3 came out did you indicate you were willing to go forward  
4 with that, with the 1.16 cfs determination in that  
5 report, to implement physical solutions?

6 WITNESS COLE: I don't recall having said that.  
7 My bottom line has always been capturing sufficient water  
8 to allow us to sustain our business and our living there  
9 on the ranch. Whatever that is, that's the bottom line  
10 and that's what I've agreed to. So we will -- the point  
11 of discussion of 2 cfs, 2 1/2, 1 1/4, 1.75, if funding  
12 became available to magically create a hybrid solar  
13 system with improved hydroelectric plant and a better  
14 conveyance. And we had a agreed maximum diversion of  
15 1.75 cfs and all of that preserved our energies to this  
16 point in our business and our life, yes.

17 And so the bottom line for me is does it enable  
18 survival? And I don't recall that specific situation,  
19 but --

20 MR. PETRUZZELLI: So if your -- so if your  
21 business could continue operating with a lower peak  
22 diversion rate you would be okay with that?

23 WITNESS COLE: Survival of the business and our  
24 family's heritage, yes.

25 MR. PETRUZZELLI: Okay. Do you recall the

1 December 17, 2014, meeting with Division staff and the  
2 subsequent stakeholder meeting?

3 WITNESS COLE: I do.

4 MR. PETRUZZELLI: Okay. Do you recall the site  
5 tour with staff in your pickup truck?

6 WITNESS COLE: No. I don't deny that it  
7 happened, but I don't remember doing that.

8 MR. PETRUZZELLI: So you don't recall  
9 conversations during the site visit?

10 WITNESS COLE: Absolutely not. I couldn't  
11 recreate any conversations.

12 MR. PETRUZZELLI: Okay. You wouldn't recall  
13 that at any point in conversations that might have  
14 occurred you may have indicated that you could -- that  
15 you were willing to accept the 1.16 number in the  
16 Lennihan Report?

17 WITNESS COLE: I don't think I could recall a  
18 conversation with my own mother three-and-a-half years  
19 ago in a pickup truck, let alone state inspectors. The  
20 answer is no.

21 MR. PETRUZZELLI: Okay.

22 And you don't recall indicating to Will Harling  
23 that you were willing to go forward with that --

24 WITNESS COLE: I do not.

25 MR. PETRUZZELLI: -- or not, you do not?

1                   WITNESS COLE: I do not.

2                   MR. PETRUZZELLI: Do you recall defending that  
3 determination at the stakeholder meeting to the effect of  
4 asking people what was wrong with that number?

5                   WITNESS COLE: I'm sorry, I don't recall that  
6 either. I wish I did. I don't.

7                   MR. PETRUZZELLI: Okay.

8                   (Whispers.) WR-83.

9                   MR. PETRUZZELLI: I'm going to continue asking  
10 you questions while she pulls up that exhibit.

11                  WITNESS COLE: Sure.

12                  MR. PETRUZZELLI: Do you recall indicating  
13 during that meeting that you had to shut down your hydro  
14 power plant in June that year?

15                  WITNESS COLE: I don't recall that, but that's  
16 a real possibility that I said that. We often shoot --  
17 shoot -- shut down our hydro plant based on water  
18 availability. And June would be a typical time when we  
19 would have the transition period between hydro generation  
20 and non-hydro generation, so that's quite possible that I  
21 said that.

22                  MR. PETRUZZELLI: And did you indicate that you  
23 spent about \$4,000 on diesel fuel that month; do you  
24 recall that?

25                  WITNESS COLE: Again, I don't recall that

1 specific conversation, but I may have said that.

2 MR. PETRUZZELLI: Okay.

3 WITNESS COLE: Fuel bills -- or diesel fuel  
4 prices have changed and evolved over -- especially  
5 recently, so that number may have been appropriate at the  
6 time.

7 (Exhibit WR-83 displayed on screen.)

8 MR. PETRUZZELLI: Yeah, I -- Mr. Cole, I'd like  
9 to direct your attention to this exhibit. This exhibit  
10 was notes from that meeting presented from Mr. Harling,  
11 multiple -- it indicates that there were multiple  
12 attendees at that meeting including Water Board staff.

13 WITNESS COLE: Right. My name is spelled wrong  
14 in that I just noticed. Go ahead.

15 MR. PETRUZZELLI: There are several  
16 misspellings in these notes. And I'd like to direct your  
17 attention to this conversation surrounding the  
18 highlighted portion where there's a discussion about the  
19 amount in the report. And you seem to be asserting that  
20 your right is 3 cfs, but in finding a number that people  
21 are comfortable with you indicate what's wrong with the  
22 number in the report.

23 WITNESS COLE: Okay. Which number are we  
24 talking about?

25 MR. PETRUZZELLI: Does this refresh your memory



1 at all?

2 WITNESS COLE: I need to be directed to which  
3 number in the report we're talking about?

4 MR. PETRUZZELLI: You're indicating what's  
5 wrong with the number in the report.

6 WITNESS COLE: Are we talking the conveyance  
7 loss, the total water right amount, the consumptive uses  
8 or what? I don't know which number we're talking about  
9 at this point.

10 MR. PETRUZZELLI: Well the conversation about  
11 the report in this -- at this point in the meeting  
12 relates to the conclusion in the report of the Marble  
13 Mountain water right.

14 WITNESS COLE: Okay. So I'm looking a couple  
15 of comments above from Barbara -- where Barbara states,  
16 "We're still of the opinion this is a 3 cfs water right.  
17 The question is can we agree to some kind of physical  
18 solution?"

19 Taro responds, "I don't think we can get to a  
20 final stage without us giving an opinion," being the  
21 Water Board.

22 "What do NFWF and NOAA need to fund a  
23 solution?" from Konrad.

24 Bob, "We need a number to move forward with a  
25 solution."

1 I'm presuming we're talking about the 3 cfs,  
2 which was just sentences before that. "We don't want to  
3 revisit this in 10 or 15 years." So my reading of this  
4 is that I'm responding to the sentence -- the comment  
5 from Barbara four sentences prior.

6 MR. PETRUZZELLI: Do you recall the conclusion  
7 of the -- regarding the Marble Mountain Ranch water right  
8 in that report; was it 3 cfs or was it 1.16?

9 WITNESS COLE: The number that I'm recalling  
10 was that ultimately the Water Board's assessment was that  
11 we would ultimately prevail in preserving a 3 cfs water  
12 right.

13 MR. PETRUZZELLI: Was that the assessment from  
14 the Division?

15 WITNESS COLE: I don't recall.

16 MR. PETRUZZELLI: Okay, so you don't recall  
17 whether that was the assessment from the Division or the  
18 assessment from the Lennihan Report?

19 WITNESS COLE: I'm thinking that was -- is it -  
20 - you've got the documents, I'm trying to pull my memory  
21 out. I can't do that at this point.

22 MR. PETRUZZELLI: I'm just trying to have --  
23 get some clarity as to what you meant by this statement.

24 WITNESS COLE: Well based on the conversation  
25 that I'm reading here the conversation was about water

1 rights of a capacity at 3 cfs. And my question of what's  
2 wrong with this number, would relate to the most recent  
3 sentence on the topic of flow, which is 3 cfs. So that's  
4 how I'm reading that.

5 MR. PETRUZZELLI: So your recollection was that  
6 the Lennihan report concluded your right was 3 cfs?

7 WITNESS COLE: Yeah, I don't recall.

8 MR. PETRUZZELLI: Okay. So you don't recall  
9 what this number was?

10 WITNESS COLE: No. My response here -- right  
11 now my read on what this conversation is about is the 3  
12 cfs water right number, at this point. Unfortunately, I  
13 wish I did have a 100 percent recall for 3 years back. I  
14 don't, Mr. Petruzzelli, so I'm trying to regenerate that  
15 memory by reading this and that's what I come up with.

16 MR. PETRUZZELLI: Yeah. I -- I hoped to  
17 possibly refresh your recollection.

18 WITNESS COLE: Okay.

19 MR. PETRUZZELLI: Okay.

20 (Whispers) Let's go back to --

21 MR. BUCKMAN: And just for the record the  
22 Exhibit Number that we were just referring to is WR-83?

23 MR. PETRUZZELLI: (Whispers) Do you know what  
24 exhibit number that was?

25 MS. MAPES: The one that we were just on?

1 MS. WEAVER: I'll advise Counsel, we can hear  
2 you whispering.

3 MR. PETRUZZELLI: It was 83.

4 So let's go to Page 3 of your written  
5 testimony. Is it your assertion that since about May --  
6 since about May 2015 have you limited your diversion to  
7 consumptive demands?

8 WITNESS COLE: That's correct.

9 MR. PETRUZZELLI: Okay. And that meant not  
10 diverting for hydropower; would that be correct?

11 WITNESS COLE: That's correct with the caveat  
12 that I diverted more during fire prevention.

13 MR. PETRUZZELLI: Okay. Does your Pelton wheel  
14 have a minimum operating threshold?

15 WITNESS COLE: I'm certain that it does. What  
16 it is I don't know. I can only tell you that we change  
17 the jet sizes to match the available water and go to the  
18 smaller jets as we have less available water. And what  
19 the minimum amount of flow required to operate that hydro  
20 plant is, I don't know. We, for pragmatic purposes,  
21 would often shut it off at a certain point just because  
22 it would become -- for the sake of ease of operation of  
23 our business, easier just to run the diesel when it got  
24 to a certain point. So we would shut down the hydro  
25 plant and run the diesel.

1                   MR. PETRUZZELLI: Do you recall Mr. Howard's  
2 testimony yesterday when he indicated that he went -- on  
3 occasion when he was visiting the ranch he saw water  
4 flowing through the Pelton wheel not generating power?

5                   WITNESS COLE: I do.

6                   MR. PETRUZZELLI: Okay. Would you tend to  
7 agree with that incident, with that testimony?

8                   WITNESS COLE: What hasn't been identified is  
9 the fact that there are more hydroelectric plants using  
10 that water than Marble Mountain Ranch. And it's  
11 especially at that time that he was observing. The Blue  
12 Heron Ranch has a permitted -- had a permitted water  
13 diversion and hydroelectric generation permit. And used  
14 our effluent to operate their system. Beneficial uses of  
15 that water for hydro plant generation include ours as  
16 well as the Blue Heron Ranch, which is down ditch.

17                   MR. PETRUZZELLI: And you used the past tense  
18 for that.

19                   WITNESS COLE: Well, they haven't operated it  
20 since we haven't been able to operate our power plant.  
21 So when we go to strictly consumptive use they've been  
22 denied the operation of their hydro plant as well.

23                   When Joey Howard was there and observed that  
24 there was water going through the hydroelectric plant  
25 when we were not operating it, that did two things: That

1 refreshed our pond for beneficial use that allowed for  
2 stock watering along access points through our pasture.  
3 And it powered the hydroelectric plant at the Blue Heron.

4 MR. PETRUZZELLI: So in your experience would  
5 you say that Stanshaw Creek has a diurnal flow pattern:  
6 higher in the morning, lower later in the day?

7 WITNESS COLE: Most definitely.

8 MR. PETRUZZELLI: Okay. And at times of year  
9 would you say that in the morning the flows are high  
10 enough to operate the Pelton wheel, and then not high  
11 enough later in the day?

12 WITNESS COLE: You can hypothetically get to a  
13 point where as the water availability drops and you have  
14 a cyclical diurnal availability of flows, that you could  
15 be at the peak of the diurnal graph and be within the  
16 range of the hydro plant. And at the bottom be outside  
17 the reach of the hydroelectric plant. That's a  
18 transition time where we would typically just shut down  
19 the hydroelectric plant.

20 MR. PETRUZZELLI: And would you switch over to  
21 diesel at that point?

22 WITNESS COLE: Correct.

23 MR. PETRUZZELLI: Okay. Would you be able to  
24 go out to the point of diversion and limit your -- lower  
25 your diversion rate or modify your diversion rate to meet

1 whatever your actual demands would then be at that time?

2 WITNESS COLE: Yes. And that's fairly easily  
3 done.

4 MR. PETRUZZELLI: So on a summer afternoon you  
5 can go out to the point of diversion, rearrange the rocks  
6 --

7 WITNESS COLE: No.

8 MR. PETRUZZELLI: -- to -- okay. But you just  
9 said it was easily done?

10 WITNESS COLE: Yes.

11 MR. PETRUZZELLI: Okay.

12 WITNESS COLE: So there are two weirs that I  
13 installed as part of the improvement processes on the  
14 ditch. The management of the ditch requires a couple of  
15 points in the upper head waters of the ditch to allow  
16 venting of excess flows. And as storm pulses come  
17 through, sometimes quite rapidly in the middle of the  
18 night, there has to be a way for a pulse of water to  
19 bleed out of the ditch without somebody being there to  
20 shut down a valve. Those -- that's -- that need is  
21 accommodated by weirs, which have a preset freeboard and  
22 adjustable boards on them, so that as we go in and out of  
23 storm pulses we can raise and lower those.

24 In a hypothetical scenario where we have a  
25 ditch capture of 13 Stanshaw units, which is an arbitrary

1 number we use with like hatch marks along the side of one  
2 of our culverts. And in this hypothetical scenario if we  
3 have a storm pulse coming in of a couple inches of water  
4 we would drop down the weir, anticipating that we would  
5 want to have increased venting capacity so that less  
6 water would travel down the -- down the ditch in a pulse.

7           As we approached into a storm, if we sensed  
8 that there was a major storm coming we would go off and  
9 fully open those weirs, venting all of the captured water  
10 back into the Stanshaw Creek drainage. And sometimes  
11 even blowing out the rock and rubble berm itself by  
12 moving larger boulders.

13           MR. PETRUZZELLI: So are you actually able to  
14 modify your diversion rate on a daily basis?

15           WITNESS COLE: You are by moving up the ditch  
16 and taking a half-inch thick board off, putting a half-  
17 inch thick board on. Putting a piece of plywood on, off;  
18 putting a two-inch board on, off. So --

19           MR. PETRUZZELLI: Can you precisely match that  
20 diversion to -- fairly precisely match that diversion to  
21 your -- to what your demands would be at that time?

22           WITNESS COLE: It works.

23           MR. PETRUZZELLI: So you can?

24           WITNESS COLE: It's manageable. Yes, it works.

25           MR. PETRUZZELLI: Okay. And you can do that



1 daily?

2 WITNESS COLE: I can do that daily. I can do  
3 that several times during a day if I needed to, but the  
4 usual routine is that we see longer weather patterns.  
5 And longer-term needs and so we don't make -- we don't  
6 have a reason to go up and in one hour put a board in,  
7 take a board out. And then two hours later put a board  
8 in, put a board out. We have weather patterns and  
9 longer-range needs, which means that we end up doing that  
10 on a less frequent basis. Although we hypothetically  
11 could make micro-adjustments on a moment-by-moment basis.

12 MR. PETRUZZELLI: So --

13 WITNESS COLE: The need just doesn't happen.

14 MR. PETRUZZELLI: Okay. So do -- do you recall  
15 the technical report authored by Mr. Howard?

16 WITNESS COLE: I do.

17 MR. PETRUZZELLI: And do you recall that in  
18 that report he states that your diversion rate, that the  
19 amount you divert is independent of what your actual  
20 demands are?

21 WITNESS COLE: Yes. And I'm not sure what he  
22 means by that.

23 MR. PETRUZZELLI: So you seem to recall it --  
24 you generally recall that statement, but you don't fully  
25 understand it?

1                   WITNESS COLE:  You've refreshed my memory that  
2 he said that, but I don't know what he means by that,  
3 because that's not the case.

4                   MR. PETRUZZELLI:  Ms. Mapes is going to pull  
5 that up.  And I'll continue --

6                   WITNESS COLE:  Sure.

7                   MR. PETRUZZELLI:  -- asking you questions while  
8 she does that.

9                   WITNESS COLE:  Joey may have made assumptions  
10 on a -- assumption on operation or an incomplete  
11 understanding.  The reality is that within a realm we can  
12 accurately match diversion to what the need is.  And  
13 that's evidenced by the fact that we haven't had any  
14 overtoppings in 20 years.  It's evidenced by the fact  
15 that we can capture just enough water to remain on the  
16 ranch and not go off of the outfall to Irving Creek.  And  
17 exercise our right for consumptive and domestic uses  
18 without running the hydroelectric plant.  So we can  
19 capture just enough, so that we can beneficially consume  
20 and use that amount.

21                   MR. PETRUZZELLI:  So if you had say a daily  
22 flow requirement, you could go out and change the boards  
23 to meet a daily flow requirement?

24                   WITNESS COLE:  Within reason, yes.

25                   MR. PETRUZZELLI:  But you would have the

1 ability to go out daily to modify your diversion rate to  
2 meet what the flow -- what the required flow rate would  
3 be?

4 WITNESS COLE: Presuming -- the problem that I  
5 have is if there is a number that says, "You may capture  
6 2.9 cfs and no more," 2.9 is a number which is fixed.  
7 And it places me at risk of violation if I capture 3.1  
8 cfs. The ability to manage is within the realms of  
9 reality for what the ditch is and our circumstance. It's  
10 not within the realms of reality for managing at a fixed  
11 arbitrary number. And that's one of the problems I have  
12 is that if -- I -- I don't want to agree to a solution,  
13 which is going to place me in violation of -- because I  
14 am meeting the -- the spirit of the law, but not a letter  
15 of the law.

16 MR. PETRUZZELLI: Yeah. And I -- I'm not -- I  
17 don't want to get hung up on a particular bypass number  
18 or not, right now. I just want to get an idea of what  
19 your ability might be to meet a certain number assuming  
20 that number is -- you know, what -- your ability to  
21 modify your diversion to meet a certain number.

22 WITNESS COLE: Okay.

23 MR. PETRUZZELLI: So are you saying that you  
24 can't -- that you can't modify -- you can't regulate your  
25 diversion to divert a specific amount of water or were

1 you recently saying that it's just not precise to a tenth  
2 of a cfs or to two-tenths of a cfs?

3 WITNESS COLE: Yes, all of the above on -- on  
4 one interpretation. Here's -- if I can take a minute to  
5 -- without having seen and operated the ditch you don't  
6 have the understanding of the subtle nuances of what it  
7 takes to manage the diversion. So if I make take a  
8 moment I can explain some of this?

9 MR. PETRUZZELLI: Well, let me ask you about --  
10 I'd like to ask you about Mr. Howard's report. This is,  
11 I think, page --

12 MS. MAPES: Page 6.

13 MR. PETRUZZELLI: -- page 6 of that report.  
14 Here, Section 5.1, where he discusses the water  
15 distribution system, which he testified his knowledge of  
16 which was based on conversations with you and  
17 inspections. He states, "The amount diverted typically  
18 varies with available streamflow independent of demand."

19 WITNESS COLE: Marble Mountain Ranch is a  
20 closed system. Electrically --

21 MR. PETRUZZELLI: I didn't ask you a question  
22 yet.

23 WITNESS COLE: Yes. Okay.

24 MR. PETRUZZELLI: Would you -- would you agree  
25 with that statement?

1 WITNESS COLE: No.

2 MR. PETRUZZELLI: So Mr. Howard's a  
3 professional engineer. He inspected the facility, he  
4 talked to you. And you don't agree with that statement?

5 WITNESS COLE: "The amount diverted typically  
6 varies..."

7 MR. PETRUZZELLI: If you don't understand it,  
8 just say you don't understand it. But do you agree with  
9 it?

10 WITNESS COLE: I don't think I do.

11 MR. PETRUZZELLI: Okay. Are you a trained  
12 engineer?

13 WITNESS COLE: Only on the ground with  
14 pragmatic experience, and not because I've got a degree.  
15 I have -- in engineering -- I have basic science degrees,  
16 but not an engineering degree. I've managed the ditch  
17 for 25 years and the associated components of it. So  
18 you're right, I'm not an engineer.

19 MR. PETRUZZELLI: I wanted to ask you about  
20 your statement about ditch overtoppings. Are you  
21 familiar with the Stanshaw Creek Coho Enhancement  
22 Project?

23 WITNESS COLE: No.

24 MR. PETRUZZELLI: Do you recall a restoration  
25 project in the thermal refugia pool that was completed?

1 WITNESS COLE: I'm aware of it.

2 MR. PETRUZZELLI: Okay. Do you recall that  
3 project was completed roughly around 2013, 2014?

4 WITNESS COLE: Well, I don't recall that, but I  
5 accept that you're telling me that.

6 MR. PETRUZZELLI: Okay. To the extent you're  
7 aware of that project, was it -- was that project  
8 necessitated in part due to ditch failures at Marble  
9 Mountain Ranch?

10 WITNESS COLE: I would say definitely no. I'm  
11 not aware of any ditch failure contributing at any point  
12 to any event at the refugial pool at Stanshaw.

13 MR. PETRUZZELLI: I would like -- can you read  
14 this sentence, please?

15 MS. BRENNER: Can you please describe the  
16 exhibit number of what you're --

17 MR. PETRUZZELLI: Just can you read this  
18 highlighted sentence please?

19 MS. BRENNER: -- what -- could you explain  
20 where the sentence is coming from?

21 MR. PETRUZZELLI: Okay, this sentence is coming  
22 from the report for the Coho Habitat Enhancement Project.  
23 This is an attachment to Notice of Violation Number --

24 MS. MAPES: 3.

25 MR. PETRUZZELLI: -- 3 from the Regional Board.

1 MS. BRENNER: I just need a -- I just need an  
2 exhibit number.

3 MR. PETRUZZELLI: It is Exhibit Number 167.

4 MS. BRENNER: Thank you.

5 (Exhibit WR-167 displayed on screen.)

6 MR. PETRUZZELLI: Mr. Cole, can you read that  
7 highlighted sentence?

8 WITNESS COLE: Give me a moment please. I'm  
9 trying to get the context.

10 MR. PETRUZZELLI: I'm going to highlight a  
11 little more.

12 WITNESS COLE: Okay.

13 MR. PETRUZZELLI: Okay.

14 WITNESS COLE: All right. "Approximately 560  
15 cubic yards of gravel and rock were removed from the head  
16 of an existing pool, restoring and enhancing the pre-2006  
17 form and function of this heavily utilized off-channel  
18 rearing habitat. Originating from Stanshaw Creek, the  
19 bulk of the sediment plug was deposited during the  
20 2005/2006 flood event when the upstream ditch diversion  
21 to Marble Mountain Ranch overtopped causing severe gully  
22 erosion."

23 That's what it says.

24 MR. PETRUZZELLI: Okay. Thank you. So yeah,  
25 going back to -- going to a discussion about your energy

1 demands, I believe the report from Mr. Howard and  
2 described your peak energy demands as occurring during  
3 the summer. Would you agree with that statement?

4 WITNESS COLE: Yes, I would.

5 MR. PETRUZZELLI: Okay. And that's when you  
6 have roughly 50 people at the ranch usually?

7 WITNESS COLE: Under normal circumstances.

8 MR. PETRUZZELLI: Under normal circumstances?

9 WITNESS COLE: Correct.

10 MR. PETRUZZELLI: Okay. Under the expansion  
11 scenario you discussed with Mr. Meyer that he outlines in  
12 his testimony would you -- would you anticipate having  
13 higher power demands?

14 WITNESS COLE: You cannot have more people in  
15 presence without having some higher power demand. The  
16 purpose of an increased occupancy on the ranch is to fund  
17 the improvements and the defenses of the water right. So  
18 it's kind of an ironic scenario we're talking about, but  
19 yeah.

20 MR. PETRUZZELLI: So you would probably need  
21 more power to support --

22 WITNESS COLE: Correct.

23 MR. PETRUZZELLI: -- the greater number of  
24 people. Okay. And since they're highest in the summer,  
25 I think you even characterized your peak use in the



1 summer as in the after -- in the hot afternoons when  
2 people come back from rafting on the river?

3 WITNESS COLE: That's typically the case.

4 MR. PETRUZZELLI: Yeah. You have a colorful  
5 personality, so the statements tend to -- tend to stick.

6 WITNESS COLE: I'm sorry if that offends you.

7 MR. PETRUZZELLI: Not in the least. But  
8 outside of your typical busy season would you  
9 characterize your power needs as lower than in the  
10 summer?

11 WITNESS COLE: Outside of the busy season,  
12 would --

13 MR. PETRUZZELLI: So in the off-season --

14 WITNESS COLE: Yes?

15 MR. PETRUZZELLI: -- your -- are your power  
16 needs lower than they are in the summer?

17 WITNESS COLE: Yes.

18 MR. PETRUZZELLI: Okay. And that's when you  
19 have 50 people at the ranch or the peak season is when  
20 you have 50 people, correct?

21 WITNESS COLE: I need to clarify that answer.  
22 We use every bit of power generation from the  
23 hydroelectric plant that's available in the winter, which  
24 is roughly 40 Kw. And the reason is, is that even though  
25 we have less occupancy in the winter the -- all of that

1 hydroelectric power generation is used for heating  
2 buildings. So the hypothetical scenario where there's  
3 the least demand for power would happen when there is no  
4 need to condition living circumstances by heating or  
5 cooling. And there was no occupation or low occupation  
6 on the ranch. In the winter when it's the least occupied  
7 ranch scenario we have substantial power demands. And  
8 those were historically met by the low-impact use of a  
9 hydroelectric plant.

10           Now, under the last year and a half, two years,  
11 we've had to run the diesel 24/7/365, in order to heat  
12 and take care of the small population on the ranch.  
13 Which is part of my complaint right now is that I don't  
14 have the funds and the capacity to continue making  
15 improvements when I have to spend money on diesel fill --  
16 fuel bills that could otherwise go to beneficial use  
17 improvements.

18           MR. PETRUZZELLI: So -- and when you say the  
19 small number of people at the ranch in the offseason, is  
20 that about 6 people?

21           WITNESS COLE: That's the way it is -- that's  
22 what it is right now. It will not be that in the near  
23 future when my in-laws come home to finish out their life  
24 and when my son and his wife have children and when I  
25 bring in the next caretaker. So the scenario right now

1 is 6 individuals permanently living on the ranch. It  
2 will soon be somewhat larger than that.

3 MR. PETRUZZELLI: So you use all of the power  
4 that you generate. But does the -- does your hydropower  
5 system include a heat sink to dispense heat produced by  
6 excess generation?

7 WITNESS COLE: It does, and thank you for  
8 asking. I'd like to --

9 MR. PETRUZZELLI: And is this --

10 WITNESS COLE: -- elaborate on that.

11 MR. PETRUZZELLI: Is this a photograph of that  
12 system?

13 WITNESS COLE: This is the current  
14 hydroelectric plant and the -- can I explain what a  
15 closed system is? I mentioned that earlier.

16 MR. PETRUZZELLI: Okay. And -- and just so  
17 people understand, is this -- is the water -- there's a  
18 stream of water here. Is that hot water produced by the  
19 heat sink system?

20 WITNESS COLE: It is heated water.

21 MR. PETRUZZELLI: Okay.

22 WITNESS COLE: So in a closed system you have  
23 to consume every bit of power that is generated or it  
24 burns up appliances and burns down buildings. So to that  
25 end this system has a series of relay switches, which

1 turn on heat sinks. Some of which are beneficial uses  
2 such as a heat sink, which turns on a baseboard heater or  
3 some other appliance, a pool pump. Some beneficial use  
4 as immediate demands diminish. Somebody turns on a  
5 microwave the peak demand goes up momentarily, the  
6 microwave gets -- shuts off and suddenly there's more  
7 available power being generated by a hydroelectric plant  
8 with a fixed flow coming through it than can be used.

9           So this computer system and hydroelectric plant  
10 that you just showed the picture of has a system to  
11 divert excess power as momentary fluctuations happen,  
12 including beneficial heat dumps. And as a last resort a  
13 series of water heater elements, which act as a energy  
14 sink, so that the ranch doesn't burn down.

15           MR. PETRUZZELLI: Where does that -- where the  
16 water discharge by that heat sink system go?

17           WITNESS COLE: That would go out into my pond.

18           MR. PETRUZZELLI: Okay.

19           MR. BUCKMAN: And just for the record that was  
20 Exhibit WR-82, Figure 4.

21           (Exhibit WR-82 Figure 4 displayed on screen.)

22           MR. PETRUZZELLI: Thank you. I apologize.

23           WITNESS COLE: That's a garden hose -- that's a  
24 garden hose stream. And the amount of heat put into it  
25 varies depending on the moment. And sometimes it won't

1 be on at all, because we're in full consumption of the  
2 power. If we have more available power and the  
3 beneficial heat sinks aren't needed, then it might be  
4 used more.

5 MR. PETRUZZELLI: Do you measure your power  
6 consumption?

7 WITNESS COLE: There's no way to measure the  
8 power consumption unless you put a amp meter on the lines  
9 and take a direct reading. But there's no --

10 MR. PETRUZZELLI: But you don't measure -- so  
11 you don't measure?

12 WITNESS COLE: I don't have to have a meter.  
13 There's nobody --

14 MR. PETRUZZELLI: Just asking whether you do?

15 WITNESS COLE: Yeah, I don't.

16 MR. PETRUZZELLI: Okay. Do you measure your  
17 power generation?

18 WITNESS COLE: Nobody asked me how many -- how  
19 many kilowatts I'm burning on any given moment, so the  
20 answer is no.

21 MR. PETRUZZELLI: Okay. Do you recognize this  
22 LiDAR image?

23 WITNESS COLE: I do. It looks like the image  
24 from the Rocco Fiori report.

25 MR. PETRUZZELLI: So this is Marble Mountain

1 Ranch, Exhibit 12. It is Page 4 and it is Figure 1.

2 Trying to remember to accommodate the Hearing Team.

3 (Exhibit MMR-12 Page 4, Figure 1 displayed on screen.)

4

5 Do you recognize the straight line here?

6 WITNESS COLE: That's the penstock from the  
7 upper end of the ditch leading down to the power plant at  
8 the bottom of the penstock.

9 MR. PETRUZZELLI: And are these erosion points  
10 that Mr. Fiori has identified along the length of the  
11 penstock?

12 WITNESS COLE: They are not. That's part of  
13 the Bald Butte trail system, which originates on the  
14 ranch and then departs from the ranch up to the back of  
15 the Bald Butte.

16 MR. PETRUZZELLI: So these numbers here are not  
17 erosion points?

18 MS. BRENNER: Huh-uh.

19 WITNESS COLE: No. I'm going to call those  
20 elevation points from what I can tell from here. All I -  
21 - I don't know. For sure it's hard for me to read.

22 MR. PETRUZZELLI: And this is not an erosion  
23 point?

24 WITNESS COLE: That is a legacy erosion point.  
25 At the top of the blue -- vertical blue line is the

1 entrance to the penstock. Excess water that doesn't get  
2 captured into the penstock has historically flowed down  
3 that line where your cursor is going. And then reentered  
4 the lower ditch line, which then runs out to our pond.

5 MS. WEAVER: So just to have it clear for the  
6 record, you're describing the darker line by the penstock  
7 on the LiDAR image; is that correct?

8 WITNESS COLE: Yeah, that's Marble Mountain  
9 Ranch property. That's the legacy -- excess water from  
10 what would be captured directly into the penstock would  
11 flow down there over the last 150 years, and has created  
12 that line of erosion.

13 MR. PETRUZZELLI: Okay. Thank you. So let's  
14 go back to your written testimony?

15 WITNESS COLE: Okay.

16 MR. PETRUZZELLI: And in your testimony do you  
17 state that you recently replaced the storage tanks at the  
18 ranch?

19 WITNESS COLE: That's correct.

20 MR. PETRUZZELLI: And that's now with seven  
21 3,000-gallon tanks?

22 WITNESS COLE: You know, I may be off on a  
23 gallon capacity of the tanks, but it is seven tanks.

24 MR. PETRUZZELLI: And is it correct -- would  
25 you say that this could support the ranch for a week at

1 its full capacity?

2 WITNESS COLE: That would depend on what's  
3 happening on the ranch. That wouldn't allow irrigation  
4 of pastures, that wouldn't allow any sort of dust  
5 control, it wouldn't allow any fire prevention. A week -  
6 - and also that would be based on some rejuvenation of  
7 the tanks. If I shut off the ditch and went to a  
8 minimalist consumption protocol where only people flush  
9 toilets and drank water and there was no watering of  
10 gardens then that would be sufficient for a week.

11 MR. PETRUZZELLI: Do you recognize this  
12 exhibit? I -- this is Exhibit WR-157.

13 (Exhibit WR-157 displayed on screen.)

14 WITNESS COLE: I don't know what this is.

15 MR. PETRUZZELLI: Do you recognize this portion  
16 of the exhibit?

17 WITNESS COLE: No. But if you'd like me to  
18 take a moment and read it I'm happy to do that.

19 MR. PETRUZZELLI: Okay. Does this look  
20 familiar?

21 MS. BRENNER: Could you identify what you're  
22 looking at?

23 MR. PETRUZZELLI: Oh yeah, this is a letter  
24 submitted by --

25 MS. BRENNER: No, an exhibit number.



1           MR. PETRUZZELLI: This is Exhibit WR-157, as  
2 previously stated. This is a letter from your attorney  
3 responding to an information request by Enforcement.  
4 Were these answer -- were answers to these questions  
5 provided by you or by your attorney?

6           WITNESS COLE: I would have to read them in  
7 order to answer that question.

8           (Pause during review of documents.)

9           MR. PETRUZZELLI: So, I'd like to direct your  
10 attention to Number 19, the discussion about requesting  
11 invoices for the cost of repairing the water tanks.

12          WITNESS COLE: Okay.

13          MR. PETRUZZELLI: And in that paragraph do you  
14 disclose the cost of the new tanks?

15          WITNESS COLE: Yes, it appears that I do.

16          MR. PETRUZZELLI: Okay.

17          WITNESS COLE: But I might add that the  
18 addition of additional storage tanks may or may have not  
19 been included in that. I did a sequential evolution of  
20 improving the capacity of the water purification system.  
21 So -- and I don't recall where that is on that timeline.

22          MR. PETRUZZELLI: And as this discussion  
23 continues to the next page I'm going to highlight this  
24 portion. Okay, I'll highli -- okay. So if you can just  
25 try to read the highlighted portion here, excluding the

1 footer and page number?

2 WITNESS COLE: You want me to read just the  
3 part that's highlighted?

4 MR. PETRUZZELLI: Yes, please.

5 WITNESS COLE: "Additional water storage tanks  
6 purchased by" -- and I presume you don't want the numbers  
7 on the bottom of the page read -- "Marble Mountain Ranch  
8 separately, approximately \$1,700 per tank, to bring to a  
9 total of seven 2,600-gallon" -- so I guess they were not  
10 3,000, they're 2,600-gallon -- "Snyder storage tanks with  
11 (one-week storage capacity at full ranch occupancy)."

12 MR. PETRUZZELLI: Thank you. Okay, so we'll go  
13 back to your written testimony --

14 WITNESS COLE: All right.

15 MR. PETRUZZELLI: -- I believe Page 4,  
16 Paragraph 1, and here you describe a -- how water  
17 discharges from the hydro plant in the pond, eventually  
18 discharged to Irving Creek. So in that regard, by  
19 discharging to Irving Creek it does not return flow back  
20 to Stanshaw Creek; would that be correct?

21 WITNESS COLE: That's correct. Irving Creek is  
22 a neighboring drainage and they're not directly  
23 connected.

24 MR. PETRUZZELLI: Okay. And then continuing to  
25 Page 7 you discuss the Cleanup and Abatement Order and

1 the history of the Water Board's actions. Did you file a  
2 petition for State Board Review of the Cleanup and  
3 Abatement Order?

4 WITNESS COLE: I can't answer that. I'd have  
5 to consult with my attorney.

6 MR. PETRUZZELLI: Okay. Did you on -- did you  
7 challenge that Order in court?

8 WITNESS COLE: This is -- this is my first  
9 court appearance.

10 MR. PETRUZZELLI: Okay. So going on to page --  
11 so but here in your written testimony -- we'll come back  
12 to this. Okay. So we'll come back to this. (Whispered  
13 colloquy.)

14 So this regards the Cleanup and Abatement  
15 Order. Can you read this highlighted sentence, please?

16 WITNESS COLE: "In response to the CAO on  
17 September 6th, 2016th (sic) we filed a Petition for  
18 Review and Stay of Cleanup and Abatement Order, Number  
19 R1-2016-0031 (the "Petition") to the State Water Board."

20 MR. PETRUZZELLI: Are you aware of whether that  
21 Petition for Review was granted by the State Water Board?

22 WITNESS COLE: I can't answer that. I've left  
23 the legal parameters and issues up to a -- my attorney  
24 team.

25 MR. PETRUZZELLI: Okay, fair enough. I'd like

1 to go on to Page 9. And in this portion of your  
2 testimony you discuss voluntarily foregoing your hydro  
3 power diversion and limiting your diversion to  
4 consumptive use.

5 WITNESS COLE: Okay.

6 MR. PETRUZZELLI: And is this a voluntary  
7 election to limit your diversion?

8 WITNESS COLE: I've recently voluntarily  
9 eliminated hydropower generation entirely during the  
10 summer, so that we can maximize flows back to Stanshaw  
11 Creek.

12 Historically, we would have gone through this  
13 gradual truncation of our hydropower generation as  
14 available flows were there. And we would reduce the jet  
15 size to maximize penstock pressure and still maintain  
16 power generation via the hydroelectric plant and mix it  
17 in combination with the diesel power generation plant.

18 Our -- my effort to be a contributor to the  
19 process is manifest here by the fact that we have  
20 voluntarily shut down that and limited our flows to  
21 consumptive and domestic flows during the summer months  
22 of June, July and August.

23 MR. PETRUZZELLI: Okay. And this is voluntary?

24 WITNESS COLE: Voluntary.

25 MR. PETRUZZELLI: Okay. And have you indicated

1 an intent to resume diversions up to your 3 cfs claim  
2 once the stakeholder issues are, in your mind, resolved?

3 WITNESS COLE: I need to divert 3 cfs and  
4 generate hydropower through the winter when it is not an  
5 impact to the waters of State of California. And so yes,  
6 seasonally through the course of a year. I don't intend  
7 to try to reestablish hydro plant generation when it is  
8 an impact to the fishery. That is my decision. That is  
9 a good-show effort of faith and an effort to try to be a  
10 contributor and a player in the community and a steward  
11 of the resource.

12 So I am shutting off hydroelectric generation  
13 during the summer and voluntarily doing diesel power  
14 plant generation, which unfortunately has a large carbon  
15 footprint and brings up whole -- another whole set of  
16 issues, but that's what I have available. If fish is the  
17 prior dory (sic) -- priority at Stanshaw and not other  
18 environmental issues, then so be it. I will generate  
19 power via diesel during those three months and  
20 voluntarily turn off my hydroelectric plant. I need to  
21 turn the hydroelectric plant back on in the winter when I  
22 can heat our buildings and not have an impact on the  
23 fishery.

24 MR. PETRUZZELLI: So when you have to operate  
25 your -- have you previously indicated that operating your

1 diesel generator through this summer costs you roughly  
2 around \$4,000 a -- for a month?

3 WITNESS COLE: That might have been the case  
4 then, that's not the case now.

5 MR. PETRUZZELLI: Have you indicated that in 20  
6 -- we'll come back to that.

7 WITNESS COLE: Mr. Petruzzelli, the essence of  
8 my position is that I will burn diesel in the summer if I  
9 can run, hoping that I can run hydroelectric when the  
10 flows are greater. There is no impact or damage to the  
11 fishery by diverting water from Stanshaw when Stanshaw  
12 has excess flows and I can beneficially use those flows.  
13 That's my position.

14 MR. PETRUZZELLI: Okay. This is Marble  
15 Mountain Ranch, Exhibit 20 -- Exhibit 16. It's Page 28.  
16 Can you identify what this is?

17 (Exhibit MMR-16 displayed on screen.)

18 WITNESS COLE: It appears to be a 2013 Schedule  
19 C, Tax Return, Profit and Loss for Business.

20 MR. PETRUZZELLI: Okay. And on -- is it large  
21 enough for you to read what's in Box 7?

22 MS. BRENNER: It's not for me.

23 WITNESS COLE: No.

24 MR. PETRUZZELLI: Okay.

25 WITNESS COLE: I can't tell what that is, other

1 than the general concept of what's happening here.

2 MR. PETRUZZELLI: It's a little small for me  
3 too; is this better?

4 MS. MAPES: (Whispering.) You can zoom in  
5 further.

6 WITNESS COLE: Okay.

7 MR. PETRUZZELLI: In Box 7, is that your  
8 reported gross income?

9 WITNESS COLE: It is.

10 MR. PETRUZZELLI: And is that amount \$437,000 -  
11 - \$437,333?

12 WITNESS COLE: It is.

13 MR. PETRUZZELLI: Okay. And then in Box 13 do  
14 you report a depreciation amount of \$40,120?

15 WITNESS COLE: I do.

16 MR. PETRUZZELLI: And in Box 17 for Legal and  
17 Professional Services do you -- did you report \$18,545?

18 WITNESS COLE: Yes.

19 MR. PETRUZZELLI: And then going down to Box 21  
20 did you report \$22,972?

21 WITNESS COLE: Yes.

22 MR. PETRUZZELLI: And that's for repairs and  
23 maintenance?

24 WITNESS COLE: Yes.

25 MR. PETRUZZELLI: Okay. And then going down to

1 Box 25 for utilities you reported \$31,296; is that  
2 correct?

3 WITNESS COLE: Yes.

4 MR. PETRUZZELLI: Okay. Does that include the  
5 costs for running your diesel generator?

6 WITNESS COLE: In all likelihood, yes.  
7 Although I can't recall the inclusions in that category.  
8 I would presume that it does.

9 MR. PETRUZZELLI: Okay. And then in Box 31 did  
10 you report a profit of approximately \$53,000?

11 WITNESS COLE: I did.

12 MR. PETRUZZELLI: Okay. And then I'm going to  
13 go down to Page 29 of the PDF. And under Part 5, where  
14 it reports "Other Expenses," you list \$145,000 -- three -  
15 - roughly. Is that correct?

16 WITNESS COLE: Yes.

17 MR. PETRUZZELLI: It says, "See Statement."  
18 Have you included that statement in this exhibit?

19 WITNESS COLE: I have no idea.

20 MR. PETRUZZELLI: So you couldn't -- you  
21 couldn't identify it here?

22 WITNESS COLE: No.

23 MR. PETRUZZELLI: Okay. And then going to Page  
24 25, is this your 2014 Schedule C?

25 WITNESS COLE: It is.



1 MR. PETRUZZELLI: Okay. For this year did you  
2 report, for 2014, did you report a gross income of almost  
3 \$475,000?

4 WITNESS COLE: Yes.

5 MR. PETRUZZELLI: And would that have been an  
6 increase from 2013?

7 WITNESS COLE: I already can't remember what  
8 2013 was, so you'll have to refresh my memory, please.

9 MR. PETRUZZELLI: I believe you reported your  
10 gross income as roughly \$437,000 for 2013.

11 WITNESS COLE: That would -- yes, then of  
12 course be an increase.

13 MR. PETRUZZELLI: So that would be an increase.  
14 Okay. So you made more money in 2014 than you did in  
15 2013?

16 WITNESS COLE: I grossed more money in 2014 --

17 MR. PETRUZZELLI: Okay.

18 WITNESS COLE: -- than I did in 2013 by the  
19 Schedule C, yes.

20 MR. PETRUZZELLI: And then in Box 13 for  
21 depreciation, you -- is it correct that you list almost  
22 \$58,000?

23 WITNESS COLE: Yes.

24 MR. PETRUZZELLI: And for -- in Box 17 for  
25 legal and professional services you list roughly \$22,000?

1 WITNESS COLE: Yes.

2 MR. PETRUZZELLI: And then going to Box 21 for  
3 repairs and maintenance, around \$69,000?

4 WITNESS COLE: Yes.

5 MR. PETRUZZELLI: And in Box 25 you reported  
6 utility expenses about \$37,000. Is that correct?

7 WITNESS COLE: Yes.

8 MR. PETRUZZELLI: And this was in 2014 before  
9 you started voluntarily limiting your diversion; is that  
10 correct?

11 WITNESS COLE: That -- I can't say that's the  
12 case, because I've been not running the diesel -- or the  
13 hydroelectric plant in the summer for much longer than  
14 three years.

15 MR. PETRUZZELLI: But it was before you limited  
16 your --

17 WITNESS COLE: There's been two --

18 MR. PETRUZZELLI: -- summer diversion to  
19 consumptive uses for the NMFS flow; is that --

20 WITNESS COLE: Let's clarify this, I have not  
21 run the hydroelectric plant operations at all in the last  
22 year and a half, two years, based on the legal issues. I  
23 have voluntarily turned off hydro plant generation in the  
24 summer for much, much longer.

25 MR. PETRUZZELLI: But have you previously

1 testified that starting around 2015 you started diverting  
2 less water voluntarily in response to the NMFS  
3 recommendations?

4 WITNESS COLE: Year-round, yes.

5 MR. PETRUZZELLI: Okay. So and this -- and did  
6 this lead to greater reliance on the diesel generator?

7 WITNESS COLE: Yes.

8 MR. PETRUZZELLI: Okay. So you would have  
9 consumed more diesel fuel?

10 WITNESS COLE: If I'm not running the  
11 hydroelectric plant at all the only other power source  
12 for me is the diesel power plant. I don't access to the  
13 grid, I don't a have a solar system, I don't have any --  
14 any other system. So it's either diesel or it's  
15 hydroelectric in power.

16 Also, I might add that the sum total of these  
17 numbers may or may not reflect anything on the ratios of  
18 fuel consumption, because I can't tell you what else is  
19 included in that sum total number.

20 MR. PETRUZZELLI: Well, right now I'm just  
21 asking you about this number. And perhaps we can get  
22 into that later?

23 WITNESS COLE: Yeah.

24 MR. PETRUZZELLI: And that year your net  
25 profit, it's in Box 31, that was \$1,195; is that correct?

1 WITNESS COLE: Yes.

2 MR. PETRUZZELLI: Okay. And then we'll go up  
3 to Page 22. Is this your 2015 tax return?

4 WITNESS COLE: It is.

5 MR. PETRUZZELLI: Okay. It looks like -- this  
6 no longer looks like a Schedule C; is that correct?

7 WITNESS COLE: Yes. This is the return for an  
8 S Corporation. We changed our business profile from --  
9 we've had an evolution from an LLC to a DBA and then to  
10 an S Corporation. So the schedules and reports have  
11 changed to meet the legal parameters of those different  
12 business forms.

13 MR. PETRUZZELLI: Okay. And in Box 6 for your  
14 net income you reported \$623,000, roughly?

15 WITNESS COLE: It's \$627,000. Oh, Box 3? Yes,  
16 623.

17 MR. PETRUZZELLI: Well, I think it's Box 6?

18 WITNESS COLE: Yes.

19 MR. PETRUZZELLI: Okay, thank you. In Box 9,  
20 repairs and maintenance, is it correct that you reported  
21 \$58,000 roughly?

22 WITNESS COLE: Well I can't tell what Box 9  
23 represents, but that's the number there.

24 MR. PETRUZZELLI: Okay. And your total  
25 deductions in Box 20 were \$708,000?

1 WITNESS COLE: Correct.

2 MR. PETRUZZELLI: Okay. And I'm going to ask  
3 about Line 14. Unfortunately this copied poorly. Do you  
4 know if this would represent depreciation?

5 WITNESS COLE: Not a clue.

6 MR. PETRUZZELLI: Okay. But the number is  
7 \$186,000?

8 WITNESS COLE: The number does read 186 --  
9 apparently "804 or 904," I can't really tell either.

10 MR. PETRUZZELLI: Okay. All right. And then  
11 go -- in Box -- I'm trying to find one that's more  
12 readable. On -- yeah, your ordinary business income you  
13 report a loss of \$85,000; is that correct? And that is  
14 Line 21.

15 WITNESS COLE: Can you make that a little bit  
16 bigger for me, so that I can see that --

17 MR. PETRUZZELLI: Of course.

18 WITNESS COLE: -- ordinary business income, is  
19 it -- yes, that's what that reads. I agree.

20 MR. PETRUZZELLI: Okay. But your overall  
21 income here, "Goods, Services Sold, \$627,000," is that  
22 more than the previous year?

23 WITNESS COLE: This is the 2015 year we were  
24 looking at?

25 MR. PETRUZZELLI: Yes.

1 WITNESS COLE: And the 2014 had 400-and-  
2 something. Is that accurate?

3 MR. PETRUZZELLI: The 2014 year had, I think,  
4 \$474,000.

5 WITNESS COLE: I would agree that \$627,000 is  
6 more than \$400-and-something-thousand dollars.

7 MR. PETRUZZELLI: Excellent. Okay. So then I  
8 think we go to Page 88. Do you recognize -- is this your  
9 2016 return?

10 WITNESS COLE: Yes, it is.

11 MR. PETRUZZELLI: Okay. And fortunately this  
12 one's a little easier to read. And here in Box 1, where  
13 it says, "Gross Receipts of Sales," is that in excess of  
14 \$750,000?

15 WITNESS COLE: It is.

16 MR. PETRUZZELLI: And that's more than 2015?

17 WITNESS COLE: Yes, it is.

18 MR. PETRUZZELLI: Okay. Would you -- would you  
19 agree that the increase is roughly \$126,000?

20 WITNESS COLE: Over what year to what year?

21 MR. PETRUZZELLI: From the prior year?

22 WITNESS COLE: So the prior year was what? Six  
23 --

24 MR. PETRUZZELLI: 623,000.

25 WITNESS COLE: So yeah, roughly.

1 MR. PETRUZZELLI: Okay. And ultimately you  
2 reported a loss of \$137,000; is that correct?

3 WITNESS COLE: Yes.

4 MR. PETRUZZELLI: Okay.

5 WITNESS COLE: Can I ask what year this is,  
6 again?

7 MR. PETRUZZELLI: This is 2016.

8 WITNESS COLE: Okay.

9 (Time sounds.)

10 HEARING OFFICER MOORE: Yeah. One hour has  
11 gone by, so at this point how much more time do you think  
12 you need to resolve this line of questioning?

13 MR. PETRUZZELLI: Maybe five minutes? Okay.

14 HEARING OFFICER MOORE: I'll allow that.

15 MR. PETRUZZELLI: All right. So I'd like to go  
16 to your energy cost estimates in Exhibit 19. You had  
17 this estimate from the electrician. Is it correct that  
18 this is for an interconnected system?

19 (Exhibit MMR-19 displayed on screen.)

20 WITNESS COLE: Give me just a moment.

21 MR. PETRUZZELLI: Okay. I mean, does it --  
22 does this quote describe the system as interconnecting  
23 with your existing hydro system?

24 WITNESS COLE: Yeah. I just read the first  
25 paragraph and that's accurate.

1           MR. PETRUZZELLI: Okay. And it operates in  
2 conjunction with a battery?

3           WITNESS COLE: I don't know that. Let me look.  
4 Yes.

5           MR. PETRUZZELLI: Okay. And it indicates that  
6 the hydro system would be available for winter use?

7           WITNESS COLE: I don't know. Let me see this.  
8 Where does it say that?

9           MR. PETRUZZELLI: In that highlighted portion?

10          WITNESS COLE: Okay, yes.

11          MR. PETRUZZELLI: Okay. And -- and does this  
12 quote indicate that it would be sufficient to meet the  
13 ranch's power demands?

14          WITNESS COLE: Can you show me where it says  
15 that, because I don't know where it says that.

16          MR. PETRUZZELLI: Can you read that highlighted  
17 portion?

18          WITNESS COLE: "This new -- this new system is  
19 the minimum size necessary to cover energy consumption of  
20 the 126,265.68-kilowatt-hour a year (see attached) by  
21 Marble Mountain Ranch Resort."

22          MR. PETRUZZELLI: And do you recall Mr.  
23 Howard's testimony yesterday that this system would  
24 probably likely allow the ranch to operate year-round  
25 with a lower peak diversion -- at a lower peak diversion



1 rate?

2 WITNESS COLE: No. Actually, I don't recall  
3 that. I'll accept that he said that, but I don't recall  
4 him saying that.

5 MR. PETRUZZELLI: Fair enough. And then I'd  
6 like to go to this second estimate from Mr. Schlate --  
7 Mr. -- I think it's Hal?

8 WITNESS COLE: Slater.

9 MR. PETRUZZELLI: Slater?

10 WITNESS COLE: Right.

11 MR. PETRUZZELLI: He talks about -- this a  
12 larger solar system and he talks about the financing.  
13 Does he indicate that the loan for this would run roughly  
14 about \$4,000 a month?

15 WITNESS COLE: That's --

16 MR. PETRUZZELLI: Can you read the highlighted  
17 portion?

18 WITNESS COLE: Yes. Yeah, please -- I'm sorry  
19 - "These loans are simple to obtain, but typically have  
20 higher rate -- probably around \$4,000 a month for 20  
21 years."

22 MR. PETRUZZELLI: Okay. And is it correct that  
23 the warranties for this system range from 20 to 25 years,  
24 depending on the parts of the system that are warrantied?

25 WITNESS COLE: I don't know that. Can you

1 highlight that, so I can agree or disagree?

2 MR. PETRUZZELLI: Can you read this sentence,  
3 please?

4 WITNESS COLE: Okay. "You may choose from  
5 either SolarWorld or LG for the solar panels both of  
6 which have 25 year warranties."

7 MR. PETRUZZELLI: Okay. And then can you read  
8 this highlighted sentence please?

9 WITNESS COLE: "These two are the only  
10 technologies that offer a 20 plus year warranty on the  
11 batteries like the PV -- like -- like the PV panels  
12 have."

13 MR. PETRUZZELLI: Okay.

14 WITNESS COLE: He's awaiting for a competitive  
15 quote from a manufacturer of flow batteries. Okay.

16 MR. PETRUZZELLI: Okay.

17 And then I'd like to go back down to his  
18 discussion of costs --

19 WITNESS COLE: Um-hmm.

20 MR. PETRUZZELLI: -- and is it correct that he  
21 indicates you could probably own this -- pay this system  
22 off and own it within eight years?

23 WITNESS COLE: "If you can use the tax benefits  
24 you could probably prepay the loan as you recover them  
25 and own it within 8 years or less."

1 MR. PETRUZZELLI: Can the record -- can the  
2 record reflect that Mr. Cole is reading from the exhibit?  
3 Thank you.

4 WITNESS COLE: I didn't finish. Did you want  
5 me to finish that?

6 MR. PETRUZZELLI: Sure.

7 WITNESS COLE: "If you can use the tax benefits  
8 you could probably prepay the loan as you recover them  
9 and own it within 8 years or less. Or use the tax  
10 savings to grow the business."

11 MR. PETRUZZELLI: So \$4,000 a month, is that  
12 roughly equal to your diesel expense, at times?

13 WITNESS COLE: If the only expense is payment  
14 on a system, and that's the number given -- assigned to  
15 the diesel at the time, yes.

16 MR. PETRUZZELLI: And --

17 WITNESS COLE: If there's no other  
18 considerations involved, then they're roughly equal  
19 numbers.

20 MR. PETRUZZELLI: And let's say this system  
21 meets your power needs. You pay it off in eight years.  
22 Would you still have to pay for it once it's paid off?

23 WITNESS COLE: I don't have to make payments on  
24 it. It doesn't mean I have to buy -- don't have to buy  
25 new batteries or do maintenance on anything.

1 (Timer sounds.)

2 According to this projection that he's made it  
3 would be paid off in some length of time. There is no  
4 analysis of the operation expense of it or the future  
5 maintenance of the photovoltaic -- voltaic system with  
6 batteries, especially on a commercial installation. This  
7 is only an evaluation of an initial installation.

8 MR. PETRUZZELLI: But it's a warrantied system.  
9 Is that correct?

10 WITNESS COLE: It appears to have warranties on  
11 the solar panels. And I think we read that the batteries  
12 are also included in a warranty system of some sort?

13 MR. PETRUZZELLI: Yeah. And how long are the  
14 warranties?

15 WITNESS COLE: I'm reading 20 years.

16 MR. PETRUZZELLI: Okay. And what's the  
17 warranty for the solar panels? I will highlight that  
18 sentence.

19 WITNESS COLE: Twenty-five.

20 MR. PETRUZZELLI: So if you pay it off in eight  
21 years, how many years -- and at that point you own it --

22 WITNESS COLE: Yeah.

23 MR. PETRUZZELLI: -- assuming the warranty  
24 covers maintenance costs how many years would you have  
25 without additional payments for a system such as this?

1                   WITNESS COLE: With no other considerations  
2 whatever the difference between 20-25 years and the  
3 payoff of 8 years. So presuming we could use tax  
4 deductions and there were no other factors involved then  
5 that's the number.

6                   MR. PETRUZZELLI: And so does that -- based on  
7 a 20-to- 25-year warranty and an 8-year payoff is that  
8 roughly 12 to 17 years without payments?

9                   WITNESS COLE: I presume so. I haven't done  
10 the head math.

11                  MR. PETRUZZELLI: I'm a lawyer. I have a hard  
12 time doing the math myself.

13                  WITNESS COLE: Okay.

14                  MR. PETRUZZELLI: And given that my time has  
15 expired, those are my questions.

16                  WITNESS COLE: Okay.

17                  MS. WEAVER: I just wanted to quickly clarify  
18 that last line of questioning was MMR-19, correct?

19                  MR. PETRUZZELLI: It was MMR-19. And  
20 specifically the last line of questioning was on Page 3  
21 of the exhibit.

22                  MS. WEAVER: Okay. Thank you.

23                  HEARING OFFICER MOORE: Okay. Thank you,  
24 Counselor.

25                  And time check, it's about 4:33 p.m. We can

1 continue.

2           The next potential questioner is National  
3 Marine Fisheries Service. Do you have any questions for  
4 Mr. Cole?

5           MR. KEIFER: Yes, I do.

6           HEARING OFFICER MOORE: Please approach. Okay.

7           So I wanted to just do -- yeah, on -- on the  
8 time check, how long roughly do you think your line of  
9 questioning will take?

10          MR. KEIFER: Less than 10 minutes.

11          HEARING OFFICER MOORE: Okay. Thank you.

12 Okay, I guess I've been advised we have a pretty hard  
13 stop at 5:00 o'clock, so I'll be watching this as we  
14 approach it. Thank you.

15          WITNESS COLE: Can I pick up my bottle of  
16 water, please?

17          HEARING OFFICER MOORE: Yes, go right ahead.

18 Thanks for asking, very considerate.

19          Okay, Counselor.

20                                   CROSS-EXAMINATION BY

21          MR. KEIFER: Okay. Good afternoon, Mr. Cole.

22          WITNESS COLE: Good afternoon.

23          MR. KEIFER: I have just a couple of questions  
24 for you. Do you recall testifying under questioning from  
25 Mr. Petruzzelli that you have basic science degrees?

1 WITNESS COLE: That's correct.

2 MR. KEIFER: What is your full educational  
3 background?

4 WITNESS COLE: A bachelor's degree from UC  
5 Davis in Zoology and two-and-half to three years of  
6 graduate work in cellular biology, studying the sperm-egg  
7 interactions of the African clawed frog, *Xenopus laevis*.

8 MR. KEIFER: You've also testified that you  
9 purchased the ranch in 1994. What would you have -- how  
10 would you describe your current occupation in running the  
11 ranch, do you have a job title?

12 WITNESS COLE: Under what terms? I'm not sure  
13 what you're asking.

14 MR. KEIFER: Would you -- if I were to ask you  
15 or there were a form to fill out that asked your  
16 occupation, how would you describe it?

17 WITNESS COLE: Depending on the person asking  
18 the question I might respond that I'm a fly-fishing  
19 guide, a whitewater river guide, horse wrangler, a short-  
20 order cook, a facilities maintenance operator or I'd --  
21 it would depend on the person asking the question. My  
22 job hats are varied and many.

23 MR. KEIFER: Would it be fair to roll that up  
24 into one rubric as a owner/operator of a dude ranch,  
25 guest ranch?

1 WITNESS COLE: Sure.

2 MR. KEIFER: Sure. What was your occupation in  
3 1994, just prior to purchasing the ranch?

4 WITNESS COLE: You're speaking to a serial  
5 entrepreneur. I had a whitewater rafting business called  
6 "Access to Adventure," which operated on 13 different  
7 rivers across the West Coast including the Klamath River,  
8 which is my original connection to this area speaking of  
9 Somes Bar.

10 I had an interior design and contracting  
11 business called D & H Interiors, standing for Doug and  
12 Heidi, where we installed carpets, hardwood floors,  
13 ceramic tiles, draperies, wallcoverings, upholstering  
14 items and generally finish work of any type inside of a  
15 building, commercial and residential.

16 I also taught high school science and math in  
17 Foothill Farms Junior High, Grant High School, Highland  
18 High School, and ultimately continued teaching high  
19 school for a brief period at Happy Camp High School.

20 I also was co-owner and operator of two fairly  
21 significant preschool and daycare facilities in Yolo  
22 County, New Generations and In Our Care.

23 All of those items were sold in order to fund  
24 the purchase of Marble Mountain Ranch.

25 MR. KEIFER: Did you finance that purchase of



1 the ranch?

2 WITNESS COLE: The paper was carried in part by  
3 the owner, the previous -- now let me think. I assumed a  
4 note that was left remaining from the Hayes Family that  
5 was serviced by Bob and Judith Young. And I took assets  
6 from my previous businesses. And also had contribution  
7 helps from my parents.

8 MR. KEIFER: Did you have a professional  
9 appraisal done on the ranch and the value of the water  
10 right before you purchased it?

11 WITNESS COLE: I didn't have any appraisal  
12 done. There was a business appraisal done by the --  
13 excuse me -- by the seller in order to begin with the  
14 negotiating price for the sale of the ranch. I had  
15 nothing to do with that.

16 MR. KEIFER: Did you have the assistance of  
17 counsel in carrying out the transaction to purchase --

18 WITNESS COLE: I did not.

19 MR. KEIFER: -- the ranch?

20 If I can just have a moment?

21 HEARING OFFICER MOORE: Yeah, take your time.

22 (Brief pause in the proceedings.)

23 MR. KEIFER: Did you conduct an inspection of  
24 the property before you purchased it Mr. Cole?

25 WITNESS COLE: Yes, I did.

1           MR. KEIFER: Did your inspection include the  
2 point of diversion, the ditch, the water right that was  
3 associated with the property?

4           WITNESS COLE: We did a quick walk of it, yes.

5           MR. KEIFER: What was the purchase price for  
6 the ranch? What did you pay for it?

7           WITNESS COLE: I'm not sure I can recall with  
8 100 percent accuracy, but I can put you in the ballpark  
9 of --

10          MR. KEIFER: To the best of your recollection  
11 is what I'm looking for.

12          WITNESS COLE: So please don't hold me to this,  
13 but it was in the range of 650,000.

14          MR. KEIFER: I won't hold you to that. There's  
15 public records available in --

16          WITNESS COLE: Right.

17          MR. KEIFER: -- Siskiyou County, right?

18          That's all I have.

19          HEARING OFFICER MOORE: Thank you, Mr. Keifer.

20          Next, the Department of Fish and Wildlife. And  
21 I'll repeat the question about timing. We have about 20  
22 minutes until --

23          MR. PUCCINI: I'll try to be quick.

24          HEARING OFFICER MOORE: Okay. So it'll be less  
25 than 20 minutes?

1 MR. PUCCINI: It will.

2 HEARING OFFICER MOORE: Thank you.

3 CROSS-EXAMINATION BY

4 MR. PUCCINI: Up on the screen is CDFW-Exhibit  
5 8. I'll represent that is a Arrest/Investigation Report  
6 prepared by a Warden Boyd with the Department on  
7 September 29th, 2000. Have you ever seen this document,  
8 Mr. Cole?

9 (Exhibit CDFW-8 displayed on screen.)

10 MS. BRENNER: I'm going to object. It goes  
11 beyond the scope of his Direct.

12 HEARING OFFICER MOORE: Yeah.

13 MR. PUCCINI: The contents of the --

14 HEARING OFFICER MOORE: Overruled. That's  
15 good.

16 MR. PUCCINI: Thank you.

17 HEARING OFFICER MOORE: Cross is not limited  
18 strictly to Direct.

19 MR. PUCCINI: I just want to bring your  
20 attention to some statements by Mr. Boyd in the report to  
21 see if you agree with them or if you have any information  
22 to share about it.

23 He says in the report -- and I'm trying to find  
24 it -- basically I'll represent that the report was in  
25 response to a complaint that Mr. Boyd investigated

1 finding the construction of a dam. And he reports that  
2 the dam was three-and-a-half feet tall and that it  
3 diverted nearly all the surface flow down the long  
4 diversion ditch. And that's in reference to the ditch  
5 for Marble Mountain Ranch.

6 He then made contact with you and you went out  
7 to take a look at it. And you made some statements about  
8 -- let's see, right here on Line 16 -- that the amount of  
9 water needed to allow fish passage would cause you severe  
10 financial burden. And you use the water to generate  
11 power for the property and business.

12 Do you recall those statements or that  
13 encounter at all?

14 WITNESS COLE: No, I don't recall the  
15 statements, but I accept them from -- on the face of this  
16 document. I know Brian Boyd.

17 MR. PUCCINI: Okay. His statement that the --  
18 the dam was diverting nearly all of the surface flow down  
19 a diversion ditch, at least at the time or even  
20 thereafter is this a -- is this a common occurrence?

21 WITNESS COLE: Well, can I back up and ask if  
22 he addresses any of the return flow points in this  
23 document?

24 MR. PUCCINI: No, I didn't see any of that.

25 WITNESS COLE: All right. To the point -- to

1 the degree that he does not address the two overflow  
2 weirs that have been -- that were installed and in place  
3 immediately after we purchased the -- the ditch and began  
4 diverting, I would agree. With a caveat that -- if  
5 that's what he wrote, except for he neglected to include  
6 those items.

7 MR. PUCCINI: Just to restate my question,  
8 regardless of whether the flow is being returned to the  
9 creek or not, is it a common occurrence for you or Marble  
10 Mountain Ranch to operate the dam in such a way that it  
11 diverts nearly all of the surface flow of the creek into  
12 the ditch?

13 MS. BRENNER: Could you put a timeframe in that  
14 question?

15 WITNESS COLE: Yeah.

16 MR. PUCCINI: Either in 2000 or thereafter?

17 WITNESS COLE: The operation of the berm, to  
18 capture water we were more aggressive in the early days.  
19 After contact with Brian Boyd and his comments we allowed  
20 for fish passage.

21 MR. PUCCINI: Okay. Thank you.

22 WITNESS COLE: In a more -- in a more direct  
23 way. I mean, we presumed that -- you know, I had a  
24 discussion with him and said, "Well what is fish  
25 passage?" And he -- if I can remember that conversation

1 -- told me what minimum would be required for a fish to  
2 get down the stream, which wasn't a whole lot. But it  
3 was a notable thing that had to be installed into the  
4 berm or maintained in the berm. And so as nebulous a  
5 passage -- or as nebulous a comment as "fish passage" was  
6 we did have a discussion on what that meant, so that we  
7 could comply.

8 MR. PUCCINI: Thank you.

9 MS. WEAVER: Counsel, before we move off this  
10 document can you just state the exhibit number again for  
11 the court reporter?

12 MR. PUCCINI: Yes. It's CDFW-8.

13 MS. WEAVER: CDFW-8?

14 MR. PUCCINI: Correct.

15 MS. WEAVER: Thank you.

16 MR. PUCCINI: Thank you.

17 Mr. Cole on Page 3 of your testimony, offered  
18 into evidence as Exhibit MMR-1, you state that you divert  
19 some water from Stanshaw Creek into a small pond on the  
20 ranch for non-consumptive purposes, including "fish and  
21 wildlife." How is the pond used for fish and wildlife?

22 WITNESS COLE: Well it's habitat. And so we  
23 have waterfowl visiting, we have predators that live on  
24 that -- on that pond. So it's providing habitat as you  
25 would normally expect at the refugial pool at the end of

1 Stanshaw minus the salmonids of concern. So in every  
2 other regard it's a habitat issue.

3 MR. PUCCINI: When you say fish, do you mean  
4 both finned fish and non-finned fish, like amphibians for  
5 example?

6 WITNESS COLE: The ranch is loaded with frogs.

7 MR. PUCCINI: Okay. Of the fish that are in  
8 the pond are any fish not stocked?

9 WITNESS COLE: I don't think so, unless a fish  
10 could survive a migration from Stanshaw Creek down the  
11 ditch, through the trash rack, down the penstock, through  
12 the water wheel, down the lower ditch line and into the  
13 ditch. So that would be an unlikelihood.

14 MR. PUCCINI: Okay. That leads to my -- my  
15 next and last question, which is on Pages 2 and 3 of  
16 Jennifer Bull's testimony offered into evidence as  
17 Exhibit CDFW-1, Ms. Bull explains that she visited the  
18 ranch on May 14th, 2015. And during that visit she  
19 observed fish in the pond on the ranch that appeared to  
20 her to be salmonids based on their markings. And she  
21 recounts that she told you -- excuse me -- she recounts  
22 that later you told her that the fish in the pond came  
23 from Stanshaw Creek. Is this statement accurate, could  
24 fish in the pond in some way originate from Stanshaw  
25 Creek?

1           WITNESS COLE:  If they could survive that  
2 journey, then they could --

3           MR. PUCCINI:  Do you recall making --

4           WITNESS COLE:  -- hypothetically.

5           MR. PUCCINI:  Okay.  Do you recall making this  
6 statement to Ms. Bull?

7           WITNESS COLE:  I do not.

8           MR. PUCCINI:  Okay.

9           That's it.  Thank you.

10          HEARING OFFICER MOORE:  Yeah, okay.  As we near  
11 5 o'clock next on the list would be the Karuk Tribe.

12          MR. HUNT:  Um-hmm.

13          HEARING OFFICER MOORE:  If you could -- if --  
14 if your questions would be ten minutes or less we can  
15 continue with the Proceeding right now?

16          MR. HUNT:  Right now I'm not sure how long.

17          HEARING OFFICER MOORE:  Yeah, if -- if you're  
18 not sure due to the nature of the hard stop at 5:00 we  
19 would then suggest that we call Recess and reconvene  
20 tomorrow morning.

21          MR. HUNT:  I mean, that's fine with me.

22          HEARING OFFICER MOORE:  Okay.

23          WITNESS COLE:  I'm -- I'm good to go.  Let's  
24 keep going.

25          HEARING OFFICER MOORE:  You know, Mr. Cole's --



1 he's all warmed up.

2 (Laughter.)

3 WITNESS COLE: I need to get home.

4 MR. HUNT: I do too, but I think that just  
5 ensure continuity through the whole process that we  
6 extend until tomorrow.

7 HEARING OFFICER MOORE: Okay. Yes, that's the  
8 wise and prudent though not most desirable course of  
9 action.

10 So at this point I want to thank everyone for  
11 their participation and hard work today. We'll recess  
12 the proceeding and reconvene tomorrow.

13 Once again, I'm going to set a time of 9:30  
14 a.m. to begin tomorrow. And we'll have the room until 5  
15 o'clock, I believe, just like today. And so those will  
16 be the time -- the timeframe for tomorrow's hearing, so  
17 we'll reconvene here at 9:30 a.m. tomorrow.

18 MS. BRENNER: Thank you.

19 HEARING OFFICER MOORE: Thank you.

20 (Proceedings adjourned at 4:48 p.m.)

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22

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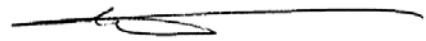
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IN WITNESS WHEREOF, I have hereunto set my hand this 26th day of January, 2018.



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PETER PETTY  
CER\*\*D-493  
Notary Public

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IN WITNESS WHEREOF, I have hereunto set my hand this 26th day of January, 2018.



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