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

13 In the Matter of:)
14 DOUGLAS AND HEIDI COLE AND) DECLARATION OF CURT BABCOCK
15 MARBLE MOUNTAIN RANCH)
16 _____)

17 I, Curt Babcock, declare as follows:

- 18 1. My testimony, herein provided and offered into evidence as CDFW **Exhibit CDFW-28**,¹
19 identifies my personal knowledge of compliance by Douglas and Heidi Cole and Marble
20 Mountain Ranch (collectively “the Diverter” or “Diverters”) with former Fish and Game
21 Code “(FGC”) section 1603, in effect prior to January 1, 2004, and Fish and Game Code
22 section 1602.
- 23 2. I have been an employee of the California Department of Fish and Wildlife (“CDFW”) for
24 the past 17 years. I am currently employed as an Environmental Program Manager in
25 CDFW’s Northern Region office (“region”). My statement of qualifications is offered into
26 evidence as **CDFW-29**.
- 27 3. As an Environmental Program Manager, I direct Senior Environmental Scientist
28 Supervisors and their staff in the administration of CDFW’s Lake and Streambed Alteration
Program (“LSA”) in the region, which includes Siskiyou County. The LSA Program is
CDFW’s program to administer and enforce Fish and Game Code section 1600 *et seq.*
throughout the state.

¹ Further references to CDFW exhibits will be “CDFW-[Exhibit Number].”

- 1 4. In my capacity as an Environmental Program Manager in the region, I interpret and apply
2 FGC section 1602 as follows: FGC section 1602 requires an entity to notify CDFW in
3 writing (“notification”) before conducting an activity that will substantially divert or
4 obstruct the natural flow of a river or stream, or substantially change or use material from
5 the bed, channel, or bank of a river or stream, and if necessary obtain from CDFW a permit
6 for the activity, referred to as a “streambed alteration agreement” (“SAA”). The notification
7 requirement applies to the substantial diversion of water regardless of the basis of right. If
8 CDFW determines the activity described in the notification could substantially adversely
9 affect an existing fish or wildlife resource, CDFW has 60 days from the date the
10 notification is complete to issue a draft SAA to the entity that includes measures the
11 Department determines are necessary to protect the resources the activity could adversely
12 affect. If CDFW does not issue a draft SAA within the 60-day time period, the entity may
13 conduct the activity as described in the notification without a SAA. If after receiving a draft
14 SAA the entity disagrees with any of the protective measures in it, the entity may request to
15 meet with CDFW to resolve any disagreement. After the entity and CDFW reach agreement
16 and CDFW meets its obligations under the California Environmental Quality Act
17 (“CEQA”) as a lead or responsible agency, CDFW will execute the draft SAA, thereby
18 making it final. If the disagreement cannot be resolved, the entity may request an arbitration
19 panel to resolve the disagreement by issuing a decision in the form of a final SAA.
- 20 5. My duties as they relate to the LSA Program and FGC section 1600 *et seq.* include ensuring
21 implementation of standard procedures in the region; advising staff on questions related to
22 process, including notification requirements, timelines, and CDFW responsibilities under
23 Fish and Game Code section 1600 *et seq.*; notification fees; resource impacts associated
24 with activities described in notifications; compliance with the CEQA; and ensuring
25 consistency across the region and with CDFW’s five other land-based regions. In addition, I
26 participate in several CDFW forums for statewide consistency; discuss issues with staff in
27 CDFW’s Habitat Conservation Planning Branch, which administers the LSA Program
28 statewide from CDFW’s Sacramento headquarters, staff in CDFW’s Water Branch, and
attorneys in CDFW’s Office of the General Counsel. In addition, I ensure proper
application of Fish and Game Code section 1600 *et seq.* by discussing projects, resource
impacts, and proposed protective measures in draft SAAs with Senior Environmental
Scientist Supervisors and their LSA Program staff, the basis for such measures, and
alternatives. In addition, I review and approve SAAs that involve large complex projects,

- 1 sensitive resources, Tribal or public interest concerns, and water diversions. Finally, I
2 determine how the region will comply with CEQA when issuing a SAA.
- 3 6. On April 30, 1999, CDFW issued to Marble Mountain Ranch a five-year streambed
4 alteration agreement for maintenance work under former FGC section 1603 (Notification
5 No. 99-0040) (“Maintenance SAA”). A true and correct copy of the Maintenance SAA is
6 offered into evidence as **CDFW-30**.
- 7 7. According to an Arrest/Investigation Report dated September 3, 2000 by CDFW Warden
8 Brian Boyd, the Diverters’ violated the Maintenance SAA and the Fish and Game Code by
9 maintaining a rock diversion dam that blocked or impeded fish passage in Stanshaw Creek.
10 A true and correct copy of the Arrest/Investigation Report is offered into evidence as
11 **CDFW-8**.
- 12 8. On October 3, 2001, the Siskiyou County Superior Court entered a “Stipulation to Final
13 Judgment and Stipulated Settlement Agreement” in *People v. Douglas Taylor Cole, et al.*,
14 Siskiyou County Superior Court Case No. SC CV CV 00-1700, which included an order by
15 the court (“stipulation”). My understanding is that this case arose from the incident Warden
16 Boyd reported in the Arrest/Investigation Report dated September 3, 2000 (**CDFW-8**).
- 17 9. Paragraph 3 of the order on page 5 of the stipulation permanently restrained defendants, Mr.
18 Cole and Marble Mountain Ranch, from doing certain acts without CDFW’s express
19 approval, including “[c]ommencing activities ... which have substantially diverted or
20 obstructed the natural flow [of Stanshaw Creek] ... without first notifying [CDFW], or prior
21 to [CDFW’s] determining that the [diversion] will not substantially affect an existing fish or
22 wildlife resource.” As I read the order, the order prohibited the Diverters from diverting
23 water from Stanshaw Creek until the Diverters submitted a notification for the diversion, or
24 until CDFW determined the diversion would not substantially affect an existing fish or
25 wildlife resource. A true and correct copy of the stipulation is offered into evidence as
26 **CDFW-31**.
- 27 10. On May 12, 2016, Mr. Cole submitted a notification to complete work in the ditch that
28 delivers water from Stanshaw Creek to Marble Mountain Ranch (“ditch”). CDFW assigned
the notification the following number: 1600-2016-0198-R1. A true and correct copy of
Notification No. 1600-2016-0198-R1, as marked by CDFW, is offered into evidence as
CDFW-32.
11. By letter dated May 16, 2016, CDFW informed Mr. Cole that he would not need a SAA for
the ditch work described in the notification, but reminded Mr. Cole he would need to notify

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CDFW under FGC section 1602 by December 31, 2016 for “the act of diverting water” from Stanshaw Creek pursuant to his water right. A true and correct copy of CDFW’s May 16, 2016 letter is offered into evidence as **CDFW-33**.

12. By letter dated February 6, 2017, CDFW informed Mr. Cole that CDFW had not received the notification described in CDFW’s May 16, 2016 letter and directed Mr. Cole to notify CDFW within 15 business days from receipt of the letter. A true and correct copy of CDFW’s February 6, 2017 letter is offered into evidence as **CDFW-34**.
13. On March 15, 2017, CDFW received a notification from Mr. Cole for the diversion of water from Stanshaw Creek, maintenance and repair of a hand-stacked rock diversion dam to divert flows into the ditch, and maintenance of an existing culvert/flume crossing on an unnamed ephemeral stream tributary to Stanshaw Creek (“Project”). CDFW assigned the notification the following number: 1600-2017-0135-R1. The notification was first assigned to Janae Scruggs, and later assigned to Michael Harris, both of whom are on my staff. A true and correct copy of Notification No. 1600-2017-0135-R1, as marked by CDFW, is offered into evidence as **CDFW-35**.
14. After a diligent search of region files, I was unable to locate a notification by the Diverters to divert water from Stanshaw Creek other than the notification CDFW received on March 15, 2017, described above—Notification No. 1600-2017-0135-R1. In my opinion, because the Maintenance SAA did not specifically authorize the “act of diverting water,” if after the stipulation was entered, the Diverters did not notify CDFW for their diversion on Stanshaw Creek until March 15, 2017, that would mean the Diverters were in violation of the stipulation and order, in addition to FGC section 1602, every day the Diverters diverted water from the creek between October 3, 2001 to at least March 15, 2017, a period of over 15 years.
15. By letter dated April 14, 2017, CDFW notified Mr. Cole that Notification No. 1600-2017-0135-R1 was complete. A true and correct copy of CDFW’s April 14, 2017 letter is offered into evidence as **CDFW-36**.
16. Sometime thereafter, I reviewed the draft SAA for the Project prepared by Mr. Harris. I confirmed that Mr. Harris had spoken with CDFW’s Caitlin Bean and Jennifer Bull in or around May 2017 to ensure that the measures included in the draft SAA were sufficient and necessary to protect fish and wildlife resources the Project could adversely affect. I agreed the draft measures were supported by scientific basis and were sufficient and necessary to protect fish and wildlife resources the Project could adversely affect.

- 1 17. On June 9, 2017, CDFW submitted the draft SAA (Notification No. 1600-2017-0135-R1)
2 to Mr. Cole. A true and correct copy of CDFW's cover letter and draft SAA are offered into
3 evidence as **CDFW-37**.
- 4 18. On July 21, 2017, CDFW received a letter dated July 19, 2017 from Douglas and Heidi
5 Cole's attorney, Ms. Barbara Brenner, confirming that CDFW would meet with her to
6 discuss certain measures in the draft SAA, which Ms. Brenner identified in her letter. A true
7 and correct copy of Ms. Brenner's July 19, 2017 letter is offered into evidence as **CDFW-**
8 **38**.
- 9 19. On July 27, 2017, CDFW and Ms. Brenner, on behalf of her clients, agreed to postpone the
10 meeting on the draft SAA until after the above-captioned hearing was finished. CDFW's
11 Office of the General Counsel ("OGC") memorialized the agreement to postpone the
12 meeting in an email message to Ms. Brenner dated September 11, 2017. A true and correct
13 copy of OGC's September 11, 2017 email message to Ms. Brenner is offered into evidence
14 as **CDFW-39**.
- 15 20. The draft SAA describes the potential impacts of the Project on fish and wildlife resources
16 identified by CDFW on page 2 of the draft SAA as follows:
- 17 • Increased water temperature due to lower stream flows.
 - 18 • Change in dissolved oxygen.
 - 19 • Water quality degradation.
 - 20 • Stranding of fish or hindering fish passage.
 - 21 • Entrapment in isolated pools due to loss of water surface elevation downstream of
22 the diversion.
 - 23 • Direct impacts on benthic organisms.
 - 24 • Change in flow depth, width, or velocity.
 - 25 • Habitat fragmentation below the diversion.
 - 26 • Impediment of up- or downstream migration.
 - 27 • Damage to aquatic habitat and function.
 - 28 • Direct and/or incidental take.
 - Indirect impacts including potential impacts to downstream coho salmon summer
rearing habitat.
 - Increased turbidity during sediment removal and/or instream activities.
 - Relocation of stream channel or change in channel form.

- 1 21. To avoid and minimize these potential impacts, CDFW included a number of protective
2 measures in the draft SAA, including Measure 2.7, "Instream Bypass Flow/Critical Riffle
3 Criteria" on pages 4-5 of the draft SAA ("Measure 2.7"). Measure 2.7 is consistent with the
4 concerns CDFW raised as early as 2000 in regard to Application 29449, as described in the
5 Prosecution Team's proposed order.
- 6 22. Measures 2.7(a)-(c) are consistent with the flow recommendation NOAA's National Marine
7 Fisheries Service ("NMFS") made, with CDFW's assistance, to the State Water Resources
8 Control Board ("State Water Board") in a letter by NMFS's Alicia Van Atta to the State
9 Water Board's Barbara Evoy, dated August 3, 2016 ("NMFS's Flow Recommendation").
10 As the letter explains on page 1, the flow recommendation was in response to the State
11 Water Board's Division of Water Rights request for "assistance from CDFW and NMFS to
12 establish a bypass flow on Stanshaw Creek that is protective of listed coho salmon and
13 riparian ecology" A true and correct copy of NMFS's Flow Recommendation is offered
14 into evidence as **CDFW-12**.
- 15 23. The purpose of Measure 2.7(a) is to protect edge water juvenile rearing habitat and macro-
16 invertebrate production between the Diverters' point of diversion and what was considered
17 at the time the flow recommendation was being developed, the limit of anadromy, as
18 described on page 10 of NMFS's Flow Recommendation.
- 19 24. Measure 2.7(b) reflects the recommendation on page 9 of NMFS's Flow Recommendation
20 that the Diverters divert no more than 10% of the unimpaired flow in Stanshaw Creek.
- 21 25. Measure 2.7(c) is based on CDFW's understanding that the State Water Board determined
22 the Diverters' water right on Stanshaw Creek to be no greater than 3.0 cfs.
- 23 26. Measure 2.7(d) is based on information from Mr. Cole that juvenile salmonids had been
24 found at the Diverters' point of diversion, and therefore is intended to return all non-
25 consumptive water and water not consumed to Stanshaw Creek as close as possible to the
26 diversion for the protection of this fish resource.

27 I declare under penalty of perjury to the laws of the State of California that the foregoing is true
28 and correct. Executed October 6, 2017, at Redding, California.


CURT BABCOCK