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Via Electronic Mail and United States Mail

October 5, 2017

State Water Resources Control Board
Division of Water Rights
Attention: Mara Irby
P.O. Box 2000
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wrhearing@waterboards.ca.gov
Mara.Irby@waterboards.ca.gov

**Re: Marble Mountain Ranch-Cole Hearing**
***Submission of Klamath Riverkeeper Re Lawfulness of Coles' Diversions and Usage of Stanshaw Creek Waters***

Ms. Irby and State Water Resources Control Board, Division of Water Rights:

Water and Power Law Group PC ("WPLG") represents Klamath Riverkeeper, a nonprofit organization focused on restoring fishery resources in the Klamath River watershed, in connection with the State Water Resources Control Board's ("SWRCB") Marble Mountain Ranch-Cole Hearing which is scheduled for November 13, 2017. The hearing will focus on diversions from Stanshaw Creek, a tributary to the Klamath River, by Douglas and Heidi Cole, to generate off-stream hydropower for the property commonly known as Marble Mountain Ranch.

(1) Pursuant to the Notice of Hearing, the SWRCB will consider the following issues at the hearing: Does the past or current diversion or use of water by Douglas and Heidi Cole and Marble Mountain Ranch constitute a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, particularly in light of impacts to public trust resources?

(2) If the past or current diversion or use of water by Douglas and Heidi Cole and Marble Mountain Ranch constitutes a waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, what corrective actions, if any, should be implemented, and with what time schedule should they be implemented?

In February 2015, WPLG submitted a memorandum to the SWRCB on behalf of its client, Old Man River Trust. It addressed whether the Coles' current diversion and usage of Stanshaw Creek waters are permitted under the Coles' pre-1914 appropriative water right, and whether such diversion and usage are violative of California law prohibiting the unreasonable diversion and usage of water. A true and correct copy of WPLG's February 2015 memorandum submitted to the SWRCB is attached as **Exhibit KR-1** to this letter and incorporated by this reference so that it is part of the administrative record for the hearing.

In the comments below, Klamath Riverkeeper addresses the two issues identified in the Notice of Hearing. However, before addressing these two issues, Klamath Riverkeeper addresses the preliminary question of whether the Coles' present off-stream use of Stanshaw Creek water to generate hydroelectric power is permitted under the Coles' pre-1914 appropriative right and Section 1706 of the California Water Code. This question needs to be addressed at the outset because, if the Coles' presently do not have an entitlement to divert Stanshaw Creek waters for their current hydroelectric use, then such water usage should be discontinued or appropriately curtailed by the SWRCB regardless of whether the SWRCB determines that such usage violates California reasonable use law.

## I. The Coles' Current Use of Stanshaw Creek Water for Hydropower Generation Is Not Covered by Their Pre-1914 Appropriative Right and Is Not Authorized under Section 1706 of the California Water Code Because Such Usage Injures Downstream Commercial Salmon Fisherman.

In September 2014, Lennihan Law (a private law firm based in Sacramento) submitted a document to the SWRCB titled "Marble Mountain Ranch Stanshaw Creek Water Rights Report" ("Lennihan Report"). This report was commissioned for the Mid Klamath Watershed Council and was prepared in collaboration with the environmental consultant Cascade Stream Solutions, who also prepared a report on Stanshaw Creek diversions. Copies of the Lennihan Report and Cascade Stream Solutions Report are attached, respectively, as **Exhibit KR-2** and **Exhibit KR-3** to this letter. The central question addressed in the Lennihan Report was the extent to which the

Coles may lawfully rely on an 1867 Water Notice filed by E. Stanshaw ("1867 Water Notice") to justify their current diversions and use of water from Stanshaw Creek.

The 1867 Water Notice indicated that the water diverted would be used for irrigation and hydraulic mining. There was no mention of hydropower generation. According to the Lennihan Report, the best evidence suggests that such generation began sometime in the 1940s or 1950s. As explained below, however, the fact that hydropower use was not listed in the 1867 Water Notice, and the fact that it appears that such hydropower use did not begin on the former Stanshaw lands until the 1940s or 1950s, does not answer the broader question of whether the Coles may lawfully use their pre-1914 appropriative right for this purpose.

The Lennihan Report (p. 11) discusses Section 1706 of the California Water Code, which provides: "The persons entitled to the use of water by virtue of an appropriation other than under the Water Commission Act [a pre-1914 appropriation] . . . may change the point of diversion, place of use, or purpose of use **if others are not injured by such change** . . ." (bold added). The report suggests that, pursuant to Section 1706, it may have perhaps been lawful to change the purpose of use under the pre-1914 right to include off-stream hydropower generation so long as this change in use did not injure others. When framed within the context of Section 1706, the critical question that emerges is therefore whether the switch to hydropower use that began in the 1940s injured other downstream users.

Prior to the hydropower use that began in the 1940s or 1950s, there was a narrow, shallow earthen ditch (and perhaps at some point a below ground pipe) that conveyed water for domestic use from Stanshaw Creek to the dwellings on the land now owned by the Coles. Prior to the 1940s or 1950s, the amount of water that was diverted into and conveyed through this ditch was minimal. However, with the switch to hydropower use in the 1940s or 1950s, the amount of water diverted into and carried in this earthen channel increased dramatically.

With the hydraulic mining and irrigation uses that occurred on the Stanshaw lands prior to 1914 (and prior to the 1940s), most, if not all, of the water diverted remained in the Stanshaw Creek watershed, and much, if not most, of the water returned to the Klamath River near where Stanshaw Creek empties into the Klamath River. This meant that most of the water diverted for mining and irrigation uses prior to the 1940s was returned for the benefit of other water users and fisheries (such as salmon) into the Stanshaw Creek watershed.

According to the Lennihan Report, however, the change to hydropower use meant that the diverted water previously used for mining and irrigation no longer made its way back to Stanshaw Creek as return flow. The Lennihan Report (p. 19) acknowledges that "the return flow [associated with the Coles' hydropower water usage] are not tributary to Stanshaw Creek but rather to Irving Creek." This change occurred because all of the water diverted for hydropower use was conveyed in the above-noted earthen channel which was extended to reach Irving Creek. That creek empties into the Klamath River approximately one mile downstream from the confluence of Stanshaw Creek and the Klamath River. Therefore, whether the change to hydropower use is lawful pursuant to Section 1706 depends on whether the redirection of return flow away from Stanshaw Creek associated with the new hydropower use injures other downstream users.

As documented by the National Marine Fisheries Service ("NMFS") in its August 3, 2016 letter to the SWRCB, and SWRCB staff reports, coho and Chinook salmon and Steelhead Trout ("steelhead") that spawn and rear and migrate through Klamath River basin waters use Stanshaw Creek as a cold water refugia when Klamath River instream temperatures rise too high. As documented by NMFS and the SWRCB, the change in the Coles' pre-1914 appropriative right that altered the return flow so that it no longer returns to Stanshaw Creek has significantly damaged juvenile salmon and steelhead rearing and survival rates in Stanshaw Creek. More specifically, NMFS and the SWRCB have found that the Coles' current levels of diversions for hydropower generation and the lack of return flow from the hydropower facility to Stanshaw Creek frequently leave Stanshaw Creek disconnected from the Klamath River, causing large numbers of stranded salmon to die in the disconnected, isolated pools on Stanshaw Creek.

There are commercial salmon fishermen in Northern California, who hold federal and state licenses to catch salmon, that rely on and fish for salmon that spawn and rear in and migrate through the Klamath River basin and use Stanshaw Creek for rearing and cold water refugia. When instream/in-channel conditions in Stanshaw Creek are such that salmon are trapped in isolated pools and die when Stanshaw Creek loses its connectivity to the Klamath River, this reduces the number and quality of salmon from the Klamath River basin available for commercial salmon fishermen. When instream conditions in

Stanshaw Creek are such that Stanshaw Creek cannot serve as cold water thermal refugia for salmon migrating up and down the Klamath River, this also reduces the number and quality of salmon from the Klamath River basis available for commercial salmon fishermen.

As a result, the changes in the Coles' claimed pre-1914 appropriative right to redirect return flow away from Stanshaw Creek has therefore injured and continues to injure commercial salmon fishermen. Section 1706 of the California Water Code only permits changes in use in pre-1914 appropriative rights when such changes in do not injure downstream users.

Importantly, the application of Section 1706 of the California Water Code to the Coles' change in use to hydropower generation makes plain why the 2014 decision by the California Court of Appeal in *Millview County Water District v. SWRCB* ("*Millview*") is inapplicable to the factual and legal issues in this hearing. In *Millview*, the Court held that certain conditions are required before the SWRCB can disallow uses set forth in a pre-1914 appropriative right due to lapses in such uses by the rights holder. However, in the case of the Stanshaw Creek diversions at issue in this hearing, the Coles are *not* trying to uphold an entitlement to continue using water for mining and irrigation as set forth in their pre-1914 appropriative right; rather the Coles are asking the SWRCB to approve a change to a new water use (hydropower generation) that was *not* in their claimed pre-1914 appropriative right and that injures downstream users. The holding in *Millview* is therefore inapplicable because *Millview* did not involve a change in use and therefore did not implicate Section 1706 of the California Water Code.

## II. California Case Law Supports the SWRCB's Determination that the Coles' Current Diversion and Use of Stanshaw Creek Water is Unreasonable Due to Severe Adverse Impacts on Instream Flow and Salmon.

There is a well-developed and consistent line of California court decisions which have held that California reasonable use law, grounded in Article X of the California Constitution and Section 100 of the California Water Code, authorize the SWRCB to regulate the diversion of

surface waters to ensure necessary instream flow to maintain water quality and habitat for fisheries.[1]

### A. The Racanelli Decision and Instream Flow.

In its 1986 decision in *United States v. SWRCB* (the "Racanelli decision", named after Judge Racanelli who authored the opinion), the California Court of Appeal addressed the question of whether the State of California could modify the existing water rights permits (issued to the Bureau of Reclamation for the federal Central Valley Project and to the California Department of Water Resources for the State Water Project) to provide additional flow into the Sacramento-San Joaquin Delta to maintain water quality standards.[2] More specifically, the Racanelli decision considered whether California reasonable use law provided the SWRCB with an independent basis to reduce out of stream diversions so additional freshwater could remain instream to reduce salinity levels from saltwater intrusion.

In the Racanelli decision, the California Court of Appeal held:

> Here, the Board determined that changed circumstances revealed in new information about the adverse effects of the projects upon the Delta necessitated revised water quality standards. Accordingly, the Board had the authority to modify the projects' permits to curtail their use of water on the grounds that the projects' use and diversion of the water had become unreasonable…Curtailment of project activities through reduced storage and export was eminently reasonable and proper to maintain the required level of water quality in the Delta.
>
> We perceive no legal obstacles to the Board's determination that particular methods of use have become unreasonable by their deleterious effects upon water quality.[3]

The Racanelli decision clarified that, consistent with California reasonable use law, the SWRCB has independent authority to restrict fresh water diversions to maintain instream water quality.

### B. *Environmental Defense Fund* and Alternate Points of Diversion.

In its 1980 *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District* ("*EDF*") decision, the California Supreme Court considered issues related to an agreement

[1] Paul Stanton Kibel, *In the Field and In the Stream: California Reasonable Use Law Applied to Water for Agriculture*, 46 MCGEORGE LAW REVIEW 87 (2014).
[2] *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986).
[3] *Id*., pp. 128-130.

between East Bay Municipal Utility District ("EBMUD") and the United States Bureau of Reclamation surrounding the construction of Auburn Dam on the American River (a tributary to the Sacramento River).[4] Pursuant to a 1970 agreement, EBMUD agreed to purchase up to 150,000 acre-feet of water which would be delivered to EBMUD through the Folsom-South Canal that diverts water from the upper American River.

EBMUD's proposed diversion of such quantities of water from the upper American River raised concerns about adverse impacts on water quality and fisheries in the lower American River, and led to proposals for EBMUD to instead divert water via a new proposed canal (the Hood-Clay Connection) that would be located on the Sacramento River below the confluence of the American River with the Sacramento River. In response to these fishery concerns, the SWRCB imposed certain instream flow conditions in the appropriative permits issued to the United States Bureau of Reclamation for Auburn Dam. More specifically, in 1971 the SWRCB issued Decision No. 1400 imposing minimum flows for the protection of fish in the American River and retaining jurisdiction to determine whether the EBMUD diversion of water through the Folsom-South Canal (as opposed to the alternative Hood-Clay Connection) constituted an unreasonable method of diversion.

In *EDF*, the California Supreme Court clarified that the SWRCB and the California courts have "concurrent jurisdiction" to prevent unreasonable water use or unreasonable methods of water diversion. On this basis, the Court granted Environmental Defense Fund. leave to amend its complaint against EBMUD to allege that the diversion of water through the Folsom-South Canal, rather than the proposed Hood-Clay Connection, constituted an unreasonable method of diversion.[5]

*EDF* affirms the independent and concurrent authority of California courts and the SWRCB to evaluate whether the selection of particular points of diversion constitute an unreasonable method of diversion due to adverse instream impacts on fisheries. As discussed further below, much of the adverse fishery effects of the Coles' diversions of Stanshaw Creek could be avoided by moving their point of diversion farther upstream so the tailwaters from the hydropower generation would remain in the Stanshaw Creek watershed.

[4] *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District* 26 Cal.3d 183 (1980).
[5] *Id*., p. 190.

### C. *Forni* and *Light*: Instream Flow and Diversions for Frost Protection.

The question of fresh water diversions for frost protection arose first in the 1976 California Court of Appeals decision in *SWRCB v. Forni* ("*Forni*").[6] Although this decision did not focus specifically on salmon, it did focus on instream impacts.

In *Forni*, the Court noted:

> [T]he State Water Resources Control Board [ ] initiated this action to enjoin certain vineyardists in the Napa Valley from drawing water directly from the Napa River to their vineyards for frost protection. The complaint charges that the direct diversion of water during the frost period extending from March 15 through May 15 each year constitutes an unreasonable method of diversion within the meaning of article XIV, section 3, of the California Constitution and section 100 of the Water Code. . . . [I]t is alleged, direct diversion during the frost season may at times dry up the river.[7]

On this set of facts, the *Forni* Court concluded:

> It is readily apparent that the claim that respondents' direct diversion of water constitutes an unreasonable use and an unreasonable method of use of water is predicated on the very premise that the direct pumping results in great temporary scarcity of water during the crucial frost period. . . . [T]he direct diversion of water for frost protection in the crucial period constitutes an unreasonable use and an unreasonable method of use of water within the purview of the Constitution and the statutory provisions . . . [W]e find no merit in respondents' assertion that the Board has exceeded its authority by declaring [ ] that the direct diversion of water in the frost period constitutes an unreasonable method of use within the meaning of the Constitution and Water Code.[8]

More recently, in December 2011, the SWRCB adopted a new regulation, Regulation 862, pertaining to salmon and diversions of water from the Russian River for vineyard frost protection. The introductory paragraph to this regulation explains:

> During a frost, the high instantaneous demand for water for frost protection by numerous vineyardists and other water users may contribute to a rapid decrease in stream stage that results in the mortality of salmonoids due to stranding. Stranding mortality can be avoided by coordinating or otherwise managing diversions to reduce instantaneous demand. Because a reasonable alternative to current

[6] *State Water Resources Control Board v. Forni*, 54 Cal.App.3d 743 (1976).
[7] *Id*., p. 747.
[8] *Id*., pp. 750, 752.

> practices exists, the Board has determined these diversions must be conducted in accordance with this section.[9]

The central component of the 2011 Russian River frost protection regulation is the requirement that diverters of water from the Russian River stream system must prepare and submit a Water Demand Management Program ("WDMP") to the SWRCB. Along with other information, the WDMP must include data regarding "[a]creage frost protected and acres frost protected by means other than water diverted from the Russian River stream system" and "[t]he rate of diversion, hours of operation, and volume of water diverted during each frost event for the year." If it is determined that the frost diversions described in the WDMP have the potential to cause salmonoid stranding mortality, "corrective actions" (such as the construction of offstream storage facilities) may be required to prevent such stranding mortality.

The closing paragraph of the 2011 Russian River frost protection regulation states:

> The diversion of water in violation of this section, including the failure to implement the corrective actions included in any corrective action plan developed by the governing body, is an unreasonable method of diversion and use and a violation of Water Code section 100, and shall be subject to enforcement by the board.[10]

SWRCB Regulation 862 was challenged in a lawsuit filed in Mendocino County Superior Court. In its 2013 decision in *Light v. SWRCB* ("*Light*"), the Mendocino County Superior Court held that although courts could rely on California reasonable use law on a case-by-case basis to bring enforcement actions for violating reasonable use standards, the SWRCB could not rely upon California reasonable use law to enact proactive restrictions to prevent unreasonable water usage or diversion.

In an opinion issued on June 16, 2014, the California Court of Appeal for the First District reversed the trial court and upheld SWRCB Regulation 862, holding:

> In finding the Board lacked the authority to enact Regulation 862, the trial court recognized the Board had regulatory authority over the unreasonable use of state waters. It held, however, that this authority was limited [ ] to pursuing enforcement actions in the courts against allegedly unreasonable users, rather than enacting regulations to preclude unreasonable use. Neither decisional law nor the

[9] California Code of Regulations, Title 23, §862 (2014).
[10] *Id.*

> governing statutes support the trial court's limited vision of the Board's regulatory authority.[11]

In this vein, the *Light* Court of Appeal opinion continued:

> It appears that in many, or perhaps most circumstances, diversion for frost protection purposes from the Russian River is biologically harmless. Yet on those occasions when it might be damaging, it has the potential to inflict long-lasting damage on already fragile salmon populations. Restricting the Board to post-event litigation deprives it of any effective regulatory remedy, since the damage will have been done and the critical circumstances may not arise again for months or years. It is difficult to imagine what effective relief a court could grant, other than a broad and inflexible injunction against future diversion for purposes of frost protection, a ruling that would be in the interests of neither the enjoined growers nor the public. Efficient regulation of the state's water resources in these circumstances demands that the Board have the authority to enact tailored regulations.[12]

In upholding the lawfulness of the Russian River frost protection regulation in *Light*, the California Court of Appeal established new precedent for reliance on California reasonable use law as an independent basis for the SWRCB to reduce the adverse impacts of out-of-stream diversions on instream fisheries.

In the case of the Coles' diversions from Stanshaw Creek for hydropower usage, the SWRCB and NMFS reports offer uncontested evidence that the volume of diversions and selected point of diversion associated with the change to hydropower usage have had adverse impacts on instream flows to such a degree that Stanshaw Creek is often unable to reach its confluence with the Klamath River. As a result, significant numbers of salmon are left stranded to die in isolated pools on Stanshaw Creek. Under circumstances such as these, California case law provides the SWRCB with clear and ample authority to impose restrictions on the Coles' diversion to ensure fish passage from the Klamath River to Stanshaw Creek, rearing habitat in Stanshaw Creek for juvenile salmon and steelhead; and cold-water refugia in the Klamath River for juvenile and adult salmon and steelhead migrating up the Klamath River.

[11] *Light v. State Water Resources Control Board*, 226 Cal.App.4th 1463 (2014).
[12] *Id*., pp. 1486-1487.

## III. Consistent with the Recommendations in the August 2016 NMFS Letter, the Coles Should Not Be Allowed to Continue to Divert Stanshaw Creek Water for Hydropower Generation Usage Unless and Until the Coles Evidence They Have Arranged for the Return of Such Diverted Water to Stanshaw Creek.

As the August 2016 NMFS letter indicates, there are two components involved in maintaining adequate instream flows in Stanshaw Creek to support salmon (to maintain connectivity between Stanshaw Creek and the Klamath River and to keep instream temperatures in Stanshaw Creek suitable for salmon). The first component is the amount, timing, and location of the Coles' diversions of water from Stanshaw Creek, and the second component is the amount and location of diverted water that the Coles return to Stanshaw Creek.

To ensure connectivity between Stanshaw Creek and the Klamath River (so that salmon and steelhead can use Stanshaw Creek as a cold water refugia and rearing habitat and to ensure salmon and steelhead can migrate between Stanshaw Creek and the Klamath River), the August 2016 NMFS letter made the following findings and recommendations:

> Klamath River coho salmon have a critical need for the cold water refugia provided by Klamath River tributaries such as Stanshaw Creek throughout the low flow season. Any loss of cold water during this time would decrease the quality and function of habitat. Because of the critically high summer Klamath River water temperatures, NMFS recommends a bypass flow [on Stanshaw Creek] that maintains at 90% of the unimpaired flow.
>
> …
>
> The lowest flow in Stanshaw Creek that ensures connectivity [to the Klamath River] is probably between 2.0 and 3.0 cfs…
>
> NMFS recommends that no more that 10% of the estimated unimpaired flow be diverted from Stanshaw Creek up to the limits of anadromy, throughout the low flow season, regardless of water year to ensure water quality and food supply is maintained for the over-summering coho salmon in the pond. By design, a 1-% diversion will decrease in size as the flow decreases. For example, as the flow drops from 3 cfs to 2 cfs the allowable diversion would decrease from 0.3 cfs to 0.2 cfs.

In recommending that Stanshaw Creek diversions be limited to no more than 10% of unimpaired flow, the August 2016 NMFS letter also clarified that this recommended limit on diversions was based on the assumption that the Coles would modify their existing hydropower system to return diverted water to Stanshaw Creek rather than continue the practice of redirecting all such

diverted water into Irving Creek. As noted above, the Coles currently do not return any of the water they divert from Stanshaw Creek for hydropower generation back to Stanshaw Creek. More specifically, the August 2016 NMFS letter provided:

> An additional requirement is that **the non-consumptive portion of the diversion is returned to Stanshaw Creek** at the upper limit of anadromy. (bold added.)
> …
> The minimum bypass of 2.0 cfs at the POD [point of diversion] **assumes that the non-consumptive diversion of up to 3.0 cfs will be returned to Stanshaw Creek** above the upper limits of anadromy. (bold added.)

Given that the current location of the Coles' hydropower generation facilities is on lands outside the Stanshaw Creek watershed (that are instead in the Irving Creek watershed), Klamath Riverkeeper is unclear, logistically, how the Coles will be able to satisfy NMFS' assumption that the waters diverted by the Coles for hydropower generation will be returned to Stanshaw Creek. There appears to be two potential ways that the Coles might be able to arrange for this return flow while still continuing to operate hydropower facilities.

One way to arrange for this return flow would be for the Coles to collect the water below the current point of hydropower generation and then convey this water back into Stanshaw Creek via pipe along Highway 96. There would be costs associated with this collection and conveyance infrastructure, and the siting of this piping would require permission from the California Department of Transportation ("Caltrans") which owns lands where the new piping would need to be placed and may require permission from the company that maintains fiber optic lines along Highway 96.

Another way to arrange for this return flow would be for the Coles to move the location of their hydropower generation closer to Stanshaw Creek, so that waters just below the location of hydropower generation could return to Stanshaw Creek without being piped along Highway 96. This may also involve moving the Coles' point of diversion further upstream. Again, there would be costs associated with this relocation, and with running additional electric lines from the relocated hydropower generation facilities to the Coles' ranch. Such relocation may also require permission from the United States Forest Service who owns lands where the relocated hydropower generation facilities and relocated point of diversion would be located.

Given the technical challenges and costs involved in arranging for such return flow to Stanshaw Creek, and given uncertainties as to whether the United States Forest Service or Caltrans would allow the placement of new facilities to enable such return flow, there is the possibility that the Coles will not be able to arrange for the return flow that is a core assumption in the recommended diversion limits in the August 2016 NMFS letter. If the Coles are unable to arrange for such return flow to Stanshaw Creek, then what happens?

Consistent with the analysis in the August 2016 NMFS letter regarding what levels of instream flows are needed to maintain Stanshaw Creek as a cold water refugia for salmon and what instream flows are needed to maintain connectivity between the Klamath River and Stanshaw Creek, it would follow that if the Coles are unable to arrange for return flow to Stanshaw Creek, then even allowing the Coles to divert 10% of Stanshaw Creek's unimpaired flow would have unacceptably adverse impacts on water levels, water quality, and salmon. As such, consistent with the analysis in the August 2016 NMFS letter, the inability of the Coles to arrange for return flows to Stanshaw Creek would require the Coles to discontinue their diversion of water from Stanshaw Creek for hydropower generation (or curtail such diversions for hydropower generation to a minimal amount well below the 10% diversion limit recommended by NMFS).

The Coles' legal counsel has previously suggested that, without the ability to continue to divert waters from Stanshaw Creek to operate their existing hydropower facilities, the Coles will lose all the value of the land because there will be no electricity on the property. This claim is without merit, as there are multiple options for the Coles to ensure needed electrical service to their ranch in the absence of continuing to operate their current hydropower facilities.

In the event that the Coles discontinue operation of their current hydropower generation facilities, they could install a combination of solar panels, a diesel generator, and a battery bank that could provide the Coles with a cost-effective energy source for their ranch. The costs of installing solar panels has come down considerably in recent year. Attached as **Exhibit KR-4** to this letter is an estimate from Wing Solar & Wood Energy Inc. in Red Bluff, California, indicating that it would cost about $125,000 for the Coles to install solar panels and a diesel generator to supply 30kW of peak power usage. This cost could come down substantially depending on actual power needs of MM Ranch. In fact, the Coles have previously relied on a

diesel generator to supplement their power needs (confirmed in the September 14, 2017 letter from the Coles' attorney, Barbara Brenner, to the SWRCB).

Additionally, the hydropower generation equipment that the Coles now use is outdated and highly inefficient. Pictures of the Coles antiquated hydropower system are provided in the Cascade Stream Solution Report attached as **Exhibit KR-3** to this letter. There is now reasonably priced micro-hydropower generation equipment that requires less water and provides more energy than the outdated equipment the Coles currently use. Information on such a replacement micro-hydropower system is provided in **Exhibit KR-5**, which includes a cost estimate from Aurora Power & Design, would produce 4180 Watts with .23 CFS of water.

In essence, the Coles are asking the SWRCB for permission to continue to divert whatever amount of water they need to continue operating their outdated, highly inefficient hydropower generation equipment, no matter how dire the resulting impacts on salmon and steelhead, instead of being required to look to alternative solar and diesel sources of power, and instead of being required to switch to more modern efficient micro-hydropower equipment that requires less water and therefore less diversions from Stanshaw Creek. The Coles' position in this regard is precisely the type of unreasonably wasteful water usage and associated excessive out-of-stream diversions that the reasonable use provisions of the California Constitution and the California Water Code were designed to prohibit.

## IV. Restricting the Coles' Current Diversion of Stanshaw Creek Waters for Hydropower Generation Usage is Required under California Public Trust Law Because There Are Economically and Technologically Feasible Options to Provide Electricity to Marble Mountain Ranch.

In its landmark 1983 decision in *National Audubon*, the California Supreme Court held that public trust uses and public trust resources associated with navigable surface waters and their tributaries must be fully protected "whenever feasible."[13] Public trust uses of such surface waters include recreational swimming, recreational paddling (in canoes and kayaks) and recreational fishing, and public trust resources include salmon and steelhead present in such surface waters.

[13] *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983).

There is a pool near the mouth of Stanshaw Creek that is used by the public for recreational swimming and recreational paddling, and when this swimming hole is depleted or dried out by the Coles' diversions for their current hydropower usage, these public trust uses of Stanshaw Creek are adversely impacted. Similarly, there are many people that engage in recreational salmon fishing in the areas near and downstream of the Stanshaw Creek-Klamath River confluence, and this public trust use is adversely impacted by the Coles' water diversions for their current hydropower usage because such diversions affect the abundance and health of salmon in the area.

As explained above, there are a number of feasible options to provide electricity to the Marble Mountain Ranch other than the current hydropower generation system used by the Coles. These feasible options include a combination of solar power with a supplemental diesel generator, or a more efficient micro-hydropower system as explained above. Per the public trust standards set forth by the California Supreme Court in *National Audubon*, these available options for providing electricity establish that is "feasible" for the SWRCB to fully protect public trust uses (recreational swimming, recreational paddling and recreational fishing) and public trust resources (salmon and steelhead) by restricting the Coles' diversions of Stanshaw Creek for their current hydropower usage.

**Conclusion**

For the reasons set forth above, the Coles' diversion of Stanshaw Creek water for its current hydropower generation use is not consistent with the Coles' claimed pre-1914 appropriative water rights. The Coles' present diversion levels of Stanshaw Creek waters for its current hydropower generation use violates the reasonable use provisions of the California Constitution and the California Water Code, is injurious to commercial salmon fishermen, and is required pursuant to California public trust law.

For the reasons set forth above, Klamath Riverkeeper generally concurs with the analysis, findings, and recommendations in the August 2016 NMFS letter and believes that the diversion limits, bypass flow requirements, and return flow obligations recommended by NFMS should be incorporated into the corrective actions ordered by the SWRCB. Furthermore, in the event the Coles are unable to comply with the return flow obligations recommended by NMFS, Klamath Riverkeeper requests the SWRCB to disallow the Coles' diversion of any Stanshaw Creek waters

for current hydropower use unless and until it can be established that such diversions are so minimal that they will not adversely impact the instream flow, water temperature, and connectivity standards presented in the August 2016 NMFS letter. This prohibition will not leave the Marble Mountain Ranch without electricity, but will simply require the Coles to invest in a solar power system with diesel generator backup or a more efficient and less wasteful hydropower generation system.

Yours,

Paul Stanton Kibel

Paul Stanton Kibel
On Behalf of Klamath Riverkeeper

**Exhibit KR-1** – WPLG, "Supplemental Information and Unresolved Issues Regarding Pre-1914 Appropriative Right Claims of Coles-Marble Mountain Ranch to Water from Stanshaw Creek" (February 20, 2015)
**Exhibit KR-2** – Lennihan Law, "Marble Mountain Ranch Stanshaw Creek Water Rights Report" (September 1, 2014)
**Exhibit KR-3** – Cascade Stream Solutions, "Marble Mountain Ranch Water Rights Investigation: Water Use Technical Memorandum" (November 18, 2014)
**Exhibit KR-4** – Wing Solar & Wood Energy, "Cost Estimate for Solar Panels and Diesel Generator" (September 19, 2017)
**Exhibit KR-5** – Aurora Power & Design, "Cost Estimate for Replacement Micro-Hydropower System" (September 28, 2017)

## DECLARATION OF SERVICE

## Marble Mountain Ranch-Cole Hearing

I, Emma Roos-Collins, declare that today I served the attached "Submission of Klamath Riverkeeper Re Lawfulness of Coles' Diversions and Usage of Stanshaw Creek Waters," supporting exhibits, and exhibit identification index by electronic mail to each person on the official service list compiled by the SWRCB in this proceeding, as well as triplicate hardcopies via USPS to the SWRCB.

Dated: October 5, 2017

By: Emma Roos-Collins

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**State Water Resources Control Board in the Matter of**
**Douglas and Heidi Cole and Marble Mountain Ranch**
**Waste and Unreasonable Use Hearing**
**SERVICE LIST OF PARTICIPANTS**

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