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STEPHEN PUCCINI (SBN 186105)  
NATHAN VOEGELI (SBN 279481)  
OFFICE OF THE GENERAL COUNSEL  
CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE  
1416 Ninth Street  
Sacramento, CA 95814  
Tel: (916) 653-6590  
Fax: (916) 654-3805  
Email: stephen.puccini@wildlife.ca.gov

Attorneys for the California Department of Fish and Wildlife

BEFORE THE STATE WATER RESOURCES CONTROL BOARD  
STATE OF CALIFORNIA

In the Matter of:  
DOUGLAS AND HEIDI COLE AND  
MARBLE MOUNTAIN RANCH

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CALIFORNIA DEPARTMENT OF FISH  
AND WILDLIFE CLOSING BRIEF

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1 **I. INTRODUCTION**

2 The California Department of Fish and Wildlife (“CDFW”) submits this closing brief  
3 in support of the Order Finding Waste, Unreasonable Method of Use, and Unreasonable  
4 Method of Diversion of Water and Ordering Corrective Actions, proposed by the  
5 Prosecution Team for the State Water Resources Control Board (“State Water Board”)  
6 Division of Water Rights (“Prosecution Team”) against Douglas and Heidi Cole and  
7 Marble Mountain Ranch (collectively, the “Coles”) and offered into evidence as Exhibit  
8 WR-1 (“Proposed Order”).  
9

10 Evidence admitted at the hearing shows that that the Proposed Order is  
11 reasonable and necessary. The evidence shows that the Coles have misused water in  
12 violation of the California Constitution and the Water Code and continue to do so. This  
13 includes evidence that the Cole’s water diversions from Stanshaw Creek have harmed  
14 and will continue to harm public trust resources, including Coho Salmon (*Onchorhynchus*  
15 *kisutch*) and steelhead (*O. mykiss*). This harm is caused by taking much or most of the  
16 natural flow of Stanshaw Creek during times of low flow (Exhibit CDFW-13, p. 2, lines 3-  
17 4<sup>1</sup>; Reporter’s Transcript, Volume 1, p. 28, line 22 – p. 29, line 1<sup>2</sup>), which increases water  
18 temperature in the creek, reduces thermal refugia in the Klamath River, and impedes fish  
19 passage during critical periods; by allowing fish to enter the ditch they use to deliver  
20 water from the creek to Marble Mountain Ranch (“ditch”) because the point of diversion  
21 (“POD”) is not screened (CDFW-1, 4:4-7; RT-1, 28:19); and by conveying water in an  
22 open unlined ditch that bleeds sediment into Stanshaw Creek, among other causes.  
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27 <sup>1</sup> Further references to CDFW exhibits will be “CDFW-[exhibit number], [page number:line number(s)]” or  
“CDFW-[exhibit number].”

28 <sup>2</sup> Further references to the Reporter’s Transcript will be “RT-[volume number], [page number:line  
number(s)].”

1 (CDFW-13, 2:3-4, 4:21-24, 5:14-18; RT-1; 28:14-18.) The Coles misuse of water is also  
2 evidenced by the fact that the water the Coles divert from Stanshaw Creek for non-  
3 consumptive use in hydropower generation is transported to Irving Creek through a pond  
4 and an erosional gully, instead of being returned to Stanshaw Creek. (CDFW-13, 5:17-  
5 18; RT-1, 29:9-12.) The hydropower effluent causes additional erosion at the outfall. (RT-  
6 1, 29:1-3.)

7  
8 After over two decades of CDFW and stakeholders working with the Coles to  
9 address these and other problems associated with their water diversions and diversion  
10 facilities without success, it is time for the State Water Board to step in and order the  
11 Coles to take corrective actions on a specific schedule that result in implementation of  
12 the flow recommendation the National Marine Fisheries Service ("NMFS") made to the  
13 State Water Board on August 3, 2016 ("NMFS's Flow Recommendation"). (CDFW-12.)

## 14 **II. BACKGROUND**

15  
16 CDFW has had concerns about the Cole's water diversion on Stanshaw Creek  
17 since at least 2000, as evidenced by the protest CDFW filed against Application 29449  
18 by Mr. Cole on March 17, 2000. (CDFW-1, 1:23-2:2; CDFW-3; RT-3, 237:14-18.) In its  
19 protest, CDFW explained the project could adversely affect fish resources or other  
20 sensitive species by reducing stream flows during critical periods (CDFW-1, 1:23-26;  
21 CDFW-3), and requested a field review with Mr. Cole "to develop suitable minimum  
22 bypass flow conditions [to protect] fish resources downstream." (CDFW-3.)

23  
24 CDFW has tried to work with the Coles over many years to address its concerns  
25 regarding the Cole's water diversion. For example, in a letter by CDFW to Douglas Cole,  
26 dated July 5, 2005 (CDFW-16), CDFW described measures the Coles could take to  
27 minimize impacts of their "unauthorized" water diversion on Stanshaw Creek. The letter  
28 also describes CDFW's agreement with the Cole's proposal to return the effluent from

1 hydroelectric generation to Stanshaw Creek. In addition, CDFW supported proposals to  
2 maintain minimum instream flows in Stanshaw Creek past the Cole's POD very similar to  
3 the NMFS's Flow Recommendation, to install a half-round culvert in the ditch to prevent  
4 berm failures and improve efficiency, and to install a solar power generation system.  
5 (CDFW-13, 2:25-3:4; CDFW-16.) As the Coho Recovery Coordinator for CDFW's  
6 Northern Region starting in September 2010 (CDFW-14), Caitlin Bean worked with the  
7 Coles to address the impacts on Coho Salmon caused by the Cole's water diversion. Ms.  
8 Bean's efforts includes her work on four grant proposals since 2011 (CDFW-13, 3:5-9).  
9 Each proposal was intended to address these impacts, and each emphasized the  
10 importance of the cold water off channel pond at the mouth of Stanshaw Creek. (CDFW-  
11 13, 3:5-5:9.) Finally, CDFW has tried to work with the Coles to bring them into  
12 compliance with Fish and Game Code ("FGC") section 1602 for their diversion of water  
13 and activities related thereto. (CDFW-28, 3:3-6:24.)  
14  
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### 16 **III. ARGUMENT**

#### 17 **A. Key Issue 1 – The Cole's Past and Current Use of Water Constitute a** 18 **Waste, Unreasonable Method of Use, and Unreasonable Method of** 19 **Diversion of Water**

20 The evidence CDFW submitted at the hearing, some of which other parties  
21 submitted or supported, demonstrates the Cole's have misused and continue to misuse<sup>3</sup>  
22 water in violation of Article X, section 2 of the California Constitution and the Water Code  
23 section 100. The evidence includes the following:  
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28 <sup>3</sup> "Misuse" as used herein means any waste, unreasonable use, or unreasonable method of diversion of water. (Cal. Code Regs., tit. 23, § 855, subd. (b).)

- 1 • A finding by Karuk Tribal fisheries staff that “extremely low flows to the  
2 Stanshaw Creek pond during the ... the summers [of 2012, 2013, and  
3 2014] [had] led to reduced pond volume, poor water quality, and even  
4 direct mortality of juvenile coho salmon (Soto, pers.comm.)[, which] ...  
5 coincided when measured flows in lower Stanshaw Creek were less than  
6 1.0 cfs, typically between 0.4 and 0.7 cfs.” (CDFW-13, 2:7-14; CDFW-7, 6-  
7 7.)  
8
- 9 • The request in the “Recovery Strategy for California Coho Salmon” that the  
10 State Water Board “investigate the legality of diversions and use of water  
11 on Stanshaw Creek. (CDFW-13, 2:18-24; CDFW-15, 9.34.) The uncertainty  
12 of the Cole’s water rights is evidenced by a 2012 grant proposal by the Mid  
13 Klamath Watershed Council (“Mid Klamath”), the “Stanshaw Creek Water  
14 Conservation Assessment.” (CDFW-19). The proposal included two  
15 deliverables: 1) “Marble Mountain Ranch Water Right Investigation: Water  
16 Use Technical Memorandum,” prepared by Cascade Stream Solutions,”  
17 November 18, 2014 (“Cascade Report”) (CDFW-20); and 2) “Marble  
18 Mountain Ranch Stanshaw Creek Water Rights Report,” prepared by  
19 Lennihan Law, P.C., September 1, 2014 (“Lennihan Report”) (CDFW-21).  
20
- 21 • Grant proposals that recognize the importance of the off-channel pond at  
22 the mouth of Stanshaw Creek to Coho Salmon and demonstrate how the  
23 Cole’s diversion of water harms coho. For example, a proposal in 2011 by  
24 Mid Klamath to restore refugial habitat for Coho Salmon at the mouth of  
25 Stanshaw Creek described the importance of off-channel habitats like the  
26 off-channel pond for over-wintering juvenile coho, and described the off-  
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1 channel pond as “excellent cold water refugia as well as winter refugia for  
2 juvenile coho.” (CDFW-13, 4:6-8; CDFW-17, 3.) A purpose of the project  
3 was to remove “a sediment slug that was deposited in the 2006 high water  
4 from ... a failed driveway and [the Cole’s] diversion ditch...” (CDFW-13,  
5 4:8-12; CDFW-17, 1, 3.)

6 Mid Klamath also submitted a proposal “to develop design alternatives to  
7 the existing water system and associated hydropower system for Marble  
8 Mountain Ranch and to eliminate inter-basin water transfer from Stanshaw  
9 to Irving creek.” (CDFW-13, 4:17-20; CDFW-18.) As Mid Klamath  
10 explained, “[The Cole’s] water diversion currently impacts rearing juvenile  
11 Coho Salmon in the section of Stanshaw Creek downstream of Highway 96  
12 through decreased instream flows and potential sedimentation from ditch  
13 failure events.” (CDFW-13, 4:21-24; CDFW-18, 2-3.) Mid Klamath also  
14 described the aquatic habitat values in Stanshaw Creek, including the off-  
15 channel pond: “Stanshaw Creek has a short but significant section of Coho  
16 habitat below the Highway 96 crossing. A lateral scour pool is formed just  
17 upstream of the Stanshaw Creek mouth when Klamath flood flows are  
18 deflected by evulsed alluvium and streamflow from Stanshaw Creek. This  
19 off-channel pond is subsequently filled by cold Stanshaw Creek water  
20 when flooding subsides, creating a high quality summer and winter rearing  
21 habitat for non-natal juvenile coho salmon migrating down the Klamath  
22 River corridor. Coho ecology studies by the Karuk Tribe at this site, and in  
23 Stanshaw Creek upstream to the Highway 96 culvert barrier, over the past  
24 10 years indicate that once coho young of the year (yoy), or 0+ fry, enter  
25 this habitat, they are likely to overwinter there until outmigration early the  
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1 next spring. Growth rates for coho overwintering in this off-channel pond  
2 are high, likely leading to increased survival and numbers of returning  
3 spawners.” (CDFW-13, 4:25-5:9; CDFW-19, 13.)

- 4 • The recognition by the State Water Board of the need for adequate bypass  
5 flows for the Cole’s diversion as evidenced by the Board’s request in early  
6 2016 that CDFW and NMFS work together to estimate such bypass flow  
7 needs and the resulting NMFS Flow Recommendation submitted to the  
8 State Water Board on August 3, 2016. (CDFW-13; 22-26.)
- 10 • CDFW’s inclusion of the NMFS Flow Recommendation in the draft  
11 Streambed Alteration Agreement it issued in 2017 for the Cole’s diversion  
12 on Stanshaw Creek (Notification No. 1600-2017-0135-R1) (“draft SAA”)  
13 (CDFW-37). (CDFW-13, 7:6-11; CDFW-28, 6:3-24; CDFW-37, 4-5.)
- 15 • Testimony regarding the importance of flow volume for salmonids. For  
16 example, Jennifer Bull’s testimony: “Flow volume influences water  
17 temperature, wetted rearing area, macroinvertebrate production, and  
18 attraction and fish passage flows. Water temperature is one of the most  
19 important factors in the survival of juvenile Coho Salmon and other  
20 salmonids, especially during the late-spring and summer. During this time,  
21 water temperature conditions in the Klamath River become inhospitable  
22 and salmonids migrate into tributaries to over summer in the cooler  
23 temperatures to survive. Salmonids are cold-blooded organisms, regulating  
24 body temperature by external conditions. Dissolved oxygen is more  
25 available to aquatic organisms at colder temperatures. Water temperature  
26 influences growth, physiology, and behavior, and optimal conditions for  
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1 Coho Salmon are confined to a narrow range: 10-15.5°C. Sub-optimal  
2 temperatures are within the range of 15.6-20.3°C. Growth may still occur,  
3 but salmonids are more susceptible to disease, behavioral changes, and  
4 predation. Detrimental is above 20.3°C.” (CDFW-1, 2:3-16.)

- 5 • Evidence that steelhead can make it up Stanshaw Creek to the Cole’s POD  
6 (CDFW-1, 2:27-3:2), contrary to testimony by Steven Cramer (RT-1, 99:19-  
7 20), and because the POD is unscreened, into the ditch, along with  
8 resident rainbow trout. (CDFW-1, 3:25-28, 4:4-7; CDFW-7, 3 [reporting that  
9 two fish were observed upstream of Highway 96 and were “most likely  
10 resident coastal rainbow trout or juvenile steelhead.”].)
- 11 • The Cole’s rock diversion dam has blocked or impeded fish passage in  
12 violation of the Fish and Game Code, specifically section 5901. (CDFW-1,  
13 4:14-20; CDFW-28, 3:5-9; CDFW-8.)
- 14 • The fact that Coho Salmon and steelhead use lower Stanshaw Creek as  
15 non-natal rearing habitat, demonstrating there is habitat within Stanshaw  
16 Creek for salmonids, not just the off-channel pond. (CDFW-1, 3:3-4:4,  
17 CDFW-5, 1-2; CDFW-6, 1; CDFW-7, 3; RT-3, 229:16-232:9.) Shari  
18 Whitmore and Margaret Tauzer made clear the importance of this habitat,  
19 in addition to upper Stanshaw Creek, and not just the off-channel pond, to  
20 Coho Salmon and other fish. (RT-3, 191:17-204:4.)
- 21 • Evidence of that the ditch is prone to failure causing severe erosion and  
22 discharging pollutants back into Stanshaw Creek (RT-1, 28:16-18; CDFW-  
23 13, 4:21-24; CDFW-18, 2-3; CDFW-18, 20-23 [photographs of ditch  
24 failures], including the ditch failures Jennifer Bull observed in June 2012  
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1 (CDFW-1, 4:4-7), and Caitlin Bean observation during a field review in  
2 June 2012 that “the ditch was bleeding sediment into Stanshaw Creek.”  
3 (CDFW-13, 5:14-18.)

- 4 • CDFW’s finding that streamflow at 2.3 cfs below the Highway 96 crossing  
5 “was barely adequate to sustain fishlife and to maintain unimpeded access  
6 for juvenile steelhead in [Stanshaw Creek] below Highway 96” and that  
7 “streamflow ... below 2 cfs ... would create a low flow barrier near the  
8 mouth where the channel is aggraded and wide and stream braiding is  
9 occurring,” (CDFW-1, 4:7-14; CDFW-5, 1) and that such “[a low flow barrier  
10 would prevent salmonids from accessing Stanshaw Creek and the cool  
11 refugia provided by the creek and the off-channel pond.” (CDFW-1, 4:13-  
12 14.)
- 13 • CDFW’s recommendations to the State Water Board in 2001, 2007, and  
14 2009 that the Coles should not be allowed to divert water at their POD  
15 unless the Coles bypassed a minimum of 2.5 cfs measured at the Highway  
16 96 culverts to provide for fish passage into Stanshaw Creek, reserving the  
17 right to require additional bypass flows in the future. (CDFW-1, 4:21-5:4;  
18 CDFW-9; CDFW-10; CDFW-11.)
- 19 • CDFW’s past recommendations to the State Water Board are consistent  
20 with the NMFS Flow Recommendation, specifically: bypassing a minimum  
21 of 2.0 cfs at the Cole’s POD, returning the non-consumptive diversion to  
22 Stanshaw Creek, and maintaining 90% bypass of the unimpaired flow.  
23 (CDFW-1, 5:4-6; CDFW-9; CDFW-10; CDFW-11; CDFW-12.)  
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- Support for the methodology and results of the instream flow needs evaluation in the NMFS Flow Recommendation by CDFW’s Instream Flow Program Coordinator, Robert Holmes. (CDFW-1, 5:12-14; CDFW-13, 6:27-7:2; CDFW-24, 2:3-18), and his conclusion that “NMFS’s Flow Recommendation will provide flows for a high level of protection for over-summering coho salmon in Stanshaw Creek.” (CDFW-24, 2:19-22.)
- The Cole’s failure to comply with Fish and Game Code section 1602 for their water diversion until recently means the Coles have been diverting water without a streambed alteration agreement that would include measures necessary to protect fish and wildlife resources, including bypass flows. (CDFW-28, 2:1-16, 4:15-22.)
- CDFW’s determination in the draft SAA that the potential impacts of the Cole’s water diversion on fish and wildlife resources include the following:
  - Increased water temperature due to lower stream flows.
  - Change in dissolved oxygen.
  - Water quality degradation.
  - Stranding of fish or hindering fish passage.
  - Entrapment in isolated pools due to loss of water surface elevation downstream of the diversion.
  - Direct impacts on benthic organisms.
  - Change in flow depth, width, or velocity.
  - Habitat fragmentation below the diversion.
  - Impediment of up- or downstream migration.
  - Damage to aquatic habitat and function.

- 1           ○ Direct and/or incidental take.
- 2           ○ Indirect impacts including potential impacts to downstream Coho
- 3           Salmon summer rearing habitat.
- 4           ○ Increased turbidity during sediment removal and/or instream
- 5           activities.
- 6           ○ Relocation of the stream channel or change in channel form.

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8 (CDFW-28, 5:15-6:2.)

- 9           • CDFW's inclusion of measures in the draft SAA that are consistent with the
- 10           NMFS Flow Recommendation (CDFW-13, 7:6-11, CDFW-28, 4:25-28, 6:3-
- 11           24.)

12 **B. Key Issue 2 – Corrective Actions Are Needed**

13           CDFW supports the Prosecution Team's Proposed Order. As mentioned

14 above, the Cole's misuse of water has been ongoing since at the least the time

15 CDFW filed its protest against Application 29449 in early 2000. CDFW recognizes

16 that since that time, the Coles have worked with CDFW, the State Water Board,

17 NMFS, and other stakeholders to identify options to correct this problem, including

18 physical solutions to change or improve the Cole's water diversion and power

19 generation facilities. The Prosecution Team's witnesses, Taro Murano, Skylar

20 Anderson, Stormer Feiler, neatly summarized these efforts and the impacts the

21 Cole's misuse of water on public trust resources in their testimony. (RT-1, 182:12-

22 193:17; RT-1, 193:24-207:1; and RT-1, 207:8-220:7, respectively.) According to

23 Mr. Cole, the Cole's have made efficiency improvements on Marble Mountain

24 Ranch. (RT-2, 189:16-191:10.) While all of these efforts are laudable, they have

25 not corrected the problem of misuse. Indeed, this delay ultimately led to the

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1 issuance of the final Cleanup and Abatement Order against the Coles (“CAO”).  
2 Further, unlike other private parties that have been subject to scrutiny,  
3 investigation, or enforcement actions by regulatory agencies over their water use,  
4 the Coles have benefitted from public assistance in the form of grants,  
5 deliverables from these grants, including, significantly, the Cascade and Lennihan  
6 reports and the identification of potential physical solutions, and reports and  
7 investigations by state and federal agencies, the Karuk Tribe, and other  
8 stakeholders. Ultimately, however, it is the Cole’s obligation alone to ensure their  
9 diversion of water is lawful.  
10


11 By way of clarification, insofar as Barbara Brenner was suggesting in her  
12 opening statement this delay is due in part to CDFW’s “1600 permit,” which she  
13 described as being “held up” and “on hold” (RT-1, 71:8-9, 19-20), CDFW timely  
14 issued the draft SAA and thereafter, CDFW and Ms. Brenner, on behalf of the  
15 Coles, mutually agreed to postpone any meeting to discuss the measures in the  
16 draft SAA until the hearing was finished. (CDFW-28, 5-15; CDFW-39.) CDFW  
17 proposed the postponement for economy because some of the measures in the  
18 draft SAA are reflect the NMFS Flow Recommendation which is the subject of the  
19 hearing and which the Coles dispute. (CDFW-39.)  
20


21 While CDFW supports the Proposed Order, CDFW recognizes that the  
22 time schedule and tasks in Table 3 of the Proposed Order will need to be adjusted  
23 or changed to account for the six-month postponement of the hearing, to align the  
24 schedule and tasks with the requirements in the now final CAO, and to give the  
25 Coles a reasonable amount of time to comply with the Proposed Order and CAO.  
26 Even so, the main objective should be implementation of the NMFS Flow  
27 Recommendation.  
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**IV. CONCLUSION**

CDFW has long recognized that the Cole's diversion of water from Stanshaw Creek adversely affects Coho Salmon and other fish resources. Based on the CDFW's experience and knowledge regarding this diversion and its facilities, and consistent with CDFW's responsibilities as the state's trustee for fish and wildlife resources and CDFW's major efforts to recover Coho Salmon, CDFW urges the State Water Board to adopt the Prosecution Team's Proposed Order with reasonable adjustments to the time schedule and tasks therein, provided the end result is implementation of the NMFS Flow Recommendation.

  
\_\_\_\_\_  
Stephen Puccini, Attorney IV  
Office of the General Counsel  
Attorney for California Department of Fish and Wildlife

  
\_\_\_\_\_  
Date

SERVICE LIST OF PARTICIPANTS

<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p>	<p><b>DIVISION OF WATER RIGHTS</b>                  Prosecution Team                  Ken Petruzzelli, Attorney III                  State Water Resources Control Board Office                  of Enforcement                  801 K Street, 23rd Floor                  Sacramento CA 95814  <a href="mailto:kenneth.petruzzelli@waterboards.ca.gov">kenneth.petruzzelli@waterboards.ca.gov</a>  <a href="mailto:heather.mapes@waterboards.ca.gov">heather.mapes@waterboards.ca.gov</a></p>	<p><b>DOUGLAS AND HEIDI COLE, MARBLE MOUNTAIN RANCH</b>                  Barbara A. Brenner                  1414 K Street, 3rd Floor                  Sacramento, CA 95814  <a href="mailto:barbara@churchwellwhite.com">barbara@churchwellwhite.com</a>  <a href="mailto:kerry@churchwellwhite.com">kerry@churchwellwhite.com</a></p>
<p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p>	<p><b>CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE</b>                  Stephen Puccini, Staff Counsel                  Nathan Voegeli, Staff Counsel                  1416 Ninth St. Sacramento, CA 95814  <a href="mailto:stephen.puccini@wildlife.ca.gov">stephen.puccini@wildlife.ca.gov</a>  <a href="mailto:nathan.voegeli@wildlife.ca.gov">nathan.voegeli@wildlife.ca.gov</a></p>	<p><b>CALIFORNIA SPORTFISHING PROTECTION ALLIANCE</b>                  Chris Shutes                  1608 Francisco St.                  Berkeley, CA 94703  <a href="mailto:blancapaloma@msn.com">blancapaloma@msn.com</a></p> <p>Michael Jackson                  P.O. Box 207                  75 Court Street                  Quincy, CA 95971  <a href="mailto:mjatty@sbcglobal.net">mjatty@sbcglobal.net</a></p>
<p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p>	<p><b>KLAMATH RIVERKEEPER</b>                  Paul Kibel                  2140 Shattuck Ave., Suite 801                  Berkeley, CA 94704-1229  <a href="mailto:pskibel@waterpowerlaw.com">pskibel@waterpowerlaw.com</a></p>	<p><b>KARUK TRIBE</b>                  Fatima Abbas, General Counsel                  64236 Second Ave.                  Happy Camp, CA 96039  <a href="mailto:fabbas@karuk.us">fabbas@karuk.us</a></p> <p>Drevet Hunt                  1004 O'Reilly Ave.                  San Francisco, CA 94129  <a href="mailto:drev@lawyersforcleanwater.com">drev@lawyersforcleanwater.com</a></p>
<p>20</p> <p>21</p> <p>22</p> <p>23</p>	<p><b>NATIONAL MARINE FISHERIES SERVICE</b>                  Christopher Keifer, Attorney                  NOAA Office of General Counsel                  501 W. Ocean Blvd., Suite 4480                  Long Beach, CA 90802  <a href="mailto:christopher.keifer@noaa.gov">christopher.keifer@noaa.gov</a>  <a href="mailto:margaret.tauzer@noaa.gov">margaret.tauzer@noaa.gov</a>  <a href="mailto:justin.ly@noaa.gov">justin.ly@noaa.gov</a></p>	<p><b>OLD MAN RIVER TRUST</b>                  Konrad Fisher                  100 Tomorrow Rd.                  Somes Bar, CA 95568  <a href="mailto:k@omrl.org">k@omrl.org</a></p>
<p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p><b>PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES</b>                  Noah Oppenheim                  Regina Chichizola                  P.O. Box 29196                  San Francisco, CA 94129-8196  <a href="mailto:regina@ifrfish.org">regina@ifrfish.org</a></p>	