

1 Barbara A. Brenner (SBN 142222)  
2 Kerry A. Fuller (SBN 292466)  
3 CHURCHWELL WHITE LLP  
4 1414 K Street, 3<sup>rd</sup> Floor  
5 Sacramento, CA 95814  
6 (916) 468-0950 Phone  
7 (916) 468-0951 Fax  
8 barbara@churchwellwhite.com

9 Attorneys for Respondents  
10 DOUGLAS COLE, HEIDI COLE, AND  
11 MARBLE MOUNTAIN RANCH

12 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

13 In the Matter of Douglas Cole and Heidi Cole  
14 and Marble Mountain Ranch, Draft Order No.  
15 2017-00XX-DWR

**RESPONDENTS' OBJECTIONS TO  
TESTIMONY SUBMITTED BY THE  
STATE WATER RESOURCES CONTROL  
BOARD, DIVISION OF WATER RIGHTS,  
PROSECUTION TEAM**

16 **I. Introduction**

17 Douglas and Heidi Cole (the "Coles") and Marble Mountain Ranch (the "Ranch") object to  
18 several items of testimony and Exhibits submitted by the State Water Resources Control Board  
19 ("State Water Board"), Division of Water Rights, Prosecution Team ("Prosecution Team") in  
20 relation to the November 13, 2017, public hearing regarding the Coles' diversion and use of water.  
21 Each of the Coles objections to the Prosecution Teams' Exhibits and testimony fall into one of five  
22 categories: (1) testimony and exhibits beyond the scope of the public hearing's key issues should  
23 be stricken; (2) exhibits that are hearsay should be stricken; (3) the Prosecution Team's expert  
24 designation is improper for Mr. Murano, Mr. Anderson, and Mr. Feiler with regard to fishery  
25 resources in Stanshaw Creek and the Klamath River; (4) Mr. Feiler's testimony is related to  
26 Cleanup and Abatement Order R1-2016-0031 ("CAO"), which is outside the scope of the public  
27 hearing, therefore his testimony and all related exhibits should be stricken in their entirety; and (5)  
28 the Prosecution Team has failed to show good cause to extend the time for its direct oral  
testimony.

1 **II. Testimony and Evidence that is not Relevant to the Proceedings Should be Stricken.**

2 Adjudicative proceedings are conducted in accordance with the provisions and rules of  
3 evidence set forth in Government Code section 11513. (Cal. Code Regs., tit. 23, § 648.5.1.) The  
4 hearing need not be conducted according to technical rules relating to evidence and witnesses.  
5 (Gov. Code, § 11513, subd. (c).) Relevant evidence is admissible “if it is the sort of evidence on  
6 which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of  
7 the existence of any common law or statutory rule which might make improper the admission of  
8 the evidence over objection in civil actions.” (*Ibid.*) Relevant evidence is defined as evidence  
9 “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the  
10 determination of the action.” (Evid. Code, § 210.) Evidence that is beyond the scope of the public  
11 hearing does not function “to prove or disprove any disputed fact that is of consequence to the  
12 determination” of the Coles’ diversion and use of water. (*Ibid.*) Therefore, that evidence should be  
13 excluded.

14 **A. Testimony and Evidence Addressing the Coles’ Established Pre-1914 Water**  
15 **Right are not Relevant to this Proceeding. Any Evidence Challenging Their**  
16 **Right Should be Stricken.**

17 According to the Notice of Public Hearing for this proceeding, there are two (2) key issues  
18 to consider at the Public Hearing:

- 19 1. Does the past or current diversion or use of water by Douglas and Heidi Cole and  
20 Marble Mountain Ranch constitute a waste, unreasonable use, unreasonable method of  
21 use, or unreasonable method of diversion of water, particularly in light of any impacts  
22 to public trust resources?
- 23 2. If the past or current diversion or use of water by Douglas and Heidi Cole and Marble  
24 Mountain Ranch constitutes a waste, unreasonable use, unreasonable method of use, or  
25 unreasonable method of diversion of water, what corrective actions, if any, should be  
26 implemented, and with what time schedule should they be implemented? How should  
27 the implementation time schedule for any corrective actions be coordinated with the  
28 requirements of the Cleanup and Abatement Order issued by the North Coast Regional  
Water Quality Control Board?

1 The two questions above do not raise any issues regarding the Coles' pre-1914 right to  
2 divert three cubic feet per second ("cfs") from Stanshaw Creek. Any evidence presented to  
3 challenge the Coles' pre-1914 right would not prove or disprove whether the diversion constitutes  
4 waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of  
5 water. Therefore, that evidence is not relevant to this proceeding.

6 The Coles divert surface water from Stanshaw Creek under a pre-1914 claim of right in two  
7 Statements of Water Diversion and Use, S015022 and S016375. Following an extensive study and  
8 review period, the State Water Board, Division of Water Rights, confirmed the Coles' pre-1914  
9 three cfs claim in 2014. (See Division of Water Rights, Report of Inspection, Inspection Dates  
10 December 12, 2014 and February 12, 2015, p. 14 ["Given the unsettled legal issues surrounding  
11 forfeiture, the State Water Board or a reviewing court could reasonably conclude that the MMR  
12 pre-1914 water right may be up to the full capacity of the ditch, which MMR claims to be 3 cfs.  
13 On that basis, the Division [of Water Rights] concludes that MMR's diversion does not appear to  
14 be in excess of its claimed pre-1914 right."].) Even the Notice of Public Hearing recognizes the  
15 Coles' pre-1914 right: "Surface water to serve Marble Mountain Ranch is diverted from a single  
16 point of diversion on Stanshaw Creek, a tributary to the Klamath River, under a pre-1914 claim of  
17 right and a Small Domestic Use Registration." (Notice of Public Hearing, p. 1.) The Coles' pre-  
18 1914 right cannot be challenged in a proceeding to determine waste, unreasonable use,  
19 unreasonable method of use, or unreasonable method of diversion of water. Any evidence  
20 contradicting their pre-1914 claim of right to three cfs is thus irrelevant to this proceeding. The  
21 Coles request that the exhibits and any discussion related to the exhibits outlined below be stricken  
22 from the record because the exhibits exceed the scope of the public hearing by addressing the  
23 Coles pre-1914 three cfs right.

24 The Prosecution Team submitted nearly 200 Exhibits. Of those nearly 200 Exhibits,  
25 roughly 73 address the establishment of the Coles' pre-1914 right to divert three cfs of water.  
26 Exhibits 4-6, 15-80, 82, 86, 92, 98, 170, and 193 all address the history and establishment of the  
27 Coles three cfs right. This discussion is outside the scope of the hearing to address the Coles'  
28 diversion and use of water under that right. The 20-year negotiation process with regard to the

1 Coles' diversion was largely focused on establishing the Coles' pre-1914 right. Now that the right  
2 is established, it is no longer relevant to discuss the basis of the right at the public hearing to  
3 address the Coles' diversion and use of water under that right. Therefore, Exhibits 4-6, 15-80, 82,  
4 8, 92, 98, 170, and 193 and any discussion of those exhibits should be stricken.

5 **B. Exhibits Related to the Correspondence Between the Coles' Legal Counsel and**  
6 **the State Water Board are irrelevant as to the Coles' Diversion and Use of**  
7 **Water as it Relates to Public Trust Resources.**

8 The Prosecution Team submitted roughly 33 letters and emails between the State Water  
9 Board and other regulatory agencies and the Coles' legal counsel. This correspondence is  
10 irrelevant to impacts to public trust resources from the Coles' diversion and use of water. Exhibits  
11 23, 65, 66, 67, 69, 86, 91, 107, 108, 110, 115, 122, 124, 128, 129, 132, 135, 136, 144, 145, 146,  
12 147, 150, 151, 154, 156, 157, 160, 163, 168, 172, 183, and 186 are all correspondence between the  
13 Coles' legal counsel and regulatory agencies regarding communications from those agencies, or  
14 seeking approval or discussion of proposed projects at the Ranch. The Exhibits do not provide any  
15 information to prove or disprove any impacts to public trust resources from the Coles' diversion  
16 and use of water under their pre-1914 three cfs right. Therefore, Exhibits 23, 65, 66, 67, 69, 86, 91,  
17 107, 108, 110, 115, 122, 124, 128, 129, 132, 135, 136, 144, 145, 146, 147, 150, 151, 154, 156, 157,  
18 160, 163, 168, 172, 183, and 186 and any discussion related to those Exhibits are not relevant to  
19 the public hearing and should be stricken.

20 **C. Exhibits Related to the Coles' Guest Improvements at the Ranch are**  
21 **Irrelevant to the Coles Diversion and Use of Water as it Relates to Public Trust**  
22 **Resources**

23 Exhibits 178-182 are printouts from the Ranch's website. These materials are used to  
24 attract guests to the Ranch. Information on the Ranch's website that addresses the Coles' guest  
25 services activities at the Ranch are irrelevant to the issue of any impacts to public trust resources  
26 through the Coles' diversion and use of water. The website operates as promotional material to  
27 invite individuals to visit the Ranch for summer and fall outdoor vacations. Improvements are  
28 necessary to continue to attract business and to bring repeat visitors back to the Ranch. The  
projects highlighted on the Ranch's website were completed by the Cole family and do not require  
the time and expense of the projects proposed under Draft Order No. 2017-00XX-DWR, including

1 the time and expense of identifying and retaining consultants and contractors to implement any  
2 such project. None of the information provided in Exhibits 178-182 addresses the Coles' diversion  
3 and use of water as it relates to public trust resources. Therefore, Exhibits 178-182 are irrelevant to  
4 the issues to be considered at the public hearing and should be excluded.

5 **III. Hearsay Evidence Must be Excluded Where it is Used to Show the Truth of the**  
6 **Matter Asserted.**

7 Hearsay is evidence of a statement, other than by a witness, that is offered to prove the  
8 truth of the matter stated, *i.e.*, an out-of-court statement offered for its truth. (Evid. Code, § 1200,  
9 subd. (a).) Hearsay evidence may only be used to supplement or explain other evidence. (Gov.  
10 Code, § 11513, subd. (d).) Upon a timely objection, such hearsay evidence shall not be sufficient  
11 in itself to support a finding. (*Ibid.*) Therefore, hearsay evidence offered for the truth of the matter  
12 asserted must be excluded based on the following objections.

13 First, the 33 Exhibits, identified above, between the Coles' legal counsel, the Water  
14 Boards' legal counsel and other regulators: Exhibits 23, 65, 66, 67, 69, 86, 91, 107, 108, 110, 115,  
15 122, 124, 128, 129, 132, 135, 136, 144, 145, 146, 147, 150, 151, 154, 156, 157, 160, 163, 168, 172,  
16 183, and 186 are not only irrelevant to the issue of the public hearing, but are also hearsay  
17 evidence. The authors of those letters: the Coles' legal counsel, the State Water Boards' legal  
18 counsel, and other regulators are not offering testimony at the public hearing. The authors cannot  
19 attest to the truth of matters asserted in each of those items of correspondence. Therefore, the  
20 letters should be excluded as hearsay.

21 Next, the Prosecution Team's Exhibits also includes 60 other memoranda, letters, and  
22 correspondence that are provided without the author of that corresponding document attesting to  
23 the accuracy of the material contained in those Exhibits. Where the material contained in those  
24 Exhibits is included for the truth of the matter asserted, they are hearsay. The Exhibits and any  
25 discussion related to those Exhibits should therefore be excluded as hearsay where it asserts the  
26 truth of the matters discussed in that memorandum, letter, or other correspondence. The table  
27 below lists each of the Exhibit numbers for these 60 memoranda, letters, and correspondence  
28 Exhibits that should be excluded as hearsay:

**Table of Prosecution Team Additional Hearsay Exhibits**

27	28	30	31	35	36	37	38	39	42
45	46	47	48	49	51	52	54	55	56
58	59	64	68	70	71	72	73	74	75
76	77	79	80	98	99	105	112	118	119
125	126	127	133	134	139	141	155	158	159
161	164	166	178	179	180	181	182	187	193

Finally, the Prosecution Team included the email correspondence of the individuals who submitted written testimony on behalf of the Prosecution Team as part of the October 6, 2017, Exhibit submission. Those individuals are: Taro Murano, Skyler Anderson, and Stormer Feiler. Email correspondence between Mr. Murano and other individuals related to the Coles' diversion is included as Exhibits 81, 86, 91, 92, 100, 104, 111, 114, 138, and 153. Email correspondence between Mr. Anderson and other individuals related to the Coles' diversion is included as Exhibits 84, 85, 90, 93, 95, 96, 97, 101, 102, 103, 113, 116, 117, 120, 121, 123, 130, 131, 140, 148, 169, and 184. Email correspondence between Mr. Feiler and other individuals related to the Coles' diversion is included as Exhibits 188, 189, 190, and 191. For each of these Exhibits any information contained in the email correspondence that is not authored by Mr. Murano, Mr. Anderson, or Mr. Feiler, is hearsay that is not admissible. The other individuals included in the correspondence are not available to testify to the truth of the matter asserted within that correspondence. Therefore, the elements of these Exhibits that exceed the authorship of Mr. Murano, Mr. Anderson, and Mr. Feiler must be excluded.

**IV. The Prosecution Team's Expert Designations are Improper for Mr. Murano, Mr. Anderson, and Mr. Feiler with Regard to the Issue of the Impact of the Coles' Diversion and Use of Water to Fishery Public Trust Resources.**

As part of this proceeding, expert witness testimony is limited by the provisions of Evidence Code sections 801-805. (Cal. Code Regs., tit. 23, § 648, subd. (b).) To qualify as an expert witness, a person must have special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. (Evid. Code, § 720, subd. (a).) The hearing procedures require all expert witnesses to submit a statement of

1 qualifications. (Notice of Public Hearing, Information Concerning Appearing at Water Rights  
2 Hearings, p. 3.) Mr. Murano, Mr. Anderson, and Mr. Feiler have submitted their statements of  
3 qualifications as required by the hearing procedures. (See Exhibits WR-8, WR-10, WR-14.)

4 **A. Their status as Experts in Environmental Science is not Relevant to the Issue**  
5 **of the Impact of the Coles' Diversion and Use of Water on Public Trust**  
6 **Resources, Specifically Fisheries.**

7 “‘[T]he qualifications of an expert must be related to the particular subject upon which he  
8 is giving expert testimony.’” (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th  
9 1102, 1115 [quoting *People v. Hogan* (1982) 31 Cal.3d 815, 852].) The expert’s field of expertise  
10 must be “carefully distinguished and limited.” (*Ibid.*) Relevant evidence is defined as evidence  
11 “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the  
12 determination of the action.” (Evid. Code, § 210.) The broad study of environmental sciences does  
13 not provide sufficiently specialized knowledge, skill, experience, training, or education to testify  
14 on matters regarding public trust resources, related to biological impacts to fishery resources.  
15 Environmental sciences is not the study of managing and understanding fisheries.

16 A fisheries scientist, such as Mr. Cramer, is an expert who may opine as to the flow  
17 requirement for fishery resources in the Klamath River and Stanshaw Creek. (Exhibit MMR-17,  
18 pp. 1.) The status of Mr. Murano, Mr. Anderson, and Mr. Feiler as experts in environmental  
19 sciences is not in dispute. However, their expertise as environmental scientists does not provide  
20 them with sufficient expertise to opine on requirements for fishery resources in the Klamath River  
21 and Stanshaw Creek. Therefore, any statements regarding requirements to serve fishery resources  
22 in their testimony should be stricken because the opinion of an environmental scientist is not  
23 relevant to a recommendation for fishery resources.

24 **B. Any Expert Testimony Regarding Environmental Science is Irrelevant to the**  
25 **Issue of Impacts to Fisheries in the Klamath River.**

26 Relevant evidence is defined as evidence “having any tendency in reason to prove or  
27 disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code,  
28 § 210.) As part of Mr. Murano, Mr. Anderson, and Mr. Feiler’s written testimony, the Water Board  
submitted various emails involving these individuals. As an initial matter and as discussed above,

1 the contents of those emails are inadmissible hearsay where it is offered for the truth of the matter  
2 asserted in that email. Any information contained in those email that do not constitute hearsay by  
3 being authored by Mr. Murano, Mr. Anderson, or Mr. Feiler, is not relevant evidence of  
4 requirements to address any impacts to fisheries in the Klamath River and Stanshaw Creek. The  
5 information contained in those emails and authored by Mr. Murano, Mr. Anderson, or Mr. Feiler  
6 are the interpretation of environmental scientists of a fisheries scientist's expertise. Thus, those  
7 statements are irrelevant to their testimony as expert environmental scientists.

8 **V. Mr. Feiler's Testimony and the Exhibits to Which it Refers Should be Stricken in its**  
9 **Entirety.**

10 Mr. Feiler is an employee of the North Coast Regional Water Quality Control Board  
11 ("Regional Water Board"). Mr. Feiler's involvement with the Coles' diversion and use of water is  
12 limited to the issues identified in the CAO the Regional Water Board issued. Those issues have to  
13 do with sedimentation and other water quality concerns related to the Coles' diversion. Those  
14 concerns are not relevant to the issue of the impact to the public trust resources from the Coles'  
15 diversion and use of water. Therefore, Mr. Feiler's testimony, Exhibit 13, and any Exhibits to  
16 which that testimony refers should be stricken.

17 Moreover, as the Prosecution Team notes in their Objections to Diverter's Request for  
18 Additional Time for Direct Oral Testimony and for Submission of Written Testimony by Steven  
19 Cramer; Hearsay Objection to MMR-11, and MMR-12; Motion to Strike MMR-12, MMR-13,  
20 MMR-14 ("Prosecution Team Objections") served on all parties to the public hearing on Monday,  
21 October 9, 2017, the Coles' "compliance with CAO R1-2016-0031 is a matter for determination by  
22 the Regional Water Board." (Prosecution Team Objections, p. 4.) Because the public hearing is  
23 before the State Water Board regarding the Coles' diversion and use of water, and not before the  
24 Regional Water Board regarding water quality concerns related to the Coles' diversion, Mr.  
25 Feiler's testimony is misplaced. His testimony would be appropriate in a hearing related to the  
26 CAO, but not related to Draft Order No. 2017-00XX-DWR, the basis of this hearing. Thus, Mr.  
27 Feiler's testimony should be stricken as irrelevant.

28 ///



1 **VI. The Prosecution Team has Failed to Show Good Cause for Additional Time to**  
2 **Present Direct Oral Testimony.**

3 The Notice of Public Hearing includes information about the hearing procedures and  
4 defines certain limitations for direct testimony. “Witnesses will be allowed up to **(20) minutes**  
5 [sic] to summarize or emphasize their written testimony on direct examination. Each party will be  
6 allowed up to **one (1) hour** total to present all of its direct testimony.” (Notice of Public Hearing,  
7 Information Concerning Appearance at Water Right Hearings, p. 5, emphasis in original.) “The  
8 hearing officer may, for good cause, approve a party’s request for additional time to present direct  
9 testimony during the party’s case-in-chief.” (*Id.* at p. 5, fn. 3.)

10 The Prosecution Team’s Notice of Intent to Appear (“NOI”), submitted on July 6, 2017,  
11 states that “Prosecution Team anticipates requiring additional time to present testimony from the  
12 United States Forest Service and from Mr. Joey Howard.” (NOI, p. 1.) On July 11, 2017, the  
13 Prosecution Team indicated that it “anticipates submitting a request for additional time when a  
14 formal service list is available with an offer of proof demonstrating good cause for the additional  
15 oral direct testimony.” (Prosecution Team, July 11, 2017, Correspondence regarding Douglas and  
16 Heidi Cole and Marble Mountain Ranch Request to Reschedule Hearing and Notice of Intent to  
17 Appear, p. 1.) To date, no request for additional time or offer of proof demonstrating good cause  
18 has been provided to the other parties to the public hearing. The Prosecution Team only submitted  
19 written testimony for Taro Murano, Skyler Anderson, and Stormer Feiler, but has not clarified if  
20 they intend to call the additional witnesses identified in their NOI. Where they intend to call  
21 additional witnesses, the Prosecution Team has failed to request additional time and provide good  
22 cause for that request. Therefore, the Prosecution Team should be limited to no more than the one  
23 (1) hour for all direct oral testimony provided in the Notice of Public Hearing.

24 **VII. Conclusion**

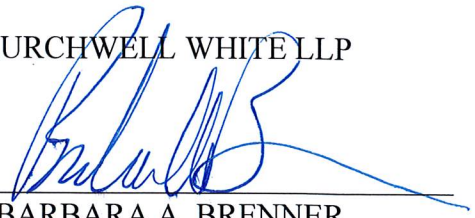
25 The Coles respectfully request that the Hearing Officer: (1) strike all testimony and exhibits  
26 that address the Coles pre-1914 three cfs right because it is beyond the scope of the public  
27 hearing’s key issues; (2) strike exhibits that are hearsay; (3) remove the Prosecution Team’s expert  
28 designation for Mr. Murano, Mr. Anderson, and Mr. Feiler with regard to the issue of impacts to  
fishery resources by the Coles’ diversion and use of water; (4) strike Mr. Feiler’s testimony

1 regarding the CAO, which is outside the scope of the public hearing; and (5) limit the Prosecution  
2 Team's time for direct oral testimony to no more than the one (1) hour provided in the Notice of  
3 Public Hearing.

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: October 16, 2017

CHURCHWELL WHITE LLP

By 

BARBARA A. BRENNER  
Attorneys for Respondents  
*Douglas Cole and Heidi Cole and  
Marble Mountain Ranch*