

State Water Resources Control Board

October 31, 2017

VIA ELECTRONIC MAIL

TO: Enclosed Service List of Participants

DOUGLAS AND HEIDI COLE AND MARBLE MOUNTAIN RANCH WASTE AND UNREASONABLE USE HEARING - RULINGS ON OBJECTIONS AND REQUESTS

This letter responds to evidentiary objections, requests for various accommodations at the hearing (including requests for additional time for oral direct testimony, for scheduling of testimony, and for acceptance of late exhibit submittals), and comments concerning the objections and requests of other parties received by the State Water Resources Control Board (State Water Board or Board) from parties to the aforementioned hearing. Below is the list of filings that will be addressed in this ruling.

Date*	Party	Document Title
10/6/17	MMR	Request for Additional Time for Direct Oral Testimony with Showing of Good Cause, Request to Submit Supplemental Written Testimony on Behalf of Steven Cramer, and Request to Set Steven Cramer's Oral Testimony
10/9/17	PT	Objection to Diverter's Request for Additional Time for Direct Oral Testimony and for Submission of Written Testimony by Steven Cramer; Hearsay Objection to MMR-11 and MMR-12; Motion to Strike MMR-12, MMR-13, MMR-14
10/9/17	Karuk Tribe	Karuk Tribe Resubmittal of Exhibits and Amended NOI
10/13/17	Klamath Riverkeeper	Inquiry by the Klamath Riverkeeper Regarding Hearing Scheduling
10/13/17	MMR	Respondent's Objections to Testimony Submitted by the California Department of Fish and Wildlife, the Karuk Tribe, the National Marine Fisheries Service, Old Man River Trust, and Klamath Riverkeeper
10/16/17	NMFS	Submission of Exhibit 4
10/16/17	PT	Opposition to Diverter's Objections to Testimony Submitted by the California Department of Fish and Wildlife, the Karuk Tribe, the National Marine Fisheries Service, Old Man River Trust, and Klamath Riverkeeper
10/16/17	MMR	Respondents' Objections to Testimony Submitted by The State Water Resources Control Board, Division of Water Rights, Prosecution Team
10/16/17	MMR	Response to Prosecution Team's Objections to Request for Additional Time for Direct Oral Testimony and for Submission of Written Testimony by Steven Cramer; Hearsay Objections To MMR-11 and MMR-12; Motion to Strike MMR-12, MMR-13, and MMR-14
10/16/17	MMR	Klamath Riverkeeper's October 13, 2017, Inquiry Regarding Scheduling

10/18/17	MMR	Response to Prosecution Team's Opposition to Diverter's Objections to Testimony Submitted by The California Department of Fish and Wildlife, The Karuk Tribe, The National Marine Fisheries Service, Old Man River Trust, And Klamath Riverkeeper
10/19/17	Klamath Riverkeeper	Comments of Klamath Riverkeeper in Response to Coles' Scheduling and Written Testimony Objections
10/19/17	PT	Response to Objections of Douglas And Heidi Cole And Marble Mountain Ranch to Prosecution Team Testimony
10/19/17	PT	Diverter Response to Klamath Riverkeeper October 13, 2017, Inquiry Regarding Scheduling
10/25/17	PT	Request to Submit Supplemental Declaration of Taro Murano

MMR – Douglas and Heidi Cole and Marble Mountain Ranch

NMFS – National Marine Fisheries Service

PT – Division of Water Rights, Prosecution Team

* Date the document was served on all parties and the State Water Board.

I. Evidentiary Objections

The parties submitted a number of evidentiary objections that go to the weight of the evidence, not its admissibility. Adjudicative proceedings before the State Water Board are governed by the California Code of Regulations, title 23, section 648 et seq.; chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code); sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648.) Sections 801 to 805 of the Evidence Code set forth requirements for expert and other opinion testimony. The State Water Board is not bound in its proceedings by technical rules relating to evidence and witnesses that would apply in a court of law. (See Gov. Code, § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) The hearing officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would necessitate undue consumption of time. (*Id.*, subd. (f).)

Strict rules governing the admissibility of evidence do not apply in administrative proceedings, in recognition of the fact that the hearing officer has expertise in the subject matter, makes both the legal and factual determinations, and is assisted by expert technical staff. “There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.” (*United States v. Brown* (11th Cir. 2005) 415 F.3d 1257, 1269.) Because the hearing officer is “presumably competent to disregard that evidence which should be excluded or to discount that evidence which has lesser probative value, it makes little sense, as a practical matter, for a judge in that position to apply strict exclusionary evidentiary rules.” (*Underwood v. Elkay Min., Inc.* (4th Cir. 1997) 105 F.3d 946, 949.) In an agency proceeding, the gate keeping function to evaluate evidence occurs when the evidence is considered in decision-making rather than when the evidence is admitted. (*U.S. Steel Min. Co., Inc. v. Director, Office of Workers’ Compensation Programs, U.S. Dept. of Labor* (4th Cir. 1999) 187 F.3d 384, 389.) Even though it arises later in the administrative process than it does in jury trials, the hearing officer’s duty to screen evidence for reliability, probativeness, and substantiality similarly ensures that final agency decisions will be based on evidence of requisite quality and quantity. (*Ibid.*)

A. Objections to Exhibits Regarding MMR's Claimed Pre-1914 Water Right

Douglas and Heidi Cole and Marble Mountain Ranch (collectively, MMR) objected to the following exhibits under the theory that they go to the validity, authorized purposes of use, or amount of MMR's claimed pre-1914 water right:

Exhibit Prefix	Exhibit Numbers
WR-	4-6, 15-80, 82, 86, 92, 98, 170, 193
CDFW-	3, 8, 20, 21, 28-39
KT-	1-3
OMRT-	1, 2, 4-6, 9, 10
KR-	1-3, 6

The issue of waste, unreasonable use, unreasonable method of use, unreasonable method of diversion, or unreasonable harm to public trust resources can be determined without examining the validity or other details of MMR's claimed pre-1914 water right. The California Constitution declares that "because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." (Cal. Const., art. X, § 2.) This language does not distinguish between valid and invalid claims of a right to divert water. Interpreting Article X, section 2 to exempt unlawful diversions would perversely incentivize them and would be contrary to the strong constitutional declaration that "general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable." (*Ibid.*)

At the hearing, the State Water Board may consider evidence or testimony related to the validity, authorized purposes of use, or amount of MMR's claimed pre-1914 water right inasmuch as it relates to the key issues in the [June 9, 2017 Notice of Public Hearing](#) (Hearing Notice). These are as follows:

- 1) 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 any 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? How should the implementation time schedule for any corrective actions be coordinated with the requirements of the Cleanup and Abatement Order issued by the North Coast Regional Water Quality Control Board?

At the time that the Board issued the Hearing Notice, a draft order related to waste and unreasonable use was the only enforcement item pending before the Board. This is still the case as of this writing. Questions related to the scope or validity of alleged pre-1914 appropriative water rights are ordinarily resolved through other enforcement processes. (See generally Wat. Code, § 1831; *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397; and *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879.) As explained above, such questions need not be resolved for the Board to determine whether waste and unreasonable use of water is occurring.

The hearing will proceed as noticed and scheduled. MMR or the PT may request that the hearing be postponed and re-noticed to address the issue of the validity, authorized purposes of use, or amount of MMR's claimed pre-1914 water right. Such requests shall be submitted to the Hearing Team and served upon all parties by **12:00 PM (noon) on November 3, 2017**. Any request should include a time schedule for filing any additional enforcement items, if applicable, that may be necessary to properly raise any additional hearing issues and a concise explanation of why the moving party believes that the benefit of expanding the scope of the hearing outweighs the cost of delay.

MMR's objections are overruled without prejudice. At the hearing, any party may object to specific oral testimony it believes exceed the scope of the hearing notice. (See Cal. Code Regs., tit. 23, § 648, subd. (b); Gov. Code, § 11513, subd. (b).) The Board will consider any such objection at that time.

B. Hearsay

MMR or the Prosecution Team (PT) objected to the following exhibits, or portions thereof, on the grounds of that they are hearsay:

Exhibit Prefix	Exhibit Numbers
WR-	23, 27, 28, 30, 31, 35-39, 42, 45-49, 51, 52, 54-56, 58, 59, 64-77, 79, 80, 81, 84-86, 90-93, 95-99, 100-105, 107, 108, 110-136, 138, 139-141, 144-148, 150, 151, 153-161, 163, 164, 166, 168, 169, 172, 178-184, 186-191, 193
MMR-	11, 12
CDFW-	17-19, 22
OMRT-	2, 9
KT-	4, 5

As noted in parties' responses to these objections, hearsay evidence may be introduced at State Water Board hearings for the purpose of supplementing or explaining other relevant evidence. (Cal. Code Regs., tit. 23, § 648, subd. (b); Gov. Code, § 11513, subd. (d).) Over timely objection, hearsay evidence shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (*Ibid.*) The Board will observe these rules in considering the matter before it.

The pending hearsay objections are overruled. The State Water Board will consider what weight to afford the testimony and exhibits when formulating a decision based on the entire record. At the hearing, parties may object to specific testimony as hearsay per section 11513, subdivision (d) of the Government Code. Any further objections that go only to the weight of testimony or exhibits, including hearsay objections, should be reserved for the parties' closing statements or briefs, if permitted by the Board.

C. Qualification of Expert Witnesses

MMR objected to the following exhibits, or portions thereof, on the grounds that witnesses for the PT are not qualified to testify as experts regarding fisheries requirements:

Exhibit Prefix	Exhibit Numbers
WR-	7, 9, 13, 81, 84-86, 90-93, 95-97, 100-104, 111, 113, 114, 116, 117, 120-123, 130, 131, 138, 140, 148, 153, 169, 184, 188-191

None of the objections challenging the qualifications of expert and other witnesses support the wholesale exclusion of all or a part of any of the witnesses' testimony from the record. All relevant evidence is admissible in this proceeding if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Cal. Code Regs., tit. 23, § 648, subd. (b); Gov. Code, § 11513, subd. (c).) The relevant testimony of environmental scientists clearly meets this standard. The hearing officer is not bound in our proceedings by Evidence Code section 720, which requires a court to qualify an expert witness prior to allowing the expert to testify. In an agency proceeding, the gate keeping function to evaluate evidence occurs when the evidence is considered in decision-making rather than when the evidence is admitted. (*U.S. Steel Min. Co., Inc. v. Director, Office of Workers' Compensation Programs*, U.S. Dept. of Labor (4th Cir. 1999) 187 F.3d 384, 389.)

MMRs objections are overruled to the extent they seek to exclude particular witnesses' testimony altogether. The Board will consider each witness' qualifications and the weight of their testimony during decision-making. For expert witness testimony, the Board will determine based a review of the record and after the submission of all relevant evidence, whether the expert's opinion is "based on a matter (including [the expert's] special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subd. (b).)

D. Relevance

MMR or the PT objected to the following exhibits, or portions thereof, on the grounds of relevance:

Exhibit Prefix	Exhibit Numbers
WR-	13, 23, 65, 66, 67, 69, 86, 91, 107, 108, 110, 115, 122, 124, 128, 129, 132, 135, 136, 144-147, 150, 151, 154, 156, 157, 160, 163, 168, 172, 178-183, 186
MMR-	1, 12-14
CDFW-	4, 27
OMRT-	3, 7-8, 11
KR-	6, 8, 9
NMFS-	21, 43

These objections are fundamentally based on a disagreement with the merits of the content of testimony or exhibits and thus go to the weight to be afforded the evidence, not its relevance or admissibility. These objections are overruled with prejudice. To the extent that the parties may believe specific exhibits or testimony lack merit, they are encouraged to address these matters through cross-examination and closing statements or briefs if allowed by the Board.

II. Late Submittal of Exhibits

The following exhibits were submitted after the exhibit deadline:

Exhibit Prefix	Exhibit Numbers
WR-	194
MMR-	TBD
NMFS-	4
KR	1-9

Late submitted case-in-chief exhibits were served on all parties and received by the State Water Board from the Karuk Tribe on October 9, 2017, from the National Marine Fisheries Service (NMFS) on October 16, 2017, and from the PT on October 25, 2017. MMR moved on October 6, 2017 to submit supplemental testimony for its witness, Steven Cramer, by October 31, 2017.

Per the Hearing Notice and September 30, 2017 extension, the deadline to file case-in-chief exhibits was October 6, 2017. Surprise testimony or exhibits are disfavored, and the hearing officers may refuse to admit proposed testimony or evidence that does not comply with the Board's requirements. (Cal. Code Regs., tit. 23, § 648.4, subds. (a), (e).) Such refusal is mandatory when there is a showing of prejudice to any party or the Board. (*Id.*, subd. (e).) However, this rule may be modified where a party demonstrates that compliance with the rule would create severe hardship. (*Ibid.*)

The Karuk Tribe's motion requesting leave to submit the above-referenced late-filed case-in-chief exhibits and testimony is granted. The Karuk Tribe reports that a technical difficulty prevented delivery of their materials before the deadline. The Karuk Tribe cured its error by promptly serving the exhibits and testimony upon the other parties and the Board and promptly filing a motion. There is not any reason to conclude that admitting the late-filed Karuk Tribe evidence would prejudice to any party or to the Board.

The State Water Board construes NMFS's October 16, 2017 filing of exhibit NMFS-4 as a motion requesting leave to submit the above-referenced late-filed case-in-chief exhibits and testimony. Exhibit NFMS-4 consists of a cover page that links to a large spreadsheet of supporting data for exhibit NMFS-1. Per MMR's October 13, 2017 objection, NMFS appears to have inadvertently excluded the exhibit when it filed its other case-in-chief exhibits and testimony. MMR's objection does not identify any reason to conclude that MMR is in any way prejudiced by the late filing of NMFS-4. NMFS promptly cured its error, and the exhibit appears to be merely supporting data for conclusion discussed in NMFS-1. Under the circumstances, the Board finds that there is not a sufficient showing of prejudice to any party or the Board. NMFS's motion is granted; MMR's objection is overruled.

The PT's motion requesting leave to submit the above-referenced late-filed case-in-chief exhibit is denied with prejudice. The PT has not explained why the proposed exhibit was not included with its case-in-chief filing or could not otherwise have been produced by the deadline to offer case-in-chief exhibits and testimony into evidence. Nothing in this ruling should be construed to limit the use of the PT's late-filed exhibit for other permissible purposes, such as rebuttal or the impeachment of hostile witnesses.

MMR proposes to submit supplemental testimony for Mr. Cramer that will describe his observations of Stanshaw Creek. Per MMR's October 6, 2017 motion, scheduling difficulties and fire in the area prevented Mr. Cramer from visiting the site until early October and Mr. Kramer needs until October 31, 2017 to finalize his analysis. The proposed testimony appears relevant to the proceeding and could likely be admitted as a rebuttal exhibit if it were excluded from MMR's case-in-chief.

Under the circumstances, MMR's delay in preparing the proposed testimony was reasonable. There is potential to prejudice other parties by the introduction of supplemental case-in-chief evidence two weeks before the date of the hearing. Surprise testimony or exhibits are disfavored. Here, however, the evidence at issue could likely be introduced as rebuttal to one or more lines of evidence proposed by other parties. There is less potential for the parties to be prejudiced by MMR's late case-in-chief submission if they have more time to evaluate the supplemental testimony as part of their preparations for the hearing.

MMR's motion requesting leave to submit supplemental testimony is conditionally granted subject to the conditions described herein. MMR shall submit the proposed supplemental testimony no later than the close of business on October 31, 2017. Any further objections to admitting the proposed testimony as part of MMR's case-in-chief shall be filed no later than **12:00 PM (noon) on November 3, 2017**, and shall include a specific and detailed description of why the moving party believes that they are prejudiced by admitting the supplemental testimony as part of MMR's case-in-chief evidence instead of MMR's rebuttal testimony. Parties are advised that the Board will carefully scrutinize any such objection.

III. Oral Direct Testimony

A. Witnesses

The following parties have discrepancies between the most recently filed Notice of Intent to Appear (NOI) forms and the testimony and any subpoenas received by the Hearing Team: MMR, NMFS, Klamath Riverkeeper, and Old Man River Trust.

Only those witnesses who have submitted written testimony, or who have been subpoenaed through a subpoena served on the Board and all other parties, will be permitted to present oral direct testimony at the hearing. If a witness is listed on a party's most recent NOI but no testimony or subpoena was received from the party for that witness, the witness will not be permitted to present oral direct testimony at the hearing. Additional witnesses may be introduced on rebuttal if they satisfy the standard for admission.

B. Additional Time

The Hearing Team received requests for additional time for oral direct testimony from MMR and the Karuk Tribe. All requests for additional time for oral direct testimony have been reviewed and are dismissed without prejudice. The time limits specified in the Hearing Notice remain in force and effect for all parties. Generally, parties will have up to 20 minutes per witness and up to one hour per party to summarize their case-in-chief testimony. Parties are encouraged to be efficient in presenting their testimony and in conducting cross-examination. Since written testimony has been submitted in advance of the hearing, it is unnecessary for witnesses to provide lengthy oral summary presentations.

During the hearing, parties may request additional time for witness testimony once their witness has exhausted the 20 minutes allowed by the hearing notice. The Board will carefully consider any such motion to determine whether it demonstrates good cause.

C. Scheduling

The Hearing Team received the following scheduling requests:

Party	Scheduling Request
MMR	Request to present Steven Cramer's testimony on Monday, November 13, 2017 at 1:00 p.m. or later.
Klamath Riverkeeper	Request to present Paul Kibel's opening statement and/or testimony on Tuesday, November 14, 2017.
PT	Request to present Joey Howard's and Stormer Feiler's testimony on Monday, November 13, 2017.

Based on the number of parties, case-in-chief testimony, and likely cross-examination and rebuttal, the State Water Board expects that this hearing will take at least two days to complete. The Board will try to accommodate all of the above-referenced scheduling requests. However, it is unlikely that all of the above requested presentation of witnesses' testimony summaries for Monday and corresponding cross-examination will be completed that day. The Board

encourages the parties to work collaboratively to resolve conflicts to the extent feasible and to present their proposals to the hearing team no later than 12:00 PM (noon) November 9, 2017. Parties requesting to have witnesses testify on November 13, 2017 are advised that their witnesses will be compelled to return on November 14, 2017, if necessary, to complete cross-examination. If witnesses fail to return to complete cross-examination, the Board has discretion to entertain such motions as may be necessary to prevent prejudice to other parties.

IV. Housekeeping

A. Exhibit Designation

Klamath Riverkeeper's response letter submitted on October 19, 2017 has been posted on the project webpage (https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/index.shtml) as a motion brief. It has not been posted, or considered, as an exhibit.

B. Hearing Team Members

The Hearing Notice listed the Hearing Team. Marianna Aue has assumed responsibility for another project and is no longer working on this hearing. Lily Weaver, Attorney, has replaced Ms. Aue on the Hearing Team.

V. Questions

Questions regarding non-controversial procedural matters related to this hearing should be directed to the hearing team at Wr_Hearing.Unit@waterboards.ca.gov, Attorney Lily Weaver at (916) 341-5184, or by email to Lily.Weaver@waterboards.ca.gov, or Mara Irby at (916) 322-6794, or by email at Mara.Irby@waterboards.ca.gov.

Sincerely,

ORIGINAL SIGNED BY

Steven Moore, State Water Board Vice Chair
Marble Mountain Ranch Hearing Officer