

September 14, 2017

VIA U.S. MAIL & EMAIL

(wrhearing@waterboards.ca.gov)

Steven Moore, Vice Chair
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

Re: State Water Resources Control Board Prosecution Team's September 13, 2017,
Response to Douglas and Heidi Cole, Marble Mountain Ranch Request to
Reschedule Public Hearing

Dear Mr. Moore:

On September 13, 2017, we received Mr. Petruzzelli's response to our September 12, 2017, request to postpone the public hearing regarding Douglas and Heidi Coles' (the "Coles") established pre-1914 water right based on the ongoing wildfire threats at Marble Mountain Ranch ("Ranch"). Mr. Petruzzelli's response includes discussion of the 20-year negotiation process between the Coles and various regulatory agencies and stakeholders¹ that requires clarification.

Mr. Petruzzelli asserts that the Coles and the State Water Board and Regional Water Board have been engaged in a 20-year negotiation process with regard to the Ranch. That negotiation period was due entirely to the State and Regional Water Boards' challenge to the Coles' now established pre-1914 water right to divert up to 3 cubic feet per second ("cfs") of water for domestic and consumptive use, as well as for hydroelectric power generation. Shortly after the State Water Board acknowledged that the Coles had an established pre-1914 right, the Regional Water Board issued a draft of Cleanup and Abatement Order Number R1-2016-0031 ("CAO") in December 2015. (Fuller Decl. at ¶ 3.) With the issuance of the draft CAO, the tone of the negotiation process turned from one of cooperation and mutual resolution of all concerns to

¹ The regulatory agencies and stakeholders that have been involved in the ongoing negotiations include United States Forest Service, National Marine Fisheries Service ("NMFS"), Karuk Tribe, State Water Resources Control Board ("State Water Board"), North Coast Regional Water Quality Control Board ("Regional Water Board"), California Department of Fish and Wildlife, the Klamath Forest Alliance, Mid-Klamath Watershed Council, and neighboring landowners. (Declaration of Kerry A. Fuller in Support of Response to Opposition to Request for Postponement by Douglas and Heidi Cole ("Fuller Decl.") at ¶ 2.)

requirements for immediate action and attempts to decrease the Coles' use of their fully entitled pre-1914 3 cfs water right.

The Coles initially entered into the negotiation process voluntarily in an effort to address fishery protection concerns while continuing to successfully operate the Ranch as a vacation oriented dude ranch, offering a number of outdoor activities including hiking, horse riding, rafting, fishing, and target shooting. (Fuller Decl. at ¶ 4.) As part of the effort to address fishery concerns near the Ranch, NMFS was preparing a recommended bypass flow. NMFS did not issue its final recommendation until August 4, 2016. (*Id.* at ¶ 5.) The Coles and their then existing consultant team were awaiting NMFS' recommendation to determine the best approach for implementing resources improvements at the Ranch to comply with that recommendation. Upon issuance of NMFS' final bypass flow recommendation, it became clear that the Coles' domestic and consumptive use needs were not considered and they would be unable to comply with the recommendation.

Following NMFS' release of its final recommendation on August 4, 2016, the Regional Water Board issued the final CAO on August 4, 2016, and the State Water Board issued Draft Order WR 2017-00XX-DWR on August 30, 2016 (collectively, "enforcement orders"). (Fuller Decl. at ¶ 6.) With issuance of those enforcement orders, the Coles attempted to discuss their difficulty in complying with the enforcement orders' requirements and timelines, but to no avail. The Coles' efforts to continue discussions included submitting financial information demonstrating that they were unable to meet the onerous demands of the enforcement orders on January 4, 2017. (*Id.* at ¶ 7.) The Coles still await a response to that submission of their financial information. (*Ibid.*) Initial estimates of the costs to comply with the enforcement orders' requirements are roughly \$1.5 million and the required actions were given timelines that are impossible to meet based on the permits the State and Regional Water Boards allege the projects require.

In addition to the shift in tone between the Coles and the State and Regional Water Boards, with the issuance of the enforcement orders, the Coles lost their existing consultants, were required to redirect their time and available assets to efforts to comply with the enforcement orders, and began to identify and engage a new consultant team. They have had new consultants join their efforts to identify and implement resources improvements at the Ranch, but those consultants lack the knowledge and information that existed with its previous consultant team. This has further delayed the Coles' efforts to comply with the enforcement orders and prepare their defense for the upcoming public hearing.

Despite the difficulties and financial hardship the Coles face based on the enforcement orders, they have voluntarily minimized their diversion of water during low flow periods to address NMFS' recommend bypass flow and the fishery concerns that were the impetus of the negotiations that have gone on for this 20-year period. The reductions in

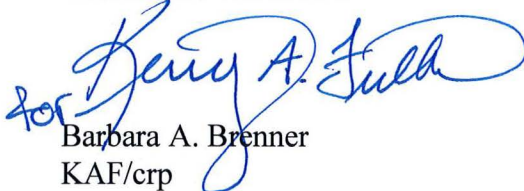
the Coles' diversions has come at a significant cost, as the Coles must rely on diesel generators for electricity at the Ranch. The costs associated with the use of the generators further hampers the Coles' ability to implement resource improvements at the Ranch, address the enforcement orders' requirements, and prepare their defense for the coming public hearing.

The reasons set forth above and the ongoing threat of the wildfire at the Ranch significantly hamper the Coles in their ability to prepare their defense of their established pre-1914 3 cfs water right.

Please contact me with any questions regarding this correspondence at barbara@churchwellwhite.com or (916) 468-0625.

Regards,

Churchwell White LLP


for Barbara A. Brenner
KAF/crp

cc: (via email only)

Kenneth Petruzzelli (Kenneth.Petruzzelli@Waterboards.ca.gov)
Heather Mapes (Heather.Mapes@Waterboards.ca.gov)
Stephen Puccini (Stephen.Puccini@wildlife.ca.gov)
Nathan Voegeli (Nathan.Voegeli@wildlife.ca.gov)
Chris Shutes (blancapaloma@msn.com)
Michael Jackson (mjatty@sbcglobal.net)
Paul Kibel (pskibel@waterpowerlaw.com)
Fatima Abbas (fabbas@karuk.us)
Christopher Keifer (christopher.keifer@noaa.gov)
Margaret Tauzer (margaret.tauzer@noaa.gov)
Justin Ly (justin.ly@noaa.gov)
Konrad Fisher (k@omrl.org)
Regina Chichizola (regina@ifrfish.org)

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

5 Attorneys for Respondents
6 DOUGLAS COLE AND HEIDI COLE

7
8 STATE OF CALIFORNIA

9 STATE WATER RESOURCES CONTROL BOARD

10 In the Matter of Douglas Cole and Heidi Cole
and Marble Mountain Ranch

DECLARATION OF KERRY A. FULLER IN
SUPPORT OF RESPONSE TO OPPOSITION
TO REQUEST FOR POSTPONEMENT BY
DOUGLAS AND HEIDI COLE

11
12
13
14
15 I, Kerry A. Fuller, declare as follows:

16 1. I represent Respondents Douglas and Heidi Cole (the “Coles”) in the above-
17 captioned matter regarding their water rights at Marble Mountain Ranch, located outside of
18 Somes Bar in Siskiyou County, California. I make this declaration in support of the
19 accompanying Response to the Opposition to Request for Postponement by Douglas and Heidi
20 Cole. I have personal knowledge of the following facts and, if called and sworn as a witness,
21 could and would competently testify thereto.

22 2. There have been numerous regulatory agencies and stakeholders involved in the
23 negotiation process to address fishery concerns near Marble Mountain Ranch, including the
24 United States Forest Service, the National Marine Fisheries Service (“NMFS”), the Karuk Tribe,
25 the State Water Resources Control Board (“State Water Board”), the North Coast Regional Water
26 Quality Control Board (“Regional Water Board”), the California Department of Fish and
27 Wildlife, the Klamath Forest Alliance, the Mid-Klamath Watershed Council, and neighboring
28 landowners.

