

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
[PROPOSED] ORDER WR 2024-XXX

**In the Matter of Waste, Unreasonable Use, Unreasonable Method of Use, and
Unreasonable Method of Diversion of Water
by**

Douglas and Heidi Cole and Marble Mountain Ranch

SOURCE: Stanshaw Creek

COUNTY: Siskiyou

**[PROPOSED] ORDER FINDING WASTE, UNREASONABLE USE, AND
UNREASONABLE METHOD OF DIVERSION**

1.0 INTRODUCTION

Douglas and Heidi Cole and Marble Mountain Ranch (collectively, Respondents) divert water from Stanshaw Creek under a pre-1914 appropriative water right claim and a Small Domestic Use registration. On August 30, 2016, the State Water Resources Control Board's Division of Water Rights (Division) issued a Draft Order alleging that Respondents' diversion and use of Stanshaw Creek water violates article X, section 2 of the California Constitution and Water Code section 100. The State Water Resources Control Board (State Water Board or Board) conducted a public hearing on November 13 through 16, 2016, to determine whether Respondents' past or present diversion and use of water constitute a waste or unreasonable use of water, and if so, whether and how corrective actions should be implemented. In 2021, the matter was reassigned to the Board's Administrative Hearings Office (AHO) for preparation of a proposed order.

Pursuant to Water Code section 1114, subdivision (c)(2)(A), the Board adopts the AHO's proposed order in its entirety as set forth herein. As described in this order, we find that Respondents' hydropower operations constitute a waste and unreasonable use of

water, and that Respondents' failure to limit their diversions to their reasonable water demand constitutes an unreasonable method of diversion.

2.0 FACTUAL FINDINGS AND PROCEDURAL HISTORY

2.1 Marble Mountain Ranch Operations

Marble Mountain Ranch (Ranch) consists of three parcels of approximately 47 acres of land in Somes Bar, Siskiyou County, identified by Siskiyou County Assessor Parcel Numbers 026-290-200-000, 026-290-240-000, and 026-290-270-000. (MMR-1 at p. 1; WR-7 at ¶ 4.)¹ Respondents acquired the Ranch from Robert E. and Mary Judith Young in 1994. (MMR-1 at p. 1.) Mr. and Mrs. Cole live on the Ranch year-round and operate it as a dude ranch from approximately April 1 through December 1, with as many as 50 guests on the premises during the Ranch's peak season from June through August. (MMR-1 at p. 1; Hrg. Trans. Vol. 4 at 262:11-13; WR-61 at p. 2029; Hrg. Trans. Vol. 2 at 172:7-8, 174:6-7.) During fire events in 2017, the Ranch also served as a camp for firefighters. (MMR-1 at pp. 9-10.) The Ranch operates off-grid and creates its own power supply either by diesel or hydropower generation. (MMR-18 at p. 1.) Respondents obtain the entirety of their water supply, and much of their power, by diverting water from Stanshaw Creek. (MMR-1 at p. 1.)

2.2 Stanshaw Creek and Coho Salmon

Stanshaw Creek drains approximately four square miles in Siskiyou County into the Klamath River at river mile 75 near Somes Bar. (KT-4 at p. 3.) During the summer low flow season, Stanshaw Creek also forms a pond on the Klamath River floodplain near the streams' confluence. (NMFS-7 at p. 4; MMR-17 at p. 2.) At very low flows, the pond and Stanshaw Creek lose connectivity to the Klamath River. (See e.g., WR-93 at p. 2561 [stating that Stanshaw Creek flows of 1.3 cfs were insufficient to provide connectivity between the pond and the Klamath]; KT-4 at pp. 4-5.) Studies have estimated the minimum flow needed at the cold-water pond to ensure connectivity between Stanshaw Creek and the mainstem to be between 2.0 and 3.0 cfs. (MMR-17 at p. 5.)

The Southern Oregon/Northern California Coast Evolutionarily Significant Unit of coho salmon (Coho salmon) was listed as a threatened species under the federal Endangered Species Act by the National Marine Fisheries Service (NMFS) in 1997.

¹ Citations to exhibits in this order refer to exhibits in the administrative record prepared by the AHO for this proceeding. Exhibits submitted by a particular party are identified by an abbreviation selected by that party (e.g., exhibits beginning with "MMR" were submitted by Respondents and exhibits beginning with "WR" were submitted by the Division of Water Rights Prosecution Team).

(NMFS-32 at p. 3.) NMFS designated the Coho salmon's critical habitat in 1999, which includes "all accessible waterways, substrate, and adjacent riparian zones between Cape Blanco, Oregon, and Punta Gorda, California (64 FR 24049; May 5, 1999)."² (NMFS-7 at p. 2.)

Unsuitably high water temperatures are one of the most significant stressors for Coho salmon in the Klamath River watershed. (See NMFS-32 at p. 28; NMFS-7 at p. 3.) As Klamath River temperatures rise in the summer, Coho salmon seek out cold water patches known as "thermal refugia" to survive. (KT-4 at p. 3.) The lower portion of Stanshaw Creek below the Highway 96 crossing and its pond serve as thermal refugia for threatened coho salmon. (NMFS-7 at p. 4.) Coho salmon also rely on Stanshaw Creek as rearing habitat in fall and winter. (KT-4 at p. 3; NMFS-7 at p. 4; Hrg. Trans. Vol. 4 at pp. 18:18-20:5; see also KT-9 at 3-5.) When low flows fail to connect Stanshaw Creek to the river, Coho salmon must go elsewhere for suitable habitat. (KT-4 at p. 4.) A lack of connectivity between Stanshaw Creek and the mainstem Klamath River also traps Coho salmon within the cold-water pool, leaving them vulnerable to predation and other problems. (*Id.*; WR-141 3122-23.)

There is very little data about Stanshaw Creek flows in the record for this proceeding. In 2016, NMFS attempted to develop an instream flow analysis to support a flow recommendation for Stanshaw Creek. (WR-141 at p. 3121.) Because Stanshaw Creek is ungauged, NMFS' analysis purported to estimate Stanshaw Creek's flows by prorating USGS hydrographic data taken between 1960-1964 from a nearby creek. (*Id.* at pp. 3123-3124.) Using this methodology, NMFS estimated Stanshaw Creek's average annual flow at 10.1 cfs, with an average 7-day minimum low flow of 2.6 cfs at the Ranch's point of diversion. (WR-141 at p. 3.) Measurements taken at the Ranch's point of diversion in 2003, 2011, and 2012 show that flows can fall as low as 2.0 cfs, with estimated minimum flows falling as low as 1.3 cfs. (*Id.* at p. 3127.)

2.3 Respondents' Diversion Infrastructure and Diversions from Stanshaw Creek

Respondents divert water from Stanshaw Creek under a claimed pre-1914 appropriative water right filed under Statement of Water Diversion and Use Nos. 15022 and 16375, and a Small Domestic Use Registration, D030945R, filed on December 1, 1998. (MMR-1a at p. 2.) Respondents claim their pre-1914 right entitles them to divert up to 3 cfs from Stanshaw Creek, which equates to an annual diversion of more than 2000 acre-feet per year. (WR-9 at ¶ 32; MMR-1a at p. 1.)

² Punta Gorda, CA is located approximately 130 miles south of the mouth of the Klamath River.

Ranch operations involve both consumptive and non-consumptive uses of Stanshaw Creek water. Consumptive uses include the irrigation of approximately 10 acres, stock watering for horses and other livestock, and domestic uses for Ranch residents and guests. (*Id.* at pp. 2-3; WR-61 at pp. 2028-29.) The primary non-consumptive use is power generation, although some water is diverted into a small pond on the ranch for recreation, aesthetics, fire suppression, and other uses. (MMR-1 at p. 3.)

As shown on the map excerpted from exhibit SWRCB-2 below, Respondents' point of diversion on Stanshaw Creek is located approximately 0.68 miles upstream of the Highway 96 crossing, and 0.87 miles from Stanshaw Creek's confluence with the Klamath River.³ (MMR-1a at p. 3.)

³ A map showing the relationship between Respondents' point of diversion and the Klamath River is available at exhibit OMRT-1.

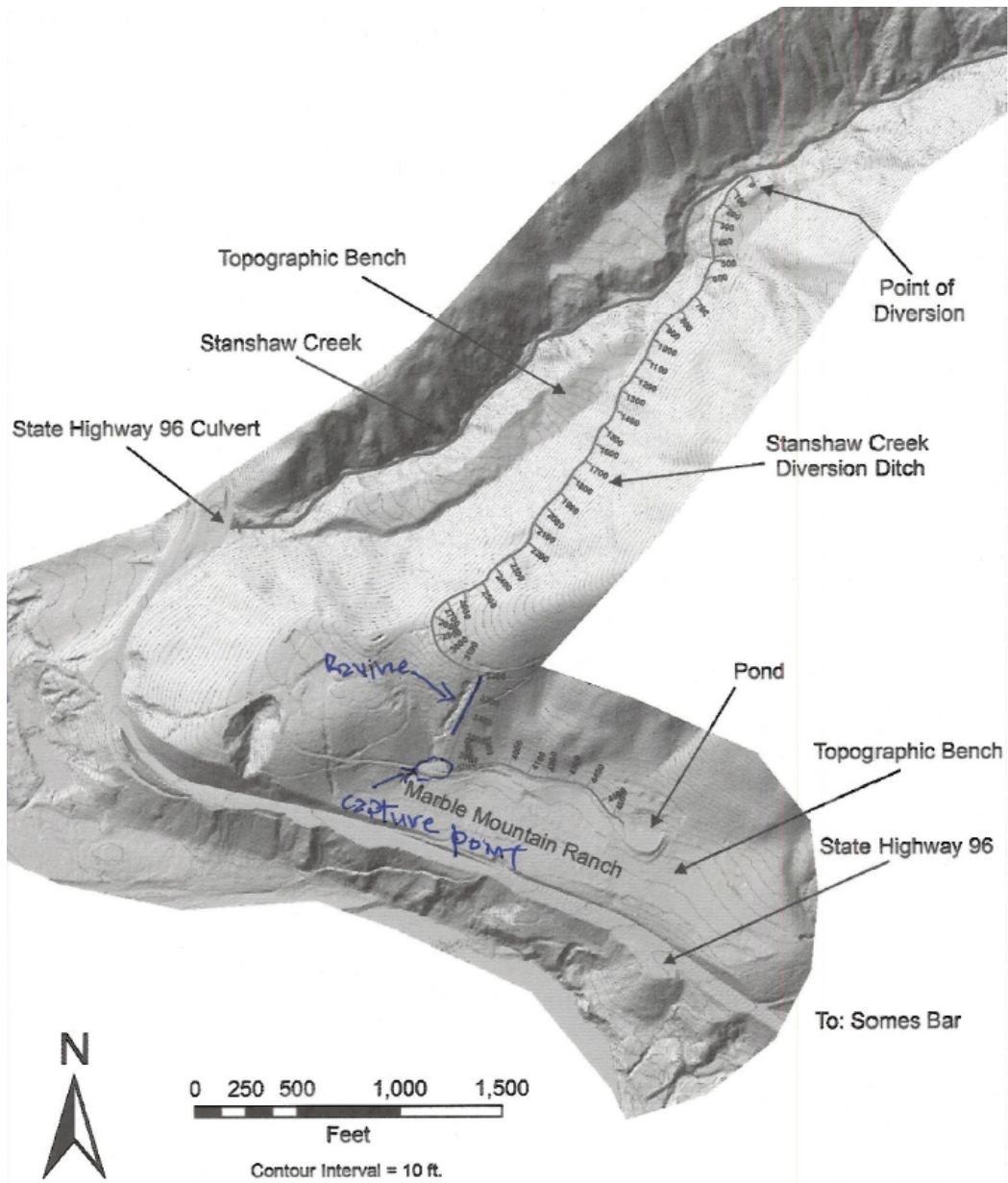


Figure 1. Project Location Map. Marble Mountain Ranch and the Stanshaw Creek Diversion Ditch. Base image is a 2010 1-meter LiDAR DEM Hillshade, provided by the Mid-Klamath Watershed Council.

The diversion consists of an unscreened handmade rock diversion dam that extends halfway across the creek. (MMR-18 at p. 1; WR-9 at ¶ 13.) Water travels by gravity from the point of diversion through a partially lined mining ditch approximately 0.5 miles long to a bifurcation where flow can be sent to either the Ranch’s domestic water system or to the Ranch’s hydropower system. (MMR-18 at p. 1; MMR-1a at p. 3.) Conveyance losses in the ditch vary with flow rate, conditions in the canal, and season, but have been measured between 0.4 and 0.6 cfs. (WR-82 at p. 2444; WR-87 at p. 2497; WR-9 at ¶ 24.b.) Losses of 0.5 to 1 cfs per mile through an unlined ditch are not uncommon in Siskiyou County. (WR-82 at p. 2444.)

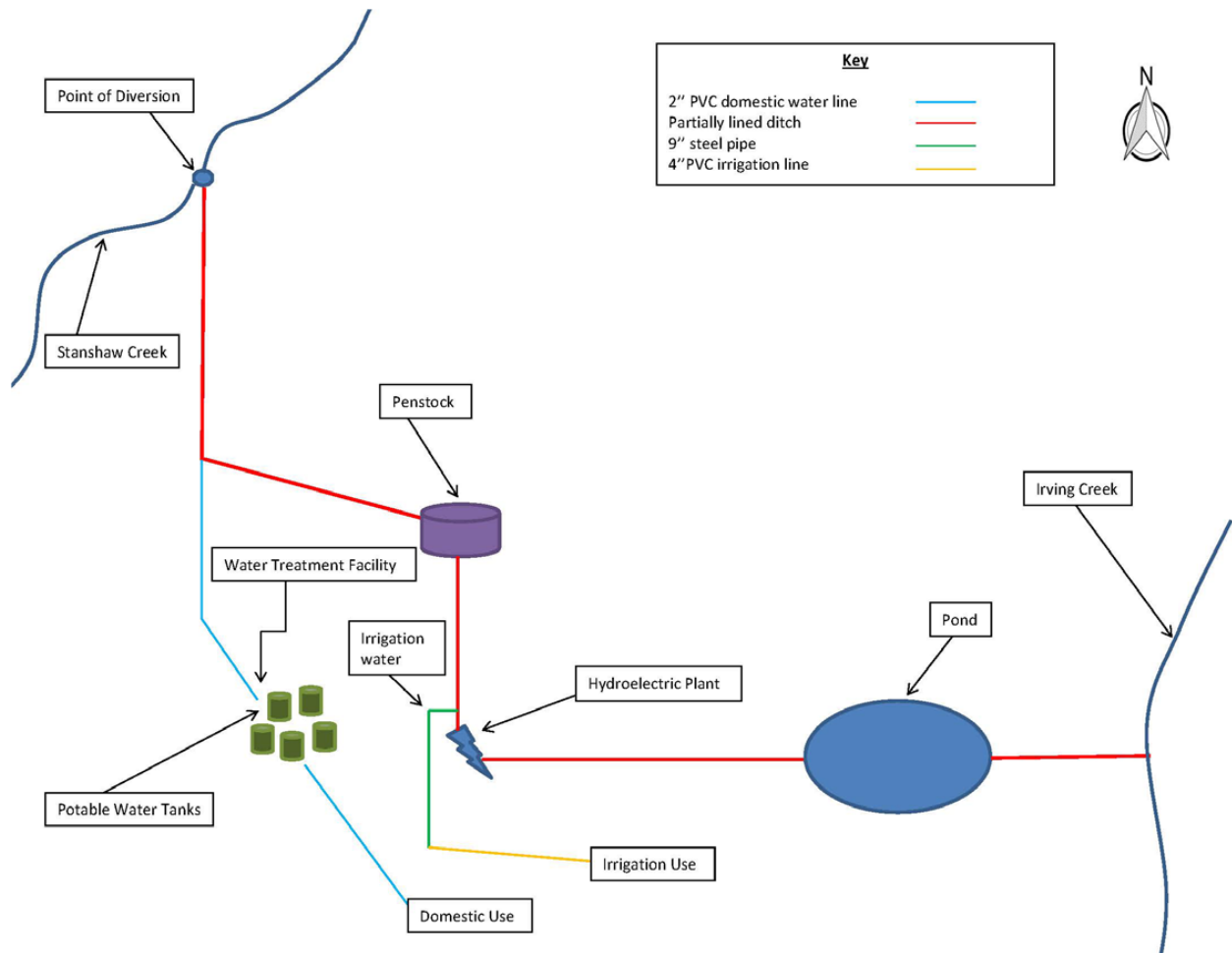
At the bifurcation, a two-inch PVC pipe delivers water into seven 3,000-gallon plastic water storage containers for domestic use. (MMR-1 at p. 3.) Respondents' consumptive use appears to range between 0.18 cfs and 0.4 cfs based on a variety of demand estimates and calculations.⁴ (MMR-18 at pp. 3-5; WR-9 at ¶ 24.d.)

Water not routed to the domestic system continues through the diversion ditch to a 14-inch diameter penstock pipe approximately 450 feet long. (MMR-1a at p. 3.) Water conveyed through the penstock is used for hydropower and connected to the Ranch's irrigation system. (*Id.*) The hydropower system consists of an 18-inch Pelton wheel powered by two pressurized jets and generates between 33.9 kW and 40 kW of electricity. (MMR-18 at p. 6; WR-4 at p. 219.) Water flowing through the hydropower facility is then discharged to the Ranch's pond, which Respondents claim serves recreational and fire protection purposes. (MMR-1a at p. 3.) Overflow from the pond discharges into a ditch that flows south across the Ranch for approximately 850 feet, then drops off a headcut, down a ravine, and into Irving Creek.⁵ (WR-9 at ¶ 23; WR-13 at ¶ 18; WR-82 at p. 2440.)⁶ A general schematic of the Ranch's diversion works from exhibit WR-200 is reproduced below:

⁴ Because of the losses described in the preceding paragraph and Respondents' hydropower operations, Respondents divert substantially more water than they consumptively use. (See MMR-1 at p. 2 [claiming a right to divert up to 3 cfs from Stanshaw Creek].)

⁵ Irving Creek discharges into the Klamath River approximately 1 mile below the confluence of Stanshaw Creek and the Klamath River. (MMR-1a at p. 4.)

⁶ The operations described above represent typical diversions and uses on Marble Mountain Ranch. There is, however, undisputed testimony in the record that firefighters may use up to 3 cfs of water from the Ranch's diversion ditch for fire suppression efforts. (MMR-1a at p. 10; MMR-11 at p. 1.)



Respondents' diversion and hydropower infrastructure have several limitations. First, the point of diversion has no permanent control structure to regulate the amount of water diverted from Stanshaw Creek. (WR-9 at ¶¶ 15.) The only way to regulate the amount of water diverted from Stanshaw Creek is by manually rearranging the hand-stacked rocks on the diversion dam. (*Id.*; see also WR-13 at ¶¶ 26.) Although Respondents have apparently modified their diversion dam to forego hydropower diversions over longer periods of time (see e.g., MMR-1 at p. 8), doing so on a daily basis is impractical. (WR-9 at ¶¶ 24.) The point of diversion thus typically operates independent of demand, limited only by available flow and the capacity of the diversion ditch.⁷ (WR-82 at p. 2439.)

⁷ Ranch employees can more readily regulate water levels within the ditch by manually adjusting flashboards, but not necessarily the amount of water diverted at the point of diversion. (See Hrg. Trans. Vol. 2, pp. 214:23-217:11; Hrg. Trans. Vol. 4, pp. 256:23-257:2.)

Second, Respondents had no reliable method of measuring their diversions at the time of the 2017 hearing.⁸ (Hrg. Trans. Vol. 3, pp. 10:9-20, 133:10-19.) Instead, they rely on markings inside a corrugated metal pipe to create an “arbitrary” unit of measurement Mr. Cole calls “Stanshaw units.” (WR-82 at p. 2441; Hrg. Trans. Vol. 2, pp. 215:24-216:2; Hrg. Trans. Vol. 4, p. 261:1-16.) This measurement system does not correlate to any generally accepted method of measuring diversions. (WR-85 at p. 2441, fn. 1; Hrg. Trans. Vol. 4, p. 261:1-16.)

Finally, the hydropower system’s Pelton wheel has a minimum operating threshold that sometimes exceeds available flows. (NMFS-12 [estimating minimum flows needed to operate Pelton wheel at 2 cfs]; WR-9 at ¶ 29; see WR-53 at p. 1982 [flows estimated at 0.6 cfs were too low to generate power].) Because the point of diversion is uncontrolled, the Ranch sometimes diverts more water than necessary for consumptive uses, but less than necessary for hydropower generation. (Hrg. Trans. Vol. 1, pp. 47:12-48:8; WR-53 at p. 1982; see WR-82 at 2441.) Similarly, when the power system generates more electricity than needed, Respondents cannot reduce their diversions and power generation but instead generate heat to burn off extra energy. (Hrg. Trans. Vol. 1, p. 47:4-11; Hrg. Trans. Vol. 2, pp. 227:3-229:4; WR-9 at ¶ 30.)

Respondents’ diversions can have negative environmental effects. In low-flow conditions, the Ranch’s diversions have the potential to harm Coho salmon by reducing flows to the cold-water pool, increasing water temperatures, eliminating connectivity with the Klamath River, and de-watering the lower portion of Stanshaw Creek. (KT-4 at pp. 5-6 [describing fish kills]; Hrg. Trans. Vol. 4 at pp. 156:177-18, 194:9-10, 217:23; WR-9 at ¶ 10.) This is particularly true of the Ranch’s hydropower diversions. In 2009, when Respondents diverted water for power generation, Stanshaw Creek water temperatures experienced a 45-degree spike on July 1. (Hrg. Trans. Vol. 1, p. 218:1-14.) In 2016, when Respondents indicated they did not divert water for power generation, Stanshaw Creek water temperatures remained relatively stable. (*Id.* at 218:15-20.) And in high-flow conditions, the Ranch’s diversions can exceed its ditch capacity, causing slumps, landsides, and undesirable water quality impacts. (WR-9 at ¶ 31; WR-13 at ¶¶ 22-27.)

2.4 Procedural History

On July 17, 2013, the Division of Water Rights (Division) received a complaint alleging that Respondents’ diversions exceeded the scope of their water right and injured public trust resources by periodically dewatering Stanshaw Creek. (WR-1, p. 9, ¶ 11; WR-3, p.

⁸ Because Respondents claim a right to divert more than 1,000 AF per year from Stanshaw Creek, they were required to install a measuring device capable of recording their diversions on an hourly or more frequent basis by January 1, 2017. (Cal. Code Regs., tit. 23, §§ 932, subd. (c)(1), 933, subd. (b)(1)(A)(i); WR-7 at ¶ 20.)

1, ¶ 1.) On January 29, 2014, Division staff received a video created by a downstream landowner that appeared to show the Ranch's diversion of nearly the entire flow of Stanshaw Creek and the lack of connectivity between the Stanshaw Creek refugial pool and the Klamath River. (WR-9, p. 2, ¶ 6; WR-76 [video].)

On or about December 3, 2015, the State Water Board and Regional Water Quality Control Board for the North Coast Region (Regional Water Board) sent a letter to Respondents, which included a Notice of Violation and a draft Cleanup and Abatement Order (draft CAO) from the Regional Water Board and a Report of Inspection from the State Water Board. (WR-1, p. 12, ¶ 19; WR-88 [Notice of Violation]; WR-106 [draft CAO]; WR-87 [Report of Inspection].) The Regional Water Board issued the draft CAO under its water quality enforcement authority. (WR-106 at pp. 2714, 2718-2719 [citing various provisions of the Porter-Cologne Water Quality Control Act].) The State Water Board issued the Report of Inspection under its water right enforcement authority. (WR-87 at p. 2497 [citing article X, § 2 of the California Constitution and Water Code § 100].) The Report of Inspection alleged that Respondents' diversion "constitutes a waste and unreasonable use of water, an unreasonable method of diversion of water, and potentially harms public trust resources." (WR-87, p. 13, ¶ 2.) The letter explained that the State Water Board would pursue enforcement if Respondents failed to respond within 20 days and begin implementing corrective actions such as: (1) installing a water diversion control mechanism at the point of diversion; (2) returning non-consumptively used water to Stanshaw Creek; (3) fixing all leaks associated with the Ranch's water treatment system; (4) piping or lining the entirety of the Ranch's water conveyance facilities; and (5) implementing bypass flows recommended by the California Department of Fish and Wildlife (CDFW) and NMFS. (WR-1, p. 12, ¶ 19; WR-105, p. 2; WR-87 at pp. 2502-2503.)

On February 12, 2016, State and Regional Water Board staff informed Respondents that they would pursue formal, parallel enforcement actions. (WR-1, pp. 12-13; WR-112.) Although Respondents stated on March 24, 2016, that they planned to take a variety of actions to address the issues identified in the inspection report, including a project installing a pipe in the conveyance ditch to reduce the conveyance losses that result from transport through the partially lined ditch, they ultimately failed to do so. (WR-115, pp. 2802, 2804; R.T., Nov. 13, 2017, p. 49:15 to 50:10; R.T., Nov. 13, 2017, p. 50:8-10; R.T., Nov. 14, 2017, pp. 188:25 to 189:12.)

On August 4, 2016, the Regional Water Board issued Cleanup and Abatement Order No. R1-2016-0031 (CAO) to the Diverters requiring that they eliminate the threat of future discharges and clean up and abate the effects of discharges of soil, rock and miscellaneous debris into Irving Creek, Stanshaw Creek, and the Klamath River, caused by their diversion facility and conveyance system. (WR-142.) As of the hearing

on this matter, the Regional Water Board had issued three notices of violation for the CAO dated October 18, 2016, March 17, 2017, and June 27, 2017. (WR-13, pp. 1113–1116; WR-152; WR-162; WR-167.) There is no evidence in the record that the Regional Water Board has pursued administrative or civil penalties for the alleged violations.

2.5 The Division's Allegations of Unreasonable Use and Requested Relief

On August 30, 2016, the Division issued a Draft Order Finding Waste, Unreasonable Method of Use, and Unreasonable Method of Diversion of Water and Ordering Corrective Actions in the Matter of Waste, Unreasonable Method of Use, and Unreasonable Method of Diversion of Water by Douglas and Heidi Cole and Marble Mountain Ranch (Draft Order). (WR-1, WR-2, WR-3.) The Draft Order alleged that the Ranch's diversion and use of water were unreasonable and wasteful for the following reasons:

1. Conveyance losses. Conveyance losses in the Ranch's system are approximately 27 percent of water diverted at the Stanshaw Creek point of diversion.
2. Lack of diversion control. The Ranch's intake at the point of diversion does not have a control mechanism to manage flow through the conveyance system, resulting in diversions that exceed the system's capacity and what the Ranch reasonably requires for beneficial use.
3. Hydropower operations. Approximately 56 percent of the total water diverted is used non-consumptively for power generation but is discharged to Irving Creek. During low-flow conditions, the Ranch diverts more water than needed to satisfy consumptive demand, but not enough to operate the hydropower system, resulting in diversions that exceed what can be beneficially used.
4. Diversion ditch. Under high-flow conditions, the Ranch diverts more water than its diversion ditch can handle, causing slumps and landslides due to overtopping. The continuous deposition of sediment from Stanshaw Creek into the ditch also reduces ditch capacity and increases the risk of overtopping. Similarly, slumps from the hillside above the ditch can dam the ditch and divert streamflow out of the ditch and downhill. Diversion ditch operations thus constitute a threat to water quality and a threat of unauthorized discharge to surface waters of the state and the United States.
5. Harm to public trust resources. The lack of a fish screen on the Ranch's diversion means that fish may be entrained in the Ranch's diversion ditch and killed if they enter the Ranch's hydropower system. Sediment discharges to Irving and Stanshaw creeks may also potentially impact public trust resources. Based on NMFS' recommendations, diversions that do not allow for a minimum 2.0 cfs

bypass flow at the point of diversion while also maintaining 90 percent of unimpaired flow in Stanshaw Creek between the Highway 96 crossing and the cold-water pool cause harm to fishery resources such as Coho salmon.

(WR-1 at ¶¶ 28-34.)

To remedy these alleged misuses of water, the Draft Order seeks a variety of remedial measures, including:

1. The completion of energy and water efficiency audits, and the implementation of any feasible recommendations from those efforts.
2. The installation of a measuring device and a permanent water diversion control mechanism at the point of diversion adequate to control the amount of water diverted.
3. The installation of a pipeline or other infrastructure in the diversion ditch to minimize conveyance losses.
4. The cessation of discharges of Stanshaw Creek water to Irving Creek.
5. The implementation of NMFS' recommendation that Respondents bypass 90 percent of unimpaired flows and a minimum of 2 cfs at their point of diversion to protect fishery resources.

(WR-1 at p. 22, Table 4.)

2.6 State Water Board Hearing

On June 9, 2017, the Board issued a Notice of Public Hearing after the Respondents did not implement the corrective actions listed in the Draft Order. The June 9, 2017, Notice of Public Hearing (Hearing Notice) regarding the draft order specified two key hearing issues:

- 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?

The Board held a public hearing concerning this matter from November 13 through 16, 2017. Eight parties participated in the hearing:

- the Division’s Prosecution Team (Prosecution Team),
- Respondents,
- the Karuk Tribe,
- NMFS,
- CDFW,
- the Old Man River Trust,
- the California Sportfishing Protection Alliance (CSPA), and
- the Klamath Riverkeeper.⁹

The parties submitted closing briefs on March 29, 2018.

2.7 Assignment to the AHO and AHO Actions

On December 9, 2021, the State Water Board’s Executive Director assigned this matter to the AHO for further proceedings, including preparation of a proposed order and transmittal of it to the Board for the Board’s consideration. On December 19, 2022, the AHO’s presiding officer scheduled a status conference for February 2, 2023. The Notice of Status Conference posed a variety of questions for the parties about the status of Respondents’ diversions since the 2017 hearing, including whether the AHO should “accept supplemental briefs or hold supplemental hearing days to hear evidence based on new information or any changes in circumstances since the 2017 public hearing.” (Notice of Status Conference (Dec. 19, 2022), at p. 4.)

CSPA, Respondents, the Prosecution Team, and the Old Man River Trust filed status conference statements. No party supported the submission of additional briefs or evidence, and both the Prosecution Team and the Ranch actively opposed supplemental briefing and hearing days.¹⁰ (Prosecution Team Status Conference Statement at pp. 6:9-7:6; Respondents’ Status Conference Statement at p. 6.) On March 28, 2023, however, the Prosecution Team submitted an updated draft order to the AHO. The Prosecution Team explained that it was recommending a new compliance plan in the updated draft order to account for the “length of time since the

⁹ The Pacific Coast Federation of Fishermen’s Associations and Institute of Fisheries Resources jointly submitted a Notice of Intent to Appear form indicating their intent to participate in the hearing by cross-examination and rebuttal only; however, no representatives of the organizations participated in the hearing.

¹⁰ Given Respondents previous opposition to re-opening the evidentiary record to address changes in conditions since the 2017 hearing, and our obligation to make findings based on the evidentiary record before us, we decline to consider their arguments that such changes have entirely obviated the need for this Order. (See generally, Respondents’ Comments on Draft Order (Dec. 13, 2024).)

November 2017 hearing and uncertain, unverified effectiveness of the Respondents' actions, and the Respondent's desire to retain their claim to divert up to 3 cfs" (Prosecution Team, Updated Proposed Order in Response to February 21, 2023 Status Conference Ruling, at p. 7:3-6.)

On November 21, 2024, the AHO circulated a draft proposed order to the parties for review and comment. Respondents, the Prosecution Team, the North Coast Regional Water Quality Control Board, Konrad Fisher, NMFS, and the Karuk Tribe submitted comments by the December 13, 2024 deadline.

3.0 LEGAL STANDARD

The rule that water diversions and use must be reasonable is "the overriding principle governing the use of water in California." (*People ex rel. State Water Resources Control Board v. Forni* (1976) 54 Cal.App.3d 743, 750.) Under article X, section 2 of the California Constitution and section 100 of the Water Code, all water rights, regardless of the basis under which the right is held, are constrained by this requirement of reasonableness. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 366-367; *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429, as modified (Apr. 20, 2011); *Modesto Properties Co. v. State Water Rights Bd.* (1960) 179 Cal.App.2d 856, 862.) Article X, section 2 provides in relevant part:

It is hereby declared 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 The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

Section 275 of the Water Code authorizes the Board to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. (See *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 472 fn. 16; *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1986) 186 Cal.App.3d 1160, 1163 fn. 4, 1169-1170, 1171.) Under its implementing regulations, the Board investigates an allegation that water is being misused in violation of the reasonable use doctrine when an interested person shows good cause or when the board itself believes that a misuse may exist. (Cal. Code Regs., tit. 23, § 856; see also *id.* § 855 [defining "misuse" as any "waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water."]) If the investigation indicates that a

misuse has occurred, State Water Board staff notifies interested persons and allows a reasonable period to cure their misuse or demonstrate that the misuse has not occurred. (*Id.*, § 857, subd. (a).) At the end of the time set by State Water Board staff, the State Water Board may hold a hearing to determine if misuse has occurred or continues to occur and issue an order requiring prevention or termination thereof. (*Id.*, § 857, subds. (b) & (d).) If a person who diverts water without a State Water Board-issued permit or license does not comply with such an order, the State Water Board may request legal action by the Attorney General. (*Id.*, § 859.) The State Water Board may also enforce compliance by issuing a cease-and-desist order to a party who violates an order issued under Water Code section 275. (Wat. Code, § 1831, subd. (d)(3).)

The reasonableness of a particular use of water depends on its context, and the Board has broad discretion in determining the reasonableness of a particular use. (*Los Angeles Waterkeeper v. State Water Resources Control Board* (2023) 92 Cal.App.5th 230, 277-284.) The “reasonableness of any particular use depends largely on the circumstances” and may change over time. (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1479; see also *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447 [holding that “the state is not confined by past [water resource] allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.”]; *Tulare Dist. v. Lindsay-Strathmore Dist. (Tulare)* (1935) 3 Cal.2d 489, 567 [“What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.”].) In *Light*, for example, grape growers in the Russian River watershed had long diverted water for frost protection purposes. (*Light, supra*, 226 Cal.App.4th at p. 1474.) When growers all diverted water for frost protection at the same time, however, the resulting sudden drop in stream levels could strand and kill salmonids. (*Ibid.*) Although the court readily conceded that “the use of sprinkled water to prevent crop frost damage is a beneficial one,” it found that the Board had authority to enact tailored regulations to prevent the unreasonable stranding of salmonids “on those occasions” when such diversions might be damaging. (*Id.* at p. 1486-87.)

In evaluating the reasonableness of water usage, the Board examines “the ascertainable facts concerning such water usage” and evaluates such facts in view of the need for water conservation in California and competing demands. (Decision 1600 at pp. 23-24.) Thus, the Board has considered the following factors to determine whether a particular use of water is wasteful or unreasonable: 1) other potential beneficial uses of conserved water; 2) whether the excess water serves a reasonable and beneficial purpose; 3) probable benefits of water savings; 4) the amount of water reasonably required for the current use; 5) amount and reasonableness of the cost of saving water; 6) whether the required methods of saving water are conventional and reasonable rather than extraordinary; 7) availability of a physical plan or solution to

maximize the beneficial use of water. (Decision 1600; Decision 1463; Order WR 2012-0004.) The Board also considers conformity with local custom in assessing the reasonableness of a diversion. (Wat. Code, § 100.5.) Although not all the above factors will apply or apply equally in every case, they provide guidance in determining whether a particular use is excessive or unreasonable. (Order WR 2012-0004, p. 6 [addressing seepage losses].)

In Decision 1600, the Board analyzed these factors in connection with a farmer's allegation that the rise in the level of the Salton Sea resulted from unreasonable and wasteful diversion and management actions of the Imperial Irrigation District (District). (Decision 1600, at p. 4.) The farmer's complaint alleged that the following practices caused unreasonable and wasteful losses of water:

1. Maintaining canals in overly full conditions, which caused frequent spills;
2. The absence of reservoirs for regulation of canal flows, which resulted in the delivery of excessive amounts of water;
3. The absence of tailwater recovery systems; and
4. The requirement that farmers order water in 24-hour intervals, with no ability to terminate delivery after sufficient water is received.

(*Id.* at pp. 4-5.) The Board concluded that the District's practices contributed to the loss of approximately one million acre-feet per year of Colorado River water that entered the Salton Sea as irrigation return flow. (*Id.* at p. 66.) The Board determined that there were "practical measures available to reduce the present losses of water in the system," and that the "failure to implement additional water conservation measures" was unreasonable and constituted a misuse of water under article X, section 2 of the California Constitution and Section 100 of the California Water Code. (*Ibid.*) Although the Board largely took a non-prescriptive approach to addressing the District's unreasonable and wasteful practices by requiring the District to develop and implement a comprehensive water conservation plan, it also required the District to take specific actions to reduce unintentional canal spills. (*Id.* at pp. 66-67.) These actions included monitoring tailwater discharges of all fields receiving water deliveries, repairing all defective tailwater structures and approach channels within eight months, developing an accounting and monitoring procedure to assess losses, and ordering the District to resume its regulatory reservoir construction program. (*Id.* at pp. 67-69.)

Although Decision 1600 primarily evaluated the reasonableness of the District's practices considering the amount of water that could be repurposed for other consumptive uses (see *id.* at pp. 9-13), the Board has also exercised its authority under Water Code section 100 to address the effects of a diversion on fish and wildlife resources. (See Order WR 95-17, at p. 24 ["A particular water use or method of diversion may be determined to be unreasonable based on its impact on fish, wildlife, or

other instream beneficial uses.”.) For example, the Board has exercised its authority under Water Code section 100 to adopt regulations prohibiting the diversion of water under certain circumstances to protect fishery resources. (*Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976; *Light, supra*, 226 Cal.App.4th 1463.) And in Order WR 95-17, the Board found that (1) the installation of a seasonal dam was unreasonable because it prevented outmigration of coho salmon and steelhead, and (2) diversion and storage of water on one creek for release in another to meet instream flow requirements was unreasonable because of potential impacts on young salmon from the quality and temperature of the water. (*Id.* at pp. 107-108.)

A water right holder is not, however, required to “adopt the best method for utilizing the water or take extraordinary precautions to prevent waste.” (*Tulare, supra*, 3 Cal.2d at p. 573 [quoting *Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8, 23].)

4.0 DETERMINATION OF WASTE AND UNREASONABLE USE

4.1 Impacts to Public Trust Resources Are Relevant to the Reasonableness of Respondents’ Water Diversions and Use.

Respondents’ closing brief raises a threshold argument that the public trust doctrine cannot support the exercise of the Board’s enforcement authority in this case because the public trust doctrine does not allow the State Water Board to curtail rights held by pre-1914 appropriators. (Respondents’ Closing Brief at p. 16:13-14.) We reject this argument.

The State Water Board has the affirmative duty to take the public trust into account in its administration of the state’s system of water rights and to protect the interests of the public in trust resources whenever feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446.) The protection of trust resources is both subject to and incorporated into the Board’s consideration of whether a particular use or method of diversion of water is wasteful or unreasonable. (See Cal. Const. Art. X, § 2 & Wat. Code, § 275.) The Board’s duty and authority in this respect extends to all waters of the state, including waters that are diverted and used under pre-1914 appropriative water rights. “Although the SWRCB does not issue a permit or license for a pre-1914 appropriation of water . . . , the [State Water Board] has authority to supervise the exercise of pre-1914 water rights under the public trust doctrine and under Water Code section 275” (State Water Board Order WR 95-4 at p. 14; see *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 862 [“The Board’s authority to protect the public trust is independent of and not bounded by the limitations on the Board’s authority to oversee the permit and license system.”]).

When deciding whether Respondents' diversion and use of Stanshaw Creek water is reasonable, we must consider other potential beneficial uses of water including other instream uses for trust purposes. (Order WR-2012-0004 at p. 6.) As such, the effects of Respondents' diversion on public trust uses of water are unquestionably relevant here. (See *Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976, 1003 [holding that "fish survival is an appropriate consideration in determining" whether a particular use or method of diversion is reasonable].)

Respondents' argument that any public trust impacts we do consider in assessing the reasonableness of their diversion must be supported by a clear and "extraordinary finding" of actual rather than potential harm is similarly unpersuasive. (Respondents' Closing Brief at pp. 16:21-17:13.) Neither of the cases Respondents cite—nor any other authority—supports their argument. (See *National Audubon Society, supra*, 33 Cal.3d 419; *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82; see also Code Civ. Proc. § 1094.5, subd. (c).) Indeed, Respondents' proposed standard of actual harm would be particularly inappropriate where, as here, the resource protected by the public trust includes endangered fish species. These species face a serious risk of extinction and waiting for further actual and extraordinary harm to occur would unacceptably exacerbate that risk. (See Fish & Game Code § 2062; see also 16 U.S.C. § 1532(6).)

Further, there is evidence of actual harm to fisheries in Stanshaw Creek as a result of Respondent's diversions and Respondents do not dispute that their diversions have, at times, harmed fish in Stanshaw Creek downstream of the Highway 96 crossing. For example, Respondents do not dispute that their diversions can effectively dewater Stanshaw Creek during low flows and that such diversions have killed juvenile Coho salmon and steelhead. (See KT-4 at pp. 5-7.) We must consider these and any other impacts to public trust resources in assessing the reasonableness of Respondents' diversions.

4.2 The Evidence does not Demonstrate that the Ranch's Current Diversions for Consumptive Uses are Unreasonable.

Respondents' engineering expert, Mr. Jeffrey Meyer, estimated that the Ranch's demonstrated consumptive demand for domestic, livestock, and irrigation uses totals 0.24 cfs at the high end. (MMR-18 at p. 7.) No party argued that Respondents' consumptive uses are unreasonable, nor is there evidence that they have unreasonable impacts on public trust resources when considered independent of the Ranch's

diversions for non-consumptive uses.¹¹ Similarly, no party has presented evidence or argument that the periodic use of up to 3 cfs of Stanshaw Creek water for firefighting activities is unreasonable or has unreasonable impacts on public trust resources when balanced against the need for fire suppression.¹² (*Id.*; MMR-1 at pp. 9-10; MMR-10; MMR-11; Hrg. Trans. Vol. II at 144:3-8, 162:14-23, 193:2-7.) Accordingly, we do not further address the reasonableness of the Ranch's diversion for consumptive use of up to 0.24 cfs and up to 3 cfs when requested for firefighting purposes by a firefighting agency such as the United States Forest Service.¹³ (See MMR-11.)

4.3 Respondents' Hydropower Operations Are Unreasonable.

Although ostensibly non-consumptive, Respondents' hydropower operations effectively result in the consumption of substantial quantities of water from Stanshaw Creek because the water diverted to their hydropower facility does not return to the creek. After analyzing Respondents' operations, we conclude that their diversions for hydropower generation are unreasonable. We therefore direct Respondents to return water diverted for non-consumptive use to Stanshaw Creek at a point above the Highway 96 crossing.

¹¹ Mr. Konrad Fisher and Water Climate Trust (WCT) argue that Respondents divert less water for irrigation than they claim, and that this Order should limit Respondents' diversions to an amount appropriate to irrigate no more than 7 acres of land. (Paul S. Kiebel, Comments of WCT on Draft Order (Dec. 13, 2024) at pp. 12-13; Konrad Fisher, Comment Letter on Draft Order (Dec. 13, 2024) at pp. 1-2.) Although there is conflicting evidence in the evidentiary record about precisely how much water Respondents need to satisfy consumptive demands, the weight of the evidence does not support such a restriction. (See, e.g., OMRT-6 at p. 13 [describing consumptive demands of approximately 0.35 cfs].) We express no opinion, however, as to whether Respondents' diversions for irrigation would be reasonable in any possible future circumstance.

¹² In his comments on a draft of this Order, Mr. Fisher argued for the first time that Respondents' diversion of up to 3 cfs for fire suppression would prevent the U.S. Forest Service and CalFire from using Stanshaw Creek water for fire suppression on his land. (Konrad Fisher, Comment Letter on Draft Order (Dec. 13, 2024) at pp. 2-3.) Not only is there no evidence in the evidentiary record that Respondents' diversions for fire suppression impact Mr. Fisher's water rights, but the evidence in the record also indicates that firefighting agency personnel have been the primary decisionmakers with respect to diversions of water for fire suppression from Respondents' point of diversion. (See MMR-1 at pp. 9-10; MMR-10; MMR-11.)

¹³ In doing so, we decline to opine on the validity of Respondents' claimed pre-1914 right. (See Rulings on Objections and Requests (Oct. 31, 2017), at p. 4 ["Questions related to the scope or validity of alleged pre-1914 appropriative water rights are ordinarily resolved through other enforcement processes. As explained above, such questions need not be resolved for the Board to determine whether waste and unreasonable use of water is occurring." (citations omitted)].)

Respondents routinely divert comparatively large quantities of water to operate their hydropower system and discharge the tailwater to Irving Creek.¹⁴ (MMR-1 at pp. 3-4.) Mr. Meyer calculated that the Ranch's hydropower system requires a flow of 2.83 cfs to achieve its peak power output. (MMR-18 at p. 6.) At least 2 cfs of flow are likely necessary for the Ranch's hydropower system to generate any power at all. (See NMFS-12; WR-9 at ¶ 29; see also WR-53 at p. 1982 (flows estimated at 0.6 cfs were too low to generate power).) There is no evidence in the record as to what the Ranch's peak power demands are,¹⁵ but the preponderance of the evidence shows that the Ranch regularly diverts more water than it can use consumptively but less than needed to operate the existing hydropower system. (Hrg. Trans. Vol. 1, pp. 47:12-48:8; WR-53 at p. 1982; see WR-82 at 2441.) There is also ample evidence that the Ranch's system regularly generates more power than can be used by the Ranch's operations when flows are available. (Hrg. Trans. Vol. 1, p. 47:4-11; Hrg. Trans. Vol. 2, pp. 227:3-229:4; WR-9 at ¶ 30.) In both instances, the water diverted by Respondents from Stanshaw Creek is not available for beneficial use by others within the Stanshaw Creek watershed. (See Decision 1600 at pp. 24-25; Cal. Const, art. X, § 2.) Thus, although Respondents characterize their hydropower operations as "non-consumptive," those diversions effectively consume significant quantities of Stanshaw Creek water by permanently removing the water from the creek.¹⁶

The evidence shows that there is an array of alternatives that would allow the Ranch either to forego entirely diversions for hydropower or return water diverted for hydropower to Stanshaw Creek. (See Karuk Tribe Closing Brief at pp. 12:25-14:20.) Indeed, after the hearing, Respondents admitted that they have been able to operate the Ranch without diverting Stanshaw Creek water to their hydropower facility. (See Respondents' Status Conference Statement (Jan. 26, 2023), at p. 1.) Doing so appears to have substantially reduced their diversions from 1089.92 acre-feet in 2017 to 159.08 acre-feet in 2020. (*Id.* at p. 2.) Accordingly, we conclude that Respondents' diversion and permanent removal of Stanshaw Creek water for hydropower generation is unreasonable.

¹⁴ Although we conclude that Respondents' diversion of hydropower tailwater into Irving Creek is unreasonable in this case, this order should not be construed to adopt a rule that diversion of one water from one stream into another is *per se* unreasonable.

¹⁵ An energy consultant estimated the Ranch's energy demand at approximately 126,265 kilowatts per year, but Respondents did not disclose the basis for that estimate. (WR-157 at p. 3548; MMR-19.)

¹⁶ There is no evidence in the record of any benefits to discharging Stanshaw Creek water to Irving Creek.

4.3.1 Respondents can substantially reduce their use of water by implementing reasonable physical solutions.

During the hearing, the parties submitted detailed evidence about two alternatives to Respondents' hydropower operations:

1. A proposal to implement a combined photovoltaic and battery system with a propane generator for a cost of \$425,000.
2. A proposal to implement photovoltaic solar power with a larger battery system and no propane generator for a cost of \$526,000. (MMR-19.)

Respondents also addressed several other proposed adjustments to their diversion of water for hydropower. First, Respondents argued that the cost of reconfiguring the existing system to return water to Stanshaw Creek would exceed \$500,000. (Hrg. Trans. Vol. I, at p. 69:17-18.) Second, Respondents rejected the possibility of moving the point of diversion further upstream, which could have the effect of reducing the amount of water needed for power generation. (See Hrg. Trans. Vol. I, at pp. 45:9-47:16.) Finally, in a post-hearing status conference statement, Respondents reiterated that they had not used their hydropower facilities since at least the 2017 hearing. (Respondents' Status Conference Statement (Jan. 26, 2023), at p. 3.) They further represented that they are in the process of installing a solar system with batteries and upgrading the hydropower facilities to "a micro-hydro system that requires less water to operate[.]" (*Id.*) Respondents also indicated that they were willing to conduct an energy audit that might reveal ways to reduce energy usage, which could decrease the cost of implementing an alternative energy system. (See WR-110 at p. 2747.)

The weight of the evidence in the record shows that Respondents can feasibly generate power without permanently removing the water from Stanshaw Creek and discharging the effluent to Irving Creek. First, as Mr. Bryan Elder testified—and Respondents subsequent conduct proves—the installation of a solar power and battery system is financially feasible. (WR-194; Respondents' Status Conference Statement (Jan. 26, 2023), at p. 3.) Between 2013 and 2016, Respondents' utility expenses ranged from \$31,296 to \$37,522. (WR-194.) Although the expense associated with these systems would initially be large, a paid-off solar system would greatly reduce Respondents' annual utility expenses. (Hrg. Trans. Vol. IV, at p. 22:15-18.)

If solar power cannot satisfy all the Ranch's energy requirements, Respondents can continue using their diesel generator to fill the gap. (See *id.*; see also MMR-1 at p. 9.) Installing a device to control diversions, combined with a micro-hydro system that requires less water to operate, should also result in smaller amounts of hydropower tailwater. A project to return these smaller flows back to Stanshaw Creek may be less expensive than a larger return flow project. (See Respondents' Status Conference Statement (Jan. 26, 2023), at p. 3.) Finally, completing an energy audit and

implementing actions to reduce overall energy demands consistent with typical practices for off-grid living would likely further decrease the cost of implementing a physical solution to avoid the permanent removal of hydropower diversions from Stanshaw Creek. (See Hrg. Trans. Vol. 4, at pp. 165:11-166:13.)

Respondents' loss of grant funding for these types of physical solutions is not dispositive when considering whether the water-saving measure is reasonable. Respondents argue that the projects envisioned in the Draft Order became "impossible to achieve" when they lost grant funding. (Respondents Closing Brief at p. 17:27.) They also argue that this order "must take into account Respondents' changed circumstances with regard to their grant funding." (*Id.* at p. 19:1-3.) But the evidence in the record suggests that Respondents lost the funding because they refused to accept the conditions of those grants. (See Hrg. Trans. Vol. 1, at pp. 56:7-57:2; Hrg. Trans. Vol. 4, at p. 264:13-25.) Respondents point to no authority in which this Board or a court found an available physical solution to become infeasible because of a loss of funding resulting from the water user's own inaction. Indeed, such a rule would incentivize diverters in Respondents' position to reject reasonably conditioned grant funds. We thus reject Respondents' argument that our feasibility determination turns on their willingness to accept conditional grant funds.

Nor do Respondents' operating losses detailed on their tax returns render any potential physical solution financially infeasible. (See Respondents' Closing Brief at 19:4-21:11.) As Mr. Elder explained, the Ranch's gross income increased over 70 percent from 2013 to 2016, and its reported net losses disappear after accounting for "allowable non-cash expenses" that have no effect on actual cash flow. (WR-194 at p. 2.) Further, as of the hearing, the Ranch itself had a net worth of approximately \$663,928. (*Id.* at 3.) While the installation of an alternative power generation system may initially impact Respondents' finances, the evidence submitted in this proceeding and Respondents' subsequent actions support the conclusion that the Ranch's financial situation is sufficiently robust to shoulder that burden. (See WR-194 at p. 5; see also Respondents' Status Conference Statement (Jan. 26, 2023), at p. 3.)

4.3.2 More efficient power generation would make water available for other potential uses.

The vast majority of Stanshaw Creek water that Respondents divert but do not use domestically is re-diverted into Irving Creek. (WR-9 at ¶ 23; WR-13 at ¶ 18; WR-82 at p. 2440.) Ensuring that the water either remains in or returns to Stanshaw Creek would make it available for a variety of other beneficial uses, particularly instream flows for fishery resources and Native American cultural uses. (See e.g., Karuk Tribe Closing Brief at pp. 5:7-7:13; Old Man River Trust Closing Brief at pp. 1-2; Prosecution Team Closing Brief at 23:6-19; CSPA Closing Brief at pp. 5:8-10:21; North Coast Regional Water Quality Control Board, *Water Quality Control Plan for the North Coast Region*

(June 2018), at pp. 2-2 – 2-3.) The preponderance of the evidence shows that limiting the Ranch’s use of water to its reasonable consumptive demands will help to avoid harm to listed salmon in Stanshaw Creek and the Klamath River in high-temperature, low-flow situations. (See *id.*; see also Wat. Code, § 1243 subd. (a) [the “preservation and enhancement” of fish and wildlife resources is a beneficial use of water].)

4.3.3 Although imposing the recommended bypass flow requirement is not appropriate for this proceeding, limiting the Ranch’s water use to its reasonable consumptive demands would likely benefit salmon.

Limiting Respondents’ permanent removal of water from Stanshaw Creek to that needed to satisfy their consumptive uses will almost certainly benefit salmon. There is insufficient evidence, however, that imposing an additional limit on Respondents’ diversions for consumptive use to bypass flows to meet NMFS’ instream flow recommendations would further benefit fisheries in Stanshaw Creek. Imposing such a requirement in this proceeding would also be inconsistent with the rule of priority. (See *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 970.)

There is no dispute that the cold-water pool fed by Stanshaw Creek provides valuable refuge habitat for salmonids seeking shelter from high Klamath River mainstem water temperatures. (E.g., MMR-21 at p. 22; NMFS-7 at pp. 4-5.) And there is ample evidence that reducing Stanshaw Creek flows to the pool, particularly when conditions are warm and dry, can have a negative effect on Stanshaw Creek and the pool’s habitat value. (See NMFS-7 at pp. 4-5; KT-4 at pp. 4-7.) Similarly, diversions that effectively dewater Stanshaw Creek almost certainly harm fish below Respondents’ point of diversion. (See Hrg Trans. Vol. 4, at pp. 104:19-108:20, 170:17-173:19, 186:18-188:24; OMRT-5.)

There is considerably less evidence as to the flows needed to avoid these effects. NMFS and other parties recommend that we require the Ranch to bypass 90 percent of flows when the Ranch is diverting solely for consumptive use or if hydropower tailwater is not returned to Stanshaw Creek, and the greater of 2 cfs or a 90 percent bypass if hydropower tailwater is returned to the creek, to ensure “habitat conditions sufficient for proper functioning of the riverine ecosystem[.]” (NMFS-1 at ¶ 4; Hrg. Trans. Vol. 3, pp. 160:23-161:24.) The basis for this recommendation is set forth in a 2016 letter submitted as exhibit NMFS-3. (See NMFS-1 at ¶ 4.) In developing its recommendation, NMFS apparently relied solely on a 2011 study by Richter *et al.* that “suggested a *presumptive* standard of no more than a 10% diversion” to achieve a “high level of protection.” (NMFS-3 at p. 8 [italics added].) The study apparently defined “high level of protection” as “minimal change to the natural structure and function of the riverine ecosystem.” (*Id.*)

There are two significant problems with the NMFS' bypass flow recommendation. First, NMFS' 2016 letter does not suggest that NMFS attempted to test the validity of this presumption, nor did NMFS submit non-hearsay evidence that appropriately supported its recommendation at the hearing. (See Gov. Code, § 11513(d).) NMFS' hydrologic analysis is based almost entirely on an estimate derived from data taken from a USGS gage on a different creek. (NMFS-3 at pp. 3-7.) Nor did NMFS independently analyze how Stanshaw Creek flows affect salmon in Stanshaw Creek. Instead, NMFS concluded that "[a]ny loss of cold water during [the low flow season] would decrease the quality and function of habitat." (*Id.* at p. 8.) In addition to a generalized need for cold water habitat, NMFS also justified its bypass flow recommendation on the fact that "actual flows at the point of diversion may already be somewhat impaired by existing and past land use, unaccounted diversions, and changing climate." (*Id.* at pp. 8-9.)

Because this order limits Respondents' diversions to the amount reasonably needed for consumptive uses at the Ranch unless water diverted for nonconsumptive use is returned to the creek, we conclude that it is not appropriate to apply Richter et al.'s "extremely conservative" general presumption without more specific evidence of an expected benefit to fish in Stanshaw Creek. (Hrg. Trans. Vol. 1 at pp. 77:23; see also *id.* at pp. 77:24-78:4)¹⁷

The cold-water pool near Stanshaw Creek's confluence with the Klamath River provides valuable refuge habitat for juvenile salmonids, and access to the pool should be possible at flows between 2 to 3 cfs. (See MMR-21 at p. 22; NMFS-3 at 12; CDFW-7 at p. 6; CDFW-11 at pp. 2-3.) Based on the limited hydrologic evidence available, limiting Respondents' diversions to their reasonable consumptive needs will be consistent with NMFS' recommendation and result in flows sufficient to maintain the habitat value of Stanshaw Creek.

Second, there are two other known diverters on Stanshaw Creek, both of which claim water rights of junior or equal priority to Respondents' claimed pre-1914 water right. Mountain Home is located upstream of the Ranch and diverts under a water right with a priority date junior to Respondents' claimed right. (WR-1, ¶ 9.a.) Mr. Konrad Fisher is located downstream of the Ranch and diverts water under the same claimed pre-1914 right as Respondents, and also claims an unexercised riparian right junior in priority to

¹⁷ This order should not be construed to require comprehensive, site-specific studies in every situation in which the Division seeks to impose bypass flow requirements on water right holders. What is required, however, is some evidence of the benefits of a particular bypass flow requirement beyond a general presumption. Such evidence could also include, but is not limited to, appropriate regional studies, State Water Board policies and regulations, testimony from individuals familiar with the needs of particular resources in a watershed or region, and historical evidence about the relationship between flows and fish populations.

Respondents. (See *id.* at ¶ 9.b; OMRT-2, p. 1 [asserting share of the same claimed pre-1914 appropriative water right as Respondents], p. 5 [claiming riparian right based on 1911 patent date]; *Rindge v. Crags Land Co.* (1922) 56 Cal.App.247, 252-253 [explaining that appropriative right may be senior to a riparian right if the appropriative right was perfected before the patent date of the claimed riparian parcel].) Although the Prosecution Team contends that the NMFS bypass flow recommendation “applies to all diverters” on Stanshaw Creek, this proceeding and order applies only to Respondents. (Prosecution Team Closing Brief at p. 13:22.)

The rule of priority is not absolute, and competing principles such as the public trust doctrine “may justify the Board’s taking action inconsistent with a strict application of the rule of priority.” (*El Dorado Irr. Dist.*, *supra*, 142 Cal.App.4th at p. 965.) The subversion of water right priorities, however, is permissible only in limited circumstances, such as when “enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust.” (*Id.* at p. 967.) There is no evidence in the record that following the rule of priority here would result in the unreasonable use of water or harm to public trust resources, particularly with the restriction imposed by this order on Respondents’ diversions for hydropower generation. Nor is there any evidence in the record that imposing bypass flow requirements on all diverters from Stanshaw Creek—either in a separate enforcement proceeding involving all diverters or through the exercise of our regulatory authority—would be infeasible. We thus decline to impose a bypass flow requirement on Respondents in this proceeding. (See *id.* at p. 970.)

Although NMFS, the Karuk Tribe, Konrad Fisher, and WCT’s comments on a draft of this Order attempt to re-characterize the information submitted in support of NMFS’ recommended bypass flow (see, e.g., Justin Ly, Comments on the Draft Order on the Matter of Waste, Unreasonable Use, Unreasonable Method of Use and Unreasonable Method of Diversion of Water by Douglas and Heidi Cole and Marble Mountain Ranch (Dec. 13, 2024)), none of their comments dispute that more water will be available to support public trust resources as a result of this Order.¹⁸ Nor do they dispute our determination that imposing a bypass flow in this proceeding, without addressing other junior right holders on the stream, would subvert the rule of priority. As we described above, this Order does not require “expensive stud[ies] to show particularized harm to

¹⁸ Mr. Fisher also contends that a bypass flow is necessary to protect the exercise of his water rights, but the document he cites in support of his argument does not show where his point of diversion is located. (Konrad Fisher, Comment Letter on Draft Order (Dec. 13, 2024) at p. 3 [citing KR-3 at p. 20].) Though we decline to impose a bypass flow requirement, Respondents should have a strong interest in complying with this Order in a manner that reduces the likelihood of future water right disputes, and the precise location of where Respondents’ hydropower tailwater should be returned to Stanshaw Creek, if Respondents seek to continue such diversions, is best resolved through the compliance plan process required by Directive 4 of this Order.

salmonids.” (Chairman Russell Attebery, Comment Letter on Draft Proposed order (Dec. 12, 2024) at p. 2.) But if the Board is to adopt a bypass flow at the recommendation of a party in an enforcement proceeding, the party must (1) submit sufficient evidence to support the assumptions and presumptions underlying the recommendation; and (2) the recommendation must be consistent with our obligation to “preserve water right priorities to the extent those priorities do not lead to violation of the public trust doctrine.” (*El Dorado Irr. Dist.*, *supra*, 142 Cal.App.4th at 966.) Although the parties’ evidence and comment letters in this proceeding do not meet these standards, from the parties may develop such evidence in future proceedings—or, in NMFS’ case, by exercising its own regulatory authority—to seek a bypass flow requirement if they believe that the implementation of this Order does not result in sufficient flows to support public trust resources in lower Stanshaw Creek.

Accordingly, we hold that Respondents’ hydropower operations are unreasonable and direct Respondents to cease diverting water for hydropower unless they return their hydropower tailwater to Stanshaw Creek at a point above the Highway 96 crossing. We decline, however, to impose NMFS’ recommended bypass flow requirement on Respondents in this proceeding.

4.4 Respondents’ Diversion Infrastructure

The Prosecution Team contends that three other aspects of Respondents’ diversion infrastructure are unreasonable: (1) the lack of a fish screen on the diversion intake; (2) the inability to control the amount of water that enters Respondents’ ditch; and (3) the use of an earthen conveyance ditch, which purportedly results in unreasonable losses and ditch failures. We agree that Respondents’ inability to limit their diversions to their reasonable and beneficial uses is unreasonable, but there is insufficient evidence to persuade us that other aspects of Respondents’ diversion infrastructure are unreasonable.

4.4.1 Respondents’ inability to control their diversion is unreasonable.

Respondents’ point of diversion does not contain a control device or a reliable method of measuring Respondents’ diversions. (WR-9 at ¶ 15.) Instead, Respondents control their diversions by manually rearranging hand-stacked rocks on their diversion dam. (*Id.*; see also WR-13 at ¶ 26; Hrg. Trans. Vol. 3, pp. 10:9-20, 133:10-19; WR-82 at p. 2441; Hrg. Trans. Vol. 2, pp. 215:24-216:2; Hrg. Trans. Vol. 4, p. 261:1-16; WR-85 at p. 2441, fn. 1.) The point of diversion thus operates independent of demand, limited only by available flow, the arrangement of rocks at the diversion structure, and the capacity of the diversion ditch, and it is not possible to accurately calculate how much water is being diverted at any one time. (WR-82 at p. 2439.) Respondents’ diversion of more water than the ditch can handle can also lead to overtopping and adverse water quality impacts. (See WR-9 at ¶ 31; WR-13 at ¶¶ 22-27.)

Respondents' inability to control and measure their diversions means that they regularly and permanently remove more water from Stanshaw Creek than they can beneficially use. (Hrg. Trans. Vol. 1 at p. 47:12-20.) Such diversions occur when Respondents divert more water than is necessary to meet their consumptive needs, but less water than they require to operate their hydropower system. (*Id.* at p. 48:1-8.) Because such water is not applied to beneficial use, its diversion is unauthorized under California law. (Water Code § 100; *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 891 [pre-1914 appropriative rights are "limited to the amount of water actually put to a beneficial use by the diverter, rather than the amount claimed or diverted"].) The lack of a reliable measuring device at the point of diversion is also unreasonable because it prevents Respondents from complying with their obligations under the Board's measurement and monitoring regulations. (See Cal. Code Regs., tit. 23, § 931 *et seq.*)

We conclude that Respondents' inability to measure their diversions and limit them to the amount that can be put to beneficial use is unreasonable, and order Respondents to install an appropriate diversion control structure at their point of diversion.

4.4.1.1 The Prosecution Team failed to meet its burden of showing that the absence of a fish screen at the point of diversion is unreasonable.

The Prosecution Team alleges that the lack of a fish screen at the Ranch's point of diversion is unreasonable because fish can become entrained and killed if they enter the diversion ditch and are "caught in the faster moving water that enters the penstock that conveys water to the hydropower turbines." (WR-1 at p. 15, ¶ 33.a.) There is no evidence, however, that fish have ever been entrained by Respondents' unscreened diversion. The only discussion of this issue in the evidentiary record appears to be speculation by a CDFW witness.¹⁹ (CDFW-1 at ¶ 10 [opining that salmonids "*could* be harmed by entering the Diverters' unscreened diversion." (italics added)].)

The evidence shows that the risk of entraining Coho salmon in Respondents' diversion is minimal. As a study submitted by CDFW found, there are at least two significant—if not complete—impediments to fish passage between Stanshaw Creek's confluence with the Klamath River and Respondents' diversion. (See CDFW-7 at pp. 3-4; see also MMR-21 at p. 6.) This may explain why the various inspections and studies that have

¹⁹ In his comments on a draft of this Order, Mr. Fisher contends that the record does contain evidence of fish being stranded in Respondents' diversion, and that he has personally seen fish in the diversion on more than a dozen occasions since 1995. (Konrad Fisher, Comment Letter on Draft Order (Dec. 13, 2024) at p. 5.) Mr. Fisher's comment letter is not evidence and he cites no evidence in the record to support his contentions.

occurred in Stanshaw Creek since 2000 have observed only two fish upstream of the Highway 96 crossing.²⁰ (See WR-1 at p. 5; CDFW-7 at p. 3.)

The parties cite no authority to suggest that the absence of a fish screen on a diversion constitutes a *per se* unreasonable method of diversion. Nor has the Prosecution Team or any other party submitted evidence showing that there will be an unreasonable impact to public trust resources if Respondents' diversion is not screened. In the absence of such evidence, we conclude that the Prosecution Team has not met its burden of showing that Respondents' failure to screen their diversion is unreasonable.

4.4.2 There is insufficient evidence to support a finding that Respondents' earthen conveyance ditch is an unreasonable method of diversion.

The Prosecution Team contends that Respondents' use of an earthen conveyance ditch is unreasonable for two reasons. First, the Prosecution Team alleges that an unreasonable amount of water—approximately 27 percent of water diverted—is lost and unavailable for beneficial use in the conveyance ditch. (WR-1 at p. 14.) Second, the Prosecution Team contends that the conveyance ditch constitutes an unreasonable threat to water quality and public trust resources because it is “prone to failing and overtopping” and such events result in “erosion and sediment discharges to Stanshaw Creek.” (*Id.* at pp. 14-15; see also WR-9 at ¶¶ 19, 31.) Water quality impacts may also occur when “material from the up-slope cut bank slumps into the ditch,” which can result in partially or completely damming the ditch and diverting stream flow out of the ditch. (WR-9 at ¶ 31.) The record contains evidence of multiple ditch failures. (*Id.* at ¶ 35; WR-89 at p. 2524.)

There is insufficient evidence in the record to conclude that Respondents' use of their earthen diversion ditch results in unreasonable losses, so long as the other requirements of this order are complied with. Open-ditch conveyance systems are common throughout California, and we have never adopted a policy that such systems are unreasonable *per se*. (See Hrg. Trans. Vol. 2, at p. 138:2-21; Decision 1600 at p. 50 [declining to hold the use of unlined canals unreasonable]; see also *Tulare, supra*, 3 Cal.2d at p. 573 [“An appropriator is not compelled . . . to divert in the most scientific manner known” to reduce conveyance losses in earthen ditches.]) The Prosecution Team notes that conveyance losses in the ditch from the POD to the hydropower system penstock have been measured at 0.5 cfs—approximately 16 percent or less of the ditch's capacity. (See Prosecution Team Closing Brief at p. 3:15-24; see also MMR-

²⁰ If barriers to passage between the Klamath River and Respondents' point of diversion are eventually removed in the future, we and several of the agencies who were parties to this proceeding retain discretion to ensure Respondents screen their diversion. (See Paul S. Kibel, Comments of WCT on Draft Order (Dec. 13, 2024) at p 6.)

18 at p.4 [estimating ditch losses at 0.4-1.0 cfs].) The only testimony in the record on ditch losses indicates that measured losses of up to 27 percent are not atypical for open-ditch conveyance systems. (Hrg. Trans. Vol. 2, 139:7-19.)

The fact that an upstream diverter uses a pipeline to convey water from its point of diversion to its place of use does not render Respondents' use of an earthen conveyance ditch unreasonable. (See Prosecution Team Closing Brief at 22:27-23:5.) Although the existence of such a pipeline suggests that it may be feasible for Respondents to install a pipeline at their own point of diversion, the Prosecution Team offered little evidence about the physical and financial challenges of doing so. (*Id.* [citing only pictures contained in WR-118 at p. 2827]; see also WR-114 at p. 2774 [estimating cost of piping ditch at approximately \$78,000 in 2016].) On the other hand, Mr. Meyer testified that installing a pipeline or lining a ditch like the Ranch's would be expensive and time-consuming. (Hrg. Trans. Vol. 2, at p. 141:3-14.) Such limited, conflicting evidence does not support an order directing Respondents to line their diversion ditch.²¹ (See *Tulare*, *supra*, 3 Cal.2d at 573.)

In any event, even if there were sufficient information in the record that would allow us to find that installing a pipeline in the Ranch's conveyance ditch is technically and financially feasible, feasibility is only one factor in our consideration of whether the conveyance ditch constitutes an unreasonable method of diversion. (See Decision 1600 at pp. 24-29.) The water savings associated with minimizing conveyance losses is dwarfed by the savings that will likely occur from requiring Respondents to install an adequate diversion control structure and generate power more efficiently—both of which should also reduce conveyance losses in Respondents' diversion ditch.

Such actions in combination with Respondents' compliance with the CAO will also likely eliminate ditch failures. Aside from the observations that led to the CAO's issuance (WR-89), the Prosecution Team did not submit any evidence that tends to show that ditch failures will continue to occur if Respondent does not abandon the use of its earthen ditch. The CAO itself does not necessarily require Respondents to abandon their earthen diversion ditch in favor of a piped conveyance line (See WR-142 at pp. 3142, 3144-3145.) Moreover, we expect that the installation of an appropriate control mechanism at Respondents' point of diversion, and the installation of a more effective

²¹ Mr. Fisher's comments on the draft of this Order argued that the "most practical way for MMR to limit their diversion to the amount of water needed for beneficial use is to divert water with a pipe rather than a ditch" because it would reduce the total number of control devices Respondents would need to install. (Konrad Fisher, Comment Letter on Draft Order (Dec. 13, 2024) at pp. 4-5.) Although we decline to require Respondents to replace their earthen diversion ditch, we anticipate that Respondents will investigate the relative efficiency of various alternatives in developing the compliance plan required by Directive 4 of this Order.

power generation system, will reduce the amount of water Respondents divert through the conveyance ditch for their reasonable and beneficial consumptive and nonconsumptive uses. The diversion of less water, particularly when Stanshaw Creek flows are high should reduce the risk of ditch failures due to overtopping. (See WR-9 at ¶ 31.)

In comments on a draft version of this Order, WCT argues that there is a lack of evidence to support our determination. Specifically, WCT argues that if Respondents divert solely for consumptive use, conveyance losses as a percentage of their diversion will be substantially higher than the percentage of water lost in conveyance when Respondents divert for both consumptive and hydropower uses. (Kibel, Comments of WCT on Draft Order (Dec. 13, 2024) at pp. 8-10.) There are three problems with this argument. First, the evidentiary record lacks support for WCT’s argument. The December 2024 analysis prepared by Cascade Stream Solutions and submitted as an exhibit to WCT’s comment letter was filed long after the evidentiary record closed.²² And WCT’s reliance on Cascade Stream Solutions’ November 2014 technical memorandum (see OMRT-6) is misplaced. That memorandum did not determine that Respondents’ diversions for consumptive use resulted in conveyance losses of 52 percent. It did, however, expressly state that “[d]etermining acceptable carriage loss from the point of diversion to the point of use is outside the scope of this investigation;” and that the losses measured from Respondents’ conveyance system were “not uncommon in Siskiyou County.” (OMRT-6 at p. 11.)

Second, even if conveyance losses associated with Respondents’ consumptive use would constitute a greater percentage of their expected future diversions, WCT’s analysis admits that conveyance losses from a smaller total diversion will be less in absolute terms than the losses associated with Respondents’ unreasonable hydropower diversions. (Compare Paul S. Kibel, Comments of WCT on Draft Order (Dec. 13, 2024) at p. 8 [estimating losses of 0.26 cfs] with OMRT-6 [measured losses of 0.4 cfs].) Thus, although there is insufficient evidence in the record to declare Respondents’ conveyance losses unreasonable, WCT effectively concedes that this Order will reduce those losses so that the water conserved is available to support downstream public trust uses. Even on a percentage basis, the conveyance losses WCT anticipates from Respondents’ diversions for consumptive use falls far below the 83 percent losses that were deemed “inefficient and wasteful” by the decision in *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 585. In any event, even if there were sufficient evidence in the record to determine that Respondents’ non-consumptive diversions will

²² Notably, WCT opposed reopening the evidentiary record to allow for the submission of additional information about conveyance losses. (See, Notice of Status Conference (Dec. 19, 2022) at p. 8; 2023-02-02 Marble Mountain Ranch Status Conference Recording at 1:00:00 – 1:01.)

result in conveyance losses of 52 percent, there remains insufficient evidence to determine that such losses are unreasonable.

We do not read *Erickson* to stand for the proposition that any conveyance losses over 50 percent are unreasonable per se. Although *Erickson* reversed the trial court's determination that "losses amounting to five-sixths of the flow" were "reasonable and consistent with local custom," it did not hold that any losses exceeding 50 percent of the total diversion are unreasonable per se. (*Erickson, supra*, 22 Cal.App.3d at 584-85; see also *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 574 [discussing various irrigation systems with losses exceeding 50 percent].) Although there may be situations in which conveyance losses of 50 percent (or less) are unreasonable, the evidentiary record here does not support such a finding.

Third, WCT apparently misunderstands the evidentiary burden in this proceeding. This is an adjudicative enforcement proceeding against a pre-1914 water right claimant in which the Prosecution Team bears the burden of proving that Respondents' losses are unreasonable. Contrary to WCT's characterization, we have not found that Respondents' "use of the earthen diversion ditch to convey water . . . was reasonable." (Kibel, Comments of WCT on Draft Order (Dec. 13, 2024) at p. 9.) We find only that the Prosecution Team and aligned parties in this proceeding failed to establish that Respondents' conveyance losses are unreasonable.

Accordingly, we decline to direct Respondents to stop using their earthen conveyance ditch.²³

CONCLUSION

Respondents' diversions for non-consumptive hydropower generation are unreasonable because they regularly fail to put those diversions to beneficial use, and because their failure to return hydropower tailwater to Stanshaw Creek above the Highway 96 crossing has unreasonable effects on other beneficial uses including those needed to maintain fishery resources. Respondents' failure to implement a method of diversion that limits their diversions to their reasonable and beneficial uses is also unreasonable. We therefore order Respondents to return any water diverted for hydropower generation to Stanshaw Creek at a point above the Highway 96 crossing, limit their diversions to the amount of water needed for beneficial use, install a control mechanism at their point of diversion adequate to limit diversions to the amount needed for their reasonable and beneficial uses, and take other actions to ensure the appropriate implementation of

²³ Nothing in this Order should be construed as authorizing or excusing any threat to water quality or unauthorized discharge to surface waters of the state and the United States associated with ownership and operation of the ditch, or of any associated regulatory requirements or liabilities.

these directives. We decline, however, to impose a bypass flow requirement on Respondents' diversions in this proceeding.

ORDER

IT IS HEREBY ORDERED that, pursuant to Water Code section 275, article X, section 2 of the California Constitution, and Water Code section 100, that the Respondents, and any successor in interest, shall cease the misuse of water as identified in this Order.

Respondents shall:

1. Limit diversions to the amount of water reasonably needed for beneficial use.
2. Install a control mechanism at the point of diversion adequate to limit diversions to the amount needed for Respondents' reasonable beneficial use.
3. Return any water diverted for non-consumptive use to Stanshaw Creek at a point above the Highway 96 crossing.
4. No less than 90 days after the issuance of this Order, Respondents shall electronically submit a compliance plan to the Division of Water Rights Enforcement Section (Enforcement Section) for its review and approval. The compliance plan shall address how Respondent will comply with directives 1 through 3, and shall also include:
 - a. A description of actions the Respondents will take to install an adequate control mechanism at their point of diversion.
 - b. A description of actions the Respondents will take to eliminate waste and limit their diversions to water beneficially used.
 - c. A description of actions Respondents will take to cease diverting water for non-consumptive use or return water diverted for non-consumptive use to Stanshaw Creek.
 - d. A description of methods the Respondents will take to monitor and report their diversions, as required under the California Code of Regulations, title 23, sections 931 *et seq.*
 - e. A description of local, state, and federal approvals necessary to implement the compliance plan, and of actions taken to obtain those approvals.
 - f. A time schedule for implementing the compliance plan, including milestones for implementing each set of actions described in this paragraph. The Respondents shall electronically submit an interim report to the Enforcement Section describing the completion of actions for each milestone in the time schedule. The time schedule shall provide for completing all compliance actions within six months or less after

necessary local, state, and federal approvals are obtained. The time schedule shall provide that any compliance action that does not require local, state, and federal approvals shall be completed within six months or less after approval of the compliance plan.

- g. The compliance plan shall be complete and fully implemented before February 1, 2027.
5. Within 30 days of the Enforcement Section's receipt of the compliance plan, the Enforcement Section must advise the Respondents whether the compliance plan is consistent with all provisions of this order. If the Enforcement Section finds inconsistencies, Respondents and the Enforcement Section shall meet and confer within 30 days regarding any disputed issues and attempt to resolve the disputes. If they reach an agreement, then the Respondents must file the amended compliance plan within 30 days. If Respondents and the Enforcement Section cannot resolve their disagreement, then they shall submit their disagreement to the Board's Deputy Director for Water Rights, who shall then consider the parties' arguments and resolve the relevant issues. Respondents must implement the compliance plan once the plan is approved and implement the compliance plan pursuant to its time schedule. The Respondents may not modify the compliance plan absent the Enforcement Section's approval.
6. Upon request from the Enforcement Section to determine compliance with this order, the Respondents: (i) shall provide any information or documents that the Enforcement Section requests to investigate the Respondents' compliance; and (ii) shall provide reasonable access to Enforcement Section personnel to inspect the Respondents' facilities and records.
7. Respondents shall obtain all necessary local, state, and federal permits and/or approvals before initiating any of the actions in a compliance plan. This Order does not approve, direct, or endorse any action the Respondents undertake before obtaining these permits and/or approvals, and before approval of the compliance plan pursuant to directive 5.

Nothing in this Order limits the authority of the State Water Board to take further enforcement action for any violation not addressed by this Order or for any future violations, including any violation of this Order.