

1 Barbara A. Brenner (SBN 142222)  
Kerry A. Fuller (SBN 292466)  
2 CHURCHWELL WHITE LLP  
1414 K Street, 3<sup>rd</sup> 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 AND MARBLE  
MOUNTAIN RANCH

7  
8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

9  
10 In the Matter of Douglas Cole and Heidi Cole  
and Marble Mountain Ranch, Draft Order No.  
11 2017-00XX-DWR

Pre-Hearing Brief

Hearing Date: November 13, 2017  
Hearing Time: 10:00 a.m.

12  
13  
14 **I. Introduction**

15 Douglas and Heidi Cole (the “Coles”), owners and operators of Marble Mountain Ranch  
16 (“Ranch”) submit this brief in summary of the testimony offered in their case in chief and to  
17 establish that the State Water Resources Control Board (“Water Board”) lacks the jurisdiction to  
18 require that the Coles implement improvements at the Ranch under the public trust doctrine. The  
19 Water Board has previously confirmed that the Coles possess a pre-1914 three (3) cubic foot per  
20 second (“cfs”) water right, and the evidence presented establishes that Stanshaw Creek does not  
21 provide significant habitat for salmonids in the Klamath River basin. Further, the public trust  
22 doctrine does not provide the Water Board with jurisdiction to regulate an established pre-1914  
23 doctrine does not provide the Water Board with jurisdiction to regulate an established pre-1914  
24 right holder after the Water Board has already made the determination that a pre-1914 right has  
25 been properly established.

26  
27 **II. Evidence Presented**

- 28 1. The Coles’ pre-1914 water right is outside the scope of the public hearing and the Coles’ pre-1914 water right has already been established.

1 a. The Coles' water right is outside the scope of the hearing

2 The notice of public hearing for Douglas and Heidi Cole and Marble Mountain Ranch  
3 issued on June 9, 2017 provides that the key issues that will be addressed at the hearing are:

4 1) Does the past or current diversion or use of water by Douglas and Heidi  
5 Cole and Marble Mountain Ranch constitute a waste, unreasonable use,  
6 unreasonable method of use, or unreasonable method of diversion of water,  
particularly in light of any impacts to public trust resources?

7 2) If the past or current diversion or use of water by Douglas and Heidi Cole  
8 and Marble Mountain Ranch constitutes a waste, unreasonable use, unreasonable  
9 method of use, or unreasonable method of diversion of water, what corrective  
10 actions, if any, should be implemented, and with what time schedule should they  
11 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? (Notice of Public  
Hearing, p.2)

12 Neither of these key issues include discussion of the Coles' established pre-1914 three (3)  
13 cfs water right and the Notice of Rescheduled public hearing issued on August 16, 2017, does  
14 not extend the scope of the hearing beyond the key issues identified in the notice of public  
15 hearing issued on June 9, 2017. Thus, any discussion of the Coles' pre-1914 3 cfs water right is  
16 outside the scope of the hearing. Furthermore, the Coles' pre-1914 three (3) cfs water right has  
17 already been established.  
18

19 b. The Coles have an establish pre-1914 right to divert up to three (3) cfs of water

20 The Coles have been engaged in an over twenty (20) year negotiation process with the  
21 Water Board and other stakeholders in the Stanshaw Creek system. A majority of that time has  
22 been spent establishing the Coles' pre-1914 three (3) cfs water right. After many years, multiple  
23 stakeholder meetings, and several independent investigations and reports of the Coles' water  
24 right, in 2015, the Water Board, Division of Water Rights in its Report of Inspection of the  
25 inspections made on 12-17-2014 and 2-12-2015 ("Report of Inspection"), stated that it disagreed  
26 with the conclusions of the Lennihan/Cascade Stream Solutions report that found the Coles' pre-  
27  
28

1 1914 right may be as low as 1.16 cfs, because the Lennihan/Cascade Stream Solutions report  
2 failed to incorporate the holding from an appellate court decision: *Millview County Water*  
3 *District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879. *Millview* provides  
4 that a forfeiture of a water right claim only occurs when a claimant's use of less than the full  
5 appropriate right lasts for five years and there is a conflicting claim to the water during that five-  
6 year period. Based on this caselaw, the Report of Inspection confirms the Coles' pre-1914 3 cfs  
7 right, stating:

9           There is no evidence in the record to suggest that there were any  
10 conflicting actual appropriations or application during any of the forfeiture periods  
11 found in the Lennihan/Cascade Stream Solutions report (i.e. 1920s through around  
12 the mid-1950s). Similarly, although Konrad Fisher has more recently alleged a  
13 conflicting claim, there is no evidence of a decrease in the MMR diversion and use  
14 during that time.

15           Given the unsettled legal issues surrounding forfeiture, the State  
16 Water Board or a reviewing court could reasonably conclude that the MMR pre-  
17 1914 water right may be up to the full capacity of the ditch, which MMR claims to  
18 be 3 cfs. On that basis, the Division [of Water Rights] concludes that MMR's  
19 diversions do not appear to be in excess of its claimed pre-1914 water right. (Report  
20 of Inspection, p. 14.)

21 2. Stanshaw Creek does not provide significant habitat for Coho Salmon in the  
22 Klamath River Basin

23           Steven Cramer's inspections at the Ranch demonstrate that Stanshaw Creek and  
24 the floodplain pool off the Klamath River does not provide significant habitat for Coho  
25 salmon in the Klamath River Basin. Numerous studies have confirmed and Mr. Cramer  
26 agrees that Stanshaw Creek is not suitable habitat for Coho salmon to spawn, though it  
27 does provide some growth habitat for non-native juvenile Coho salmon that leave the  
28 Klamath Basin and enter the floodplain pool. (Exhibit MMR-17 Cramer Testimony, p. 6-  
8.) The floodplain pool off stream of the Klamath River near Stanshaw Creek is not  
naturally sustainable and requires significant human intervention to redirect flow to the  
pool during low flow periods, even where the Coles limit their diversion of water to serve

1 their domestic and consumptive use needs. (Exhibit MMR-17 Cramer Testimony, p. 13-  
2 14.) A bypass flow of two (2) cfs, which is currently present at the diversion during the  
3 present low flow period and without returning flow to Stanshaw Creek is sufficient to  
4 provide habitat for the minimal use of the floodplain pool on the Klamath River at  
5 Stanshaw Creek by Coho salmon and other salmonid species. (Exhibit MMR-17 Cramer  
6 Testimony, p. 12.)

7  
8 3. The requirements under Draft Order No. 2017-00XX-DWR are prohibitively  
9 expensive

10 Draft Order No. 2017-00XX-DWR (“Draft Order”) require that the Coles  
11 return flow to Stanshaw Creek. Previous estimates of the costs associated with this  
12 project have been at least \$500,000. However, based on recent research, the costs of this  
13 project are higher and closer to requiring between \$1 million to \$2 million to implement.  
14 The permitting costs alone are likely to be roughly \$226,000. (Jeff Meyer Testimony,  
15 Exhibit MMR 18.) The permitting cost estimate assumes that the environmental  
16 documentation for the project only requires a mitigated negative declaration, not a full  
17 environmental impact report (“EIR”). Where an EIR is required, the costs for the  
18 permitting of the return flow project are likely to at least double to between \$450,000 and  
19 \$500,000, just for permitting. A project to return flow to Stanshaw Creek is therefore  
20 prohibitively expensive given the Coles financial position and the facts that they are  
21 currently operating the Ranch at a loss. (Exhibit MMR-16.)

22  
23  
24 **III. Legal Argument**

25 Even if the Coles were in a position to finance the return flow project, the Water Board  
26 lacks the jurisdiction under the public trust doctrine to require the Coles to implement such a  
27 project.

1           1. The Diversion Ditch does not Constitute Waste, Unreasonable Use or an Unreasonable  
2           Method of Diversion of Water

3           The Draft Order alleges that the ditch diversion system at the Ranch is an  
4 unreasonable use of water and an unreasonable method of diversion. (Draft Order ¶¶ 29 – 32.) A  
5 strict definition of what constitutes an unreasonable use of water has never been established.  
6 (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1473.) Instead,  
7 the determination is made by evaluating the circumstances in which the water is used. (*Id.*)

8           The State Water Board has found that use of an unlined ditch in a desert  
9 environment to irrigate crops where improvements could result in significant conservation was  
10 not a waste of water. (California State Water Resources Control Board, Imperial Irrigation  
11 District Alleged Waste and Unreasonable Use of Water, Decision 1600 (June 21, 1984) (finding  
12 that failing to implement a conservation plan was an unreasonable use of water, but the unlined  
13 ditches themselves were not an unreasonable use) (“Imperial Irrigation District decision”).) This  
14 is in line with the California Supreme Court’s holding that appropriators, as a matter of law,  
15 possess the right to divert water through earthen ditches, provided that conveyance losses must  
16 be reasonable. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489.)

17           The Coles’ diversion ditch is similar to those that were not an unreasonable use or  
18 waste of water in the Imperial Irrigation District decision. The diversion uses unlined ditches to  
19 convey water to the Ranch and is operated in a manner to keep conveyance loss to a minimum.  
20 In addition, the Coles have greatly reduced the amount of water they divert during low flow  
21 periods to comply with the National Marine Fisheries Services (“NMFS”) bypass flow  
22 recommendation. The reduced diversion, during low flow periods, complies with the NMFS  
23 bypass flow recommendation, but this reduction in no way demonstrates an intention to waive or  
24 reduce the amount of their established pre-1914 right to divert three (3) cfs of water, nor does it  
25 waive the Coles’ right to develop alternatives that ensure the Coles’ operations do not impact

1 fishery resources in Stanshaw Creek. The Coles regularly inspect the diversion during high-flow  
2 periods to address overtopping and seepage concerns as well.

3 All of the water the Coles divert is put to a beneficial use as has been  
4 demonstrated in their testimony and exhibits for the public hearing. These uses include domestic  
5 use for residents and guests at the Ranch, hydropower generation, irrigation, stock watering, dust  
6 control, and fire protection. Thus, the Coles are not engaged in waste, unreasonable use of water  
7 or an unreasonable method of diversion.  
8

9 2. The Water Board Lacks the Jurisdiction to Require the Coles to Change the Operation  
10 of the Diversion Based on Public Trust Resources

11 The Draft Order raises the public trust doctrine as a basis for prohibiting  
12 discharges to Irving Creek, decreasing the diversion year-round, and for submitting plans for  
13 review and approval by the Water Board, Regional Water Board, and other responsible agencies,  
14 to return flows to Stanshaw Creek by April 17, 2017. (Draft Order ¶¶ 38, 47.) The public trust  
15 doctrine, however, cannot be used to invoke the Water Board's jurisdiction in this case.  
16

17 The public trust doctrine requires the Water Board to consider the effects of a  
18 proposed diversion on trust resources, including fish species and ecological values, in connection  
19 with the issuance of post-1914 permits. (*National Audubon Society v. Super. Court* (1983) 33  
20 Cal.3d 419.) To date, no California court has necessarily held that the public trust doctrine  
21 would allow the Water Board to assert its jurisdiction and curtail rights held by pre-1914  
22 appropriators. A decision to extend jurisdiction in this manner would likely result in vigorous  
23 opposition by numerous pre-1914 water right holders.  
24

25 To invoke the public trust doctrine, the Water Board must also show that the  
26 diversion *clearly* harms the interests protected by the public trust. (*National Audubon Society,*  
27 *supra*; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82.) Potential  
28 impacts do not suffice, nor do unsupported allegations. In the present case, the Draft Order

1 proposes corrective action based on NMFS' theoretical calculations of in-stream flow  
2 requirements. The Water Board lacks substantial evidence of harm to trust resources; this defect  
3 is compounded by the fact that the Coles have taken significant steps to eliminate the possibility  
4 of harm to trust resources by curtailing diversions during low flow periods. Invoking the public  
5 trust doctrine in this context would require an extraordinary finding of harm to justify the  
6 extension of this principle to holders of pre-1914 rights. Actions taken by the Coles do not  
7 support this finding or the extension of established case law regarding the public trust doctrine.  
8

9 **IV. Conclusion**

10 Discussion of the Coles' established pre-1914 three (3) cfs water right is outside the  
11 scope of the public hearing. The evidence the Coles have submitted shows that Stanshaw Creek  
12 is not significant habitat for Coho salmon in the Klamath River, beyond providing some habitat  
13 for non-native juvenile Coho salmon. That habitat is provided for Coho and other salmonid  
14 species through the two (2) cfs bypass flows the Coles already provide through their diversion  
15 management practices without requiring the return of water used for hydroelectric power  
16 generation to Stanshaw Creek. The costs of a project to return flow to Stanshaw Creek is  
17 prohibitively expensive. Even if the Coles were in a position to implement a return flow project,  
18 as established pre-1914 water rights holders, the Water Board lacks the jurisdiction to require the  
19 Coles do so under the public trust doctrine.  
20  
21  
22

23 Dated: October 6, 2017

CHURCHWELL WHITE LLP

24  
25 By 

26 BARBARA A. BRENNER  
27 Attorneys for Douglas Cole and  
28 Heidi Cole and Marble Mountain  
Ranch