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7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
8 STATE OF CALIFORNIA

9 In the Matter of:)
DOUGLAS AND HEIDI COLE AND MARBLE) **RESPONSE TO OBJECTIONS OF**
10 MOUNTAIN RANCH) **DOUGLAS AND HEIDI COLE AND**
11) **MARBLE MOUNTAIN RANCH TO**
) **PROSECUTION TEAM TESTIMONY**

12 **I. INTRODUCTION**

13 The Prosecution Team offers this response to objections submitted by Douglas and Heidi Cole and
14 Marble Mountain Ranch (collectively the “Diverter” or “Diverters”) to testimony and evidence the
15 Prosecution Team has submitted.

16 **II. EVIDENCE RELATED TO THE DIVERTERS’ PRE-1914 CLAIM OF RIGHT IS
ADMISSIBLE**

17 **A. Relevant Evidence in State Water Board Proceedings**

18 The State Water Resources Control Board (State Water Board) conducts adjudicative proceedings in
19 accordance with the provisions and rules of evidence set forth in section 11513 of the Government Code.
(Cal. Code Regs., tit. 23, § 648.5.1.) Pursuant to the Government Code, “[a]ny relevant evidence shall be
20 admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of
21 serious affairs, regardless of the existence of any common law or statutory rule which might make improper
22 the admission of the evidence over objection in civil actions.” (Cal. Gov. Code, § 11513, subd. (c).)

23 The Key Issues in the Notice of Public Hearing (Hearing Notice)¹ are:

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

28 ¹ Available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/notice_marblemountain.pdf (accessed Oct. 16, 2017).)

1 2) If the past or current diversion or use of water by Douglas and Heidi Cole and Marble
2 Mountain Ranch constitutes a waste, unreasonable use, unreasonable method of use, or
3 unreasonable method of diversion of water, what corrective actions, if any, should be
4 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?

5 **B. Evidence Addressing the Diverters' Pre-1914 Claim of Appropriation**

6 **1. Evidence Addressing the Diverters' Pre-1914 Claim of Appropriation is a**
7 **Relevant Threshold Inquiry**

8 Article X, section 2 of the California Constitution and section 100 of the Water Code both provide
9 that water rights are limited to water reasonably required for the beneficial use served and shall never extend
10 to the waste, unreasonable use, unreasonable method of use, or unreasonable method of diverting water.²
11 In prior decisions, the State Water Board has evaluated misuse based on seven factors: 1) Other potential
12 beneficial uses for conserved water; 2) whether the excess water serves a reasonable and beneficial purpose;
13 3) probable benefits of water savings; 4) the amount of water reasonably required for current use; 5) amount
14 and reasonableness of the cost of saving water; 6) whether the required methods of saving water are
15 conventional and reasonable rather than extraordinary; 7) availability of a physical plan or solution.
(Prosecution Team Exhibit WR-20³, Bates 1679-1684; WR-63, Bates 2318.) Not all of the above factors
apply or apply equally in every case. (WR-63, Bates 2318.) However, they provide guidance in determining
whether a particular use constitutes a misuse. (*Id.*)

16 Assessing the scope and extent of a basis of right is a reasonable threshold question in hearings
17 where the unlawful diversion and use of water is at issue. (*Young v. State Water Resources Control Board*
18 (2013) 219 Cal.App.4th 397, 406-407.) The State Water Board's authority to make a threshold determination
19 of a basis of right is not limited to rights and claims of right subject to its permitting authority. (*Id.*) As a
20 result, the State Water Board has the authority to make an initial determination of whether a party claiming a
21 pre-1914 appropriation or riparian has the right claimed. (*Id.*) Although the State Water Board conducts
22 reasonable use proceedings under the authority of Water Code section 275, as opposed to other sections of
23 the Water Code such as 1052 or 1831, the State Water Board has begun previous reasonable use
24 proceedings by reviewing the basis of right for the party alleged to be misusing water. Evaluations have
included, but have not been limited to, the type of claim of right, amounts claimed and put to beneficial use,
season of use, purpose of use, and diversion works.

25 In Water Right Decision 1600 (D-1600), the rights of the Imperial Irrigation District (IID) were not
26 at issue except insofar as its right was limited by misuse. (WR-20, Bates 1664.) There was also no dispute

27 _____
28 ² State Water Board regulations collectively refer to this as the "misuse of water." (Cal. Code Regs., tit. 23, § 855,
subd. (b).)

³ Further references to Prosecution Team exhibits will be "WR-[Exhibit Number]."

1 between competing water right holders. (WR-20, Bates 1684.) Still, the State Water Board proceeded to
2 survey the various bases for IID’s right to divert and use water, which included contracts, court decisions,
3 water transfers, and legislation. (WR-20, Bates 1664-1673.) An initial review of IID’s rights was necessary
4 to subsequently assess and understand whether IID was misusing water.

5 Water Right Order 2012-0004 similarly began with an extensive discussion of the construction and
6 operation of Hidden Lakes Estates and discussed the bases of right for diverting and using water. (WR-63,
7 Bates 2315-2316.) This included evidence that Hidden Lakes Estates purchased water from San Juan Water
8 District (SJWD) and evidence of SJWD’s basis of right. (WR-63, Bates 2316.) Like IID, reviewing Hidden
9 Lakes Estates’ rights for using water was necessary to understand whether it was misusing water.

10 Key Issue 1 is whether the “past or current” diversion or use of water by the Diverters constitutes a
11 misuse, particularly in light of any impacts to public trust resources. Evidence of the Diverters’ diversion or
12 use in the past is relevant to whether their past diversion or use of water has constituted a misuse.
13 Furthermore, whether the Diverters’ reasonably need the amount of water they claim for their reasonable
14 uses is relevant to factors the State Water Board considers in determining whether misuse has occurred.
15 Diversion or use by the Diverters’ predecessors in interest is relevant insofar as it is relevant to diversion or
16 use that continued when the Diverters took ownership of Marble Mountain Ranch and potentially continues
17 today. This evidence is relevant. The relevance of specific exhibits is discussed below. (*see* II.B.3.)

18 **2. Evidence Addressing the Diverters’ Pre-1914 Claim of Appropriation is** 19 **Relevant to Whether the Diverters’ Have the Right They Claim**

20 The Diverters have a pre-1914 *claim* of appropriation. Unlike the rights in D-1600 and Water Right
21 Order 2012-0004, their claim is not established. It has never been adjudicated by a court or addressed in any
22 decision or order of the State Water Board. The Diverters’ pre-1914 claims of appropriation originate from
23 an 1867 claim by Mr. E. Stanshaw for six hundred (600) miner’s inches, about 15 cfs, to be used for mining,
24 domestic and irrigation purposes on a large patented parcel that includes the present-day MMR property.
(WR-7; WR-80; WR-87.) Since then, the original property was subdivided, hydraulic mining ceased, and the
25 quantities of water put to beneficial use diminished significantly, with only limited amounts, approximately
26 0.35 cfs, put to beneficial use for domestic use and irrigation. (WR-82.) Until about 1965, only about 0.33-0.66
27 cfs was used for hydropower generation. (*Id.*) After 1965, diversions for hydropower generation increased to
28 about 3 cfs. (*Id.*) Historically, the Diverters’ diversion has only been limited by available flow and the capacity
and integrity of the ditch. (WR-87, Bates 2498.) According to the Diverters, they have been “deepening and
improving the diversion ditch.” (MMR-1, p. 11.)

Staff from the Division of Water Rights (Division) issued the Report of Investigation (Division ROI)
shortly after the appellate court decision in *Millview County Water District v. State Water Resources Control*
Board (2014) 229 Cal.App.4th 879 (hereinafter *Millview*). (WR-87, Bates 2499.) Previously, the prevailing
view among Division permitting staff was that no more than 0.49 cfs remained of the Diverters right and that
the right did not include hydropower. (WR-31, Bates 1836-1837.) However, the *Millview* court held that
forfeiture of a water right claim only occurs when a claimant’s use of less than the full appropriation lasts at

1 least five years, but in a change from previous practice, held that at least some of that period must also occur
2 in the face of a conflicting claim, such as an actual appropriation, an application to appropriate, or instream
3 public trust resources. (229 Cal.App.4th at 903-906.) At the time, staff believed the law was sufficiently
4 unsettled, and the evidence sufficiently undeveloped, to conclude that public trust resources constituted a
conflicting claim during any potential forfeiture period. (WR-87, Bates 2499.)

5 Shortly after the Division issue the ROI, the State Water Board addressed *Millview* in Water Right
6 Order 2016-0001. (Water Right Order 2016-0001 (*available at*
7 [https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2016/wro2016_0001.](https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2016/wro2016_0001.pdf)
8 *pdf* (accessed Oct. 17, 2017).) The State Water Board explained that one scenario giving rise to a conflicting
9 claim to support a finding of forfeiture involves the need for water to remain instream to protect public trust
beneficial uses. (*Id.* at p. 18.) The manner of asserting a conflicting claim is flexible and does not include
prior notice. (*Id.*) Whether a conflicting use was permissive is not relevant. (*Id.*)

10 In 1982, the Klamath River became a recreational component of the Wild and Scenic Rivers System.
11 (Pub. Res. Code, § 5093.54.) Under the California Wild and Scenic Rivers Act, “It is the policy of the State
12 of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values
13 shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and
14 enjoyment of the people of the state.” (Pub. Res. Code, § 5093.50, subd. (a).) Furthermore, “such use of these
rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning
of Section 2 of Article X of the California Constitution.” (*Id.*)

15 The Water Quality Control Plan for the North Coast Region (Basin Plan) further recognizes beneficial
16 uses. Relevant designated beneficial uses in the Middle Klamath Hydrologic Region include Cold Freshwater
17 Habitat; Contact and Non-Contact Recreation; Commercial and Sport Fishing; Spawning, Reproduction
18 and/or Early Development; Rare, Threatened or Endangered Species; Municipal; Hydropower Generation;
19 and Migration of Aquatic Organisms. (WR-62; WR-142.) Under the Basin Plan, “The beneficial uses of any
specifically identified water body generally apply to all its tributaries.” (*Id.*)

20 The Basin Plan temperature objective for intrastate waters prohibits any alteration of natural receiving
21 water temperature “unless it can be demonstrated to the satisfaction of the Regional Water Board that such
22 alteration in temperature does not adversely affect beneficial uses.” (*Id.*) The Basin Plan also includes site
23 specific dissolved oxygen objectives; a Total Maximum Daily Load (TMDL) Addressing Temperature,
24 Dissolved Oxygen, Nutrient, and Microcystin; and an Implementation Plan for the Klamath and Lost River
25 basins. (*Id.*) The Klamath River, within the Middle Klamath River Hydrologic Area, is classified as an
impaired waterbody under section 303(d) of the Clean Water Act for sediment, temperature, microcystin,
organic enrichment/low dissolved oxygen, and nutrients. (WR-13; WR-142.)

26 The implementation plan for the Klamath River includes a Thermal Refugia Protection Policy that
27 provides enhanced protection of thermal refugia and includes a policy directive and recommendation for State
28 Water Board staff to consider the impact of increased diversions in tributaries that provide thermal refugia
when issuing water right permits for surface water diversions in the Klamath River Basin. (*Id.*) The Basin
Plan specifically identifies Stanshaw Creek as a tributary to the Klamath River known to provide thermal

1 refugia. (WR-62.) According to the Thermal Refugia Protection Policy,

2 Thermal refugia are typically identified as areas of cool water created by inflowing
3 tributaries, springs, seeps, upwelling hyporheic flow, and/or groundwater in an otherwise
4 warm stream channel offering refuge habitat to cold-water fish and other cold water aquatic
5 species. The refugia created by tributaries in the Klamath River Basin are typically in the
6 plumes and pools of cold water that form in the mainstem at the tributary confluence.
7 Refugia can also exist in tributary streams themselves. Thermal refugia are essential to the
8 support of the cold water fishery because they moderate naturally elevated temperatures in
9 the mainstem Klamath River.

10 (*Id.*)

11 Determining whether the Diverters claim is a right to no more than 3 cfs is as important as
12 determining whether it is less than 3 cfs. The law and evidentiary record is more developed now than in
13 December 2015. Evidence addressing changes in the amount of water the Diverters and their predecessors in
14 interest put to beneficial is therefore relevant to determining whether the Diverters or their predecessors in
15 interest applied less than their claimed amount for at least five years. Evidence of public trust beneficial uses
16 is relevant to whether the need for water to remain instream to protect public trust beneficial uses has
17 constituted a competing claim. The relevance of specific exhibits discussed below (*see* II.B.3).

18 **3. WR 4-6, 15-80, 82, 86⁴, 92, 98, 170, and 193 and Discussion of Those Exhibits Is
19 Relevant**

20 The Hearing Officer should deny the Diverters' motion to strike WR 4-6, 15-80, 82, 8, 92, 98, 170,
21 and 193 and any discussion of those exhibits as more specifically discussed below.⁵

22 WR-4 and WR-5 is the water right file for Application 29449. WR-6 is the enforcement file. The
23 Diverters' predecessors in interest filed Application 29449. The Diverters took over ownership of the
24 application when they purchased Marble Mountain Ranch. These exhibits are relevant, because the
25 Diverters predecessors in interest, and later the Diverters, sought to divert and use water in the same
26 amount, using the same methods and the same diversion works, and for the same beneficial uses that the
27 Diverters now claim under their pre-1914 claim of right. Consequently, misuse and public trust impacts
28 identified in Application 29449 are relevant to the Diverters pre-1914 claim of right.

WR-15 is the original claim of E. Stanshaw. WR-16 is a typed version of the claim. These exhibits
are relevant, because they establish the original claim, including the amount, season, beneficial uses, and
place of use.

⁴ The Diverters include WR-8 on page 4, as opposed to WR-86 on page 3. The inclusion of WR-8 appears to be a
typographic error. WR-8 is the Statement of Qualification of Taro Murano, which unrelated to the Diverters' objection,
because it not address the Diverters' pre-1914 claim of right.

⁵ Reviewing these exhibits one by one, the many are unrelated (i.e. irrelevant) to addressing whether the Diverters have
a pre-1914 right and, consequently, irrelevant to the Diverters' objection.

1 WR-17 and WR-18 are the two volumes of Department of Water Resources Bulletin 94-6. They are
2 referenced in the water right file for Application 29449 as an estimate of the amount of water the Diverters’
predecessor in interest applied to beneficial use. WR-17 and WR-18 are included as best evidence.

3 WR-20 is D-1600, a decision of the State Water Board addressing the misuse of water. WR-21 is
4 Water Right Order 88-20, which followed D-1600 after litigation. WR-63 is Water Right Order 2012-0004.
5 These are prior decisions of the State Water Board addressing misuse. They are clearly relevant in a misuse
6 proceeding. They are not relevant to the Diverters’ objection, because they do not address pre-1914 rights.⁶

7 WR-22 is Application 29449, filed by the Diverters’ predecessors in interest. Application 29449 is
8 relevant, because it is essentially the same diversion and use of water occurring now - 3 cfs for hydropower
9 generation. The public trust impacts and evidence of misuse identified in the file for Application 29449
10 continue today. This is evidence of past misuse of water by the Diverters. This is especially important
11 evidence, because the operation and methods of diversion and the diversion works remain substantially the
12 same today as then.

13 WR-23 includes a discussion of how much water the Diverters’ predecessor in interest reasonably
14 needed for their beneficial uses, including hydropower, and an acknowledgment that hydropower use likely
15 did not begin until around 1940-1942. This is relevant to Key Issue 1 and relevant to a factor the State Water
16 Board considers in determining whether a misuse is occurring.

17 WR-24 is notification of the Diverters’ taking ownership of Application 29449. This is relevant,
18 because it establishes that the Diverters took ownership of Application 29449. WR-24 is an excerpt from the
19 file for Application 29449.

20 WR-25 is the assessor parcel map for the Diverters’ property and WR-26 is the grant deed. This
21 evidence is relevant, because it shows that the Diverters own the property encompassing Marble Mountain
22 Ranch.

23 WR-27 and WR-28 discuss how the measurement cited in Department of Water Resources Bulletin
24 94-6 was taken. They also include observations of the operation of the Diverters’ diversion works. This is
25 relevant to how much water the Diverters’ predecessor interest reasonably needed for beneficial uses at the
26 time and, in addition, relevant evidence of past misuse insofar as the diversion works remain in substantially
27 the same condition. WR-27 are and WR-28 excerpts from the file for Application 29449.

28 WR-29 is the Water Quality Control Plan for Control of Temperature in the Coast and Interstate
Water and Enclosed Bays and Estuaries of California (Temperature Plan). The Temperature Plan is
incorporated by reference into the Basin Plan. WR-29 includes temperature objectives and implementation
policies relevant to the issue of whether the Diverters’ impact public trust beneficial uses and, consequently,
whether those impacts constitute a misuse of water. WR-29 is also relevant to Cleanup and Abatement

⁶ Since the current proceeding is a proceeding for misuse, it is unclear what basis the Diverters have for alleging these exhibits are not relevant.

1 Order 2016-0031 (CAO). WR-29 is not relevant to the Diverters' objection, because it does not address pre-
2 1914 rights.

3 WR-30 is a staff memorandum to file documenting documenting a field inspection of the Diverters'
4 point of diversion and ditch. Staff observed the point of diversion, measured, flow and conveyance loss in
5 the ditch, and identified a rainbow trout in a sediment trap in the ditch. This is relevant to whether the
6 Diverters' have misused water in the past, whether fish can access the ditch, and whether the Diverters'
7 public trust impacts constitute a misuse of water. WR-30 is an excerpt from the water right file for
8 Application 29449.

9 WR-31 includes a discussion of how much water the Diverters' predecessors in interest reasonably
10 needed for their beneficial uses. WR-31 is an excerpt from the water right file for Application 29449.

11 WR-32 is the Diverters' Statement of Diversion and Use (Statement) 15022 and associated reports.
12 This is relevant, because it is evidence of the Diverters' claim of right. The Diverters themselves cite
13 Statement 15022 as a basis for their claim of right. (MMR-01, p. 2.) It is unclear why the Diverters object to
14 this exhibit.

15 WR-33 is a streambed alteration agreement for the Diverters' domestic use registration. WR-33 is
16 an excerpt from the file for Application 29449. WR-33 is relevant, because it is evidence of prior
17 requirements for the Diverters to operate their diversion in a manner than would not harm fish and wildlife.
18 This is relevant to Key Issue 1. It is not relevant to this objection, because it does not address pre-1914
19 rights.

20 WR-34 is the Diverters' small domestic use registration. WR-34 is relevant, because it is a basis of
21 right for their diversion and use of water and because it includes terms and conditions intended to prevent
22 the diversion and use of water under the small domestic use registration from harming public trust resources.
23 It is relevant to Key Issue 1 and is not relevant to the Diverters' objection, because it does not address pre-
24 1914 rights.

25 WR-35 through WR-39, and WR-42 are protests filed in response to the Diverters' Application
26 29449. They allege the Diverters' Application 29449, which is substantially the same as the Diverters'
27 current diversion and use of water, impacts public trust resources and senior rights. These exhibits are
28 relevant to the issue whether the Diverters' impact public trust beneficial uses and whether those impacts
constitute a misuse of water. These exhibits are excerpts from the file for Application 29449.

WR-40 is a field inspection report for the Diverters' Application 29449. It discusses protests filed in
response to Application 29449. It describes methods of diverting water that are substantially similar, if not
identical, to those used by by the Diverters today. It also discusses and identifies evidence of misuse and
public trust impacts and potential actions to eliminate that misuse. WR-40 is relevant to whether the
Diverters have misused water in the past. WR-40 is an excerpt from the file for Application 29449.

WR-41 is a statement of diversion and use by the downstream property owner. WR-41 is part of the
investigation of other water rights in the watershed in order to determine whether lower-priority water rights

1 could be responsible for public trust impacts, as opposed to the Diverters. WR-41 is not relevant to the
2 Diverters' objection, because it does not address pre-1914 rights.

3 WR-43 through WR-47 and WR-50 are records of Fish & Game Code violations by the Diverters.
4 WR-43 through WR-47 and WR-50 are relevant to whether the Diverters have misused water in the past,
5 particularly with respect to their impacts on public trust resources have previously constituted a misuse of
6 water.

7 WR-48, WR-53, WR-54, and WR-55 are related to a previous investigation of the Diverters. The
8 investigation identified prior evidence of misuse and impacts to public trust resources and recommended
9 corrective actions. What these recommended corrective actions were and whether they have since been
10 implemented is relevant to whether the Diverters misused water in the past and continue to misuse water
11 today. WR-48 is an excerpt from the file for Application 29449.

12 WR-49 discusses prior measurements of the Diverters' diversion. WR-49 is relevant to how much
13 water the Diverters predecessors in interest applied to beneficial use. WR-49 is an excerpt from the file for
14 Application 29449.

15 WR-51 and WR-52 is correspondence from the National Marine Fisheries Service (NMFS) and the
16 Department of Fish & Game (DFG) stating terms necessary to dismiss their protests to Application 29449.
17 The correspondence addresses public trust impacts that continue today. Furthermore, the terms the agencies
18 required to dismiss their protests were substantially the same as corrective actions they recommend today.
19 Notably, both recommended a bypass flow. Although the specific bypass flow recommendations have
20 evolved, the agencies have consistently stated a bypass flow is necessary. WR-51 and WR-52 is evidence of
21 past and continuing impacts to public trust beneficial uses constituting a misuse of water.

22 WR-56 is a letter from DFG with terms required for the Diverters small domestic registration. The
23 letter identifies public trust impacts resulting from the Diverters' diversion and use of water and measures
24 necessary for the Diverters to avoid harming public trust resources. WR-56 is relevant to whether the
25 Diverters' diversion and use harms public trust beneficial uses. WR-56 is not relevant to the Diverters'
26 objection, because it does not address pre-1914 rights.

27 WR-57 is a notice from the State Water Board for the Diverters to renew their small domestic
28 registration. WR-58 and WR-59 is correspondence between Division permitting staff and DFG regarding
whether the Diverters complied with requirements to renew their small domestic use registration. Together,
WR-58 and WR-59 show that the Diverters failed to meet DFG requirements necessary to maintain their
small domestic use registration. This is relevant to whether the Diverters' impacts on public trust beneficial
uses constitutes a misuse of water. WR-57, WR-58, and WR-59 are not relevant to the Diverters' objection,
because they do not address pre-1914 rights.

WR-60 is a special use permit issued by the United States Forest Service (USFS). It lacks terms
addressing the use of the ditch. There is no evidence of any other special use permit. This is evidence that
the USFS has not issued a special use permit potentially mitigating harm caused by the Diverters' ditch.

1 This is relevant to whether the Diverters' misuse water. WR-60 is an excerpt from the file for Application
2 29449. It is not relevant to the Diverters' objection, because it does not address pre-1914 rights.

3 WR-61 is the Diverters' Statement 16375 and associated reports. This is relevant, because it is
4 evidence of the Diverters' claim of right. The Diverters themselves cite Statement 16375 as a basis for their
5 claim of right. (MMR-01, p. 2.) It is unclear why the Diverters object to this exhibit.

6 WR-62 is the Basin Plan. This is relevant to the CAO. It is also relevant to beneficial use
7 designations in the Middle Klamath River basin, water quality objectives, and implementation plans and
8 policies. WR-62 is therefore relevant to whether the Diverters misuse water and whether their misuse harms
9 public trust resources. WR-62 is not relevant to the Diverters' objection, because it does not address whether
10 the Diverters have a pre-1914 right. It is unclear why the Diverters included this exhibit in their objection.

11 WR-64 through WR-70 is a series of correspondence eventually leading to the cancellation of
12 Application 29449. Together, the correspondence is evidence of the Divisions' request for information
13 necessary to resolve the protests from NMFS and DFG. When the Diverters failed to undertake actions
14 necessary to resolve those protests, they chose to rely on their pre-1914 claim of right. The exhibits include
15 correspondence from the Diverters reactivating Statement 15022 and resubmitting an initial statement of
16 diversion and use. The Diverters alleged that the State Water Board had "no jurisdiction" over the Diverters'
17 pre-1914 claim of appropriation and further lacked authority to "adjudicate" the Diverters' pre-1914 claim
18 of appropriation. These exhibits are evidence that the Diverters impacts on public trust beneficial uses
19 constitute a misuse of water and continue to constitute a misuse of water today and, in addition, that the
20 Diverters relied on their pre-1914 claim of appropriation to evade requirements to reduce or eliminate their
21 impacts on public trust beneficial uses and, as a result, reduce or eliminate their misuse of water. These
22 exhibits are excerpts from the file for Application 29449.

23 WR-71 is an email from Division enforcement staff to the Department of Fish & Wildlife (DFW).
24 WR-71 is relevant, because it further explains the Diverters' reactivating Statement 15022, which has the
25 words "Inactive" written on the front. WR-71 is also relevant, because it is evidence of enforcement staff
26 learning of incidents of sediment discharge from the ditch, eventually leading to the current investigation
27 and coordination with the North Coast Regional Water Quality Control Board (Regional Water Board) to
28 investigate water quality violations. WR-71 is relevant both to the CAO and the Diverters' misuse of water.
It is not relevant to the Diverters objection, because it does not address whether the Diverters have a pre-
1914 right.

WR-72 is an email between Division enforcement staff and DFW discussing the Diverters' efforts
to secure grants to fund an investigation to support their pre-1914 claim of right and begin corrective
actions. WR-72 is relevant, because it is evidence that Division enforcement staff gave the Diverters an
opportunity to find evidence supporting their pre-1914 claim of right and gave them an opportunity to
voluntarily reduce or eliminate their misuse of water. WR-72 is not relevant to the Diverters' objection,
because it is not address whether the Diverters have a pre-1914 right.

1 WR-73 is an email from Division enforcement staff responding to an information inquiry from
2 Konrad Fisher. In response to the inquiry, the Division provided Mr. Fisher with copies of recent
3 correspondence from the Diverters. WR-73 is relevant, because it is evidence of Division enforcement staff
4 responding to public concerns about the Divorter’s public trust impacts and misuse of water. WR-73 is not
5 relevant to the Diverters’ objection, because it does not address whether the Diverters have a pre-1914 right.

6 WR-74 is an email sent by Toz Soto of the Karuk Tribe to Division enforcement staff. The email
7 includes flow data from Stanshaw Creek. WR-74 is relevant to public trust impacts and therefore relevant to
8 Key Issue 1. It is not relevant to the Diverters’ objection, because it does not address whether the Divertes
9 have a pre-1914 right.

10 WR-75 is an email from a complainant with a link to a video of the Diverters’ point of diversion and
11 diversion ditch, Stanshaw Creek, and the cold water pool. WR-76 is the linked video. WR-75 and WR-76
12 are complaints leading to the current investigation. WR-75 and WR-76 are relevant, because they visually
13 depict the Diverters’ misuse. They are not relevant to the Diverters’ objection, because they do not address
14 whether the Diverters have pre-1914 rights.

15 WR-78 is the Diverters’ small domestic registration renewal. WR-78 is evidence that the Diverters
16 maintain their small domestic registration and continue to be subject to its terms. This is relevant, because it
17 is evidence of a basis of right. It is also relevant, because its terms and conditions establish how the
18 Diverters must manage their diversion and use under the registration to avoid harming public trust beneficial
19 uses and misusing water. WR-78 is not relevant to the Diverters’ objection, because it does not address
20 whether the Diverters have a pre-1914 right.

21 WR-79 is an email from Division enforcement staff to Martha Lennihan, the author of the Marble
22 Mountain Ranch Water Rights Report (WR-80). WR-79 shows the Division supported the Diverters to
23 investigate and prove their pre-1914 right, which would hopefully lead to opportunities for the Diverters to
24 obtain grants to eliminate the impacts on public trust beneficial uses caused by their misuse of water. WR-
25 79 is therefore relevant to Key Issue 1. It is not relevant to the Diverters’ objection, because it does not
26 address whether the Diverters have pre-1914 rights.

27 WR-80 is the Marble Mountain Ranch Water Rights Report (“Lennihan Report”), which was
28 prepared under a grant by the National Fish & Wildlife Founation (NFWF) Klamath River Coho
Enhancement Fund. The Lennihan Report is offered into evidence as a demonstrative exhibit, because it
compiles and summarizes a variety of other evidence to provide a historical overview of Marble Mountain
Ranch and of the diversion and use of water at Marble Mountain Ranch. WR-82 is a technical report
prepared by Cascade Stream Solutions in association with the Lennihan Report. WR-193 is documentation
used to develop the Lennihan Report. Much of this documentation was provided by the Diverters. These
exhibits are relevant to whether the Diverters’ diverted and used more water than was reasonably necessary
for their beneficial uses, whether they misused water in past, and whether they continue to misuse water.

1 WR-86 is a letter from the Diverters' legal counsel to Taro Murano, Division enforcement staff,
2 disputing legal conclusions in the Lennihan Report. The letter is relevant, because it is evidence that,
3 although the Diverters disputed the Lennihan Report's legal conclusions and the appropriateness of certain
4 issues the report addressed, they did not dispute the general historical summary and overview of Marble
5 Mountain Ranch. Neither did they dispute the physical description of diversion works and operations in the
6 Cascade Stream Solutions Technical Report (WR-82).

7 WR-92 is a letter from Craig Tucker of the Karuk Tribe to Taro Murano, Division enforcement
8 staff. In the letter, Mr. Tucker argues that the 0.353 cfs consumptive use demand in the Lennihan Report
9 exceeds the amount of water reasonably necessary for such beneficial uses, that conveyance losses in the
10 ditch constitute waste, and that a minimum bypass flow of 2.5 cfs is necessary to protect public trust
11 beneficial uses. WR-92 is relevant to whether the Diverters' diversion use use of water exceeds the amount
12 reasonably necessary for their beneficial uses and whether they misuse water by impacting public trust
13 beneficial uses. WR-92 is not relevant to the Diverters' objection, because it does not address whether the
14 Diverters have a pre-1914 right.

15 WR-98 is a letter submitted by the Water and Power Law Group, PC on behalf of Old Man River
16 Trust. The letter disputes the findings in the Lennihan Report on the basis that Old Man River Trust is a
17 successor in interest to the E. Stanshaw claim. The letter further alleges that the Diverters' diversion for
18 hydropower is not a use covered by the Diverters' pre-1914 claim of right, because it harms public trust
19 beneficial uses, and that conveyance losses in the ditch constitute waste. WR-98 is relevant to whether the
20 Diverters misuse water, particularly whether conveyance losses in the ditch constitute waste, and whether
21 diversion for hydropower constitute misuses due to impacts on public trust beneficial uses.

22 WR-170 is Water Right Order 91-07, the Order Revising Declaration of Fully Appropriated Stream
23 Systems. Water Right Order 91-07 identified the Klamath River system as fully appropriated, because its
24 status as a recreational component of the Wild and Scenic River system. WR-170 is relevant to whether
25 public trust beneficial uses may constitute a competing claim for forfeiture. However, it is not relevant to the
26 Diverters' objection, because it does not address pre-1914 rights.

27 **C. Exhibits Related to the Correspondence Between the Diverters' Legal Counsel and the**
28 **State Water Board is Relevant**

29 The Diverters object to WR-23, 65, 66, 67, 69, 86, 91, 107, 108, 110, 115, 122, 124, 128, 129, 132,
30 135, 136, 144, 145, 146, 147, 150, 151, 154, 156, 157, 160, 163, 168, 172, 183, and 186, alleging these
31 exhibits are not relevant to the Diverters' pre-1914 claim of right.

32 WR-23 includes a discussion of how much water the Diverters' predecessor in interest reasonably
33 needed for their beneficial uses, including hydropower, and an acknowledgment that hydropower use likely
34 did not begin until around 1940-1942. This is relevant to Key Issue 1.

35 WR-65, 66, 67, and 69 are portions of a chain of correspondence eventually leading to the
36 cancellation of Application 29449. Together, with intervening correspondence from Division permitting

1 staff, the exhibits are evidence of the Diverters’ request for information necessary to resolve the protests
2 from NMFS and DFG. When the Diverters failed to undertake actions necessary to resolve those protests,
3 they chose to rely on their pre-1914 claim of right. The exhibits include correspondence of the Diverters
4 reactivating Statement 15022 and resubmitting an initial statement of diversion and use. The Diverters
5 alleged that the State Water Board had “no jurisdiction” over the Diverters’ pre-1914 claim of appropriation
6 and further lacked authority to “adjudicate” the Diverters’ pre-1914 claim of appropriation. These exhibits
7 are evidence that the Diverters were impacting beneficial uses and asserted a pre-1914 claim of
8 appropriation to evade the State Water Board’s regulatory authority. As a result, they continued impacting
9 public trust beneficial uses.

10 WR-86 is a letter from the Diverters’ legal counsel to Taro Murano, Division enforcement staff,
11 disputing legal conclusions in the Lennihan Report. The letter is relevant, because it demonstrates that,
12 although the Diverters disputed the Lennihan Report’s legal conclusions and the appropriateness of certain
13 issues the report addressed, that it does not dispute the general historical summary and overview of Marble
14 Mountain Ranch. Neither does it dispute the physical description of diversion works and operations in the
15 Cascade Stream Solutions Technical Report (WR-82).

16 WR-91 is an email to Taro Murano with Exhibit WR-86 attached. WR-91 is relevant for the same
17 reasons as WR-86.

18 WR-145 is the Diverters’ petition for reconsideration of the CAO and WR-151 is the State Water
19 Board’s acknowledgment of receipt of the Diverters’ petition for reconsideration. WR-151 states the
20 deadlines for the State Water Board to take action. These exhibits are evidence that the Diverters submitted
21 a petition for reconsideration of the CAO, that the State Water Board took no action on the petition, and as a
22 result, that the Diverters’ petition for review was dismissed by operation of law. Since no petition for writ of
23 mandate has been filed, these exhibits are evidence that the CAO is a final order of the Regional Water
24 Board and no longer subject to judicial review or challenge.

25 The remaining exhibits, WR-146, 147, 150, 151, 154, 156, 157, 160, 163, 168, 172, 183, and 186,
26 relate to the enforcement process after the Division and Regional Water Board issued their respective
27 reports of investigation. This correspondence is evidence of enforcement staff’s efforts to encourage the
28 Diverters to voluntarily eliminate their misuse, public trust impacts, and water quality violation. This
correspondence is also evidence of enforcement staff’s efforts, through communications with the Diverters,
to develop the corrective actions and time schedule in the CAO and Draft Order. Finally, this
correspondence is relevant to showing that enforcement staff followed the enforcement procedures outlined
in the regulations. (*see* Cal. Code Regs., tit. 23, §§ 856-857.)

D. Exhibits Related to the Diverters’ Guest Ranch Improvements Are Relevant

The Diverters allege that exhibits WR-178 through 182 are irrelevant. To the contrary, these exhibits are relevant. They depict what Marble Mountain Ranch looks like, what the ranch is, and what it does. Ranch improvements are relevant to the issue of whether the costs of conserving water are reasonable in the context

1 of the Diverters' financial status. The Diverters have listed many of the ranch improvements described in
2 these exhibits as assets (WR-156) and on depreciation forms in their financial information (MMR-16). This
3 evidence further shows that the Diverters hold themselves out as an environmentally responsible business and
4 a destination for ecotourism. (WR-178, 179.) This evidence comes from the Diverters' web page and blog.
This is how they publicly promote, market, and represent themselves. These exhibits are relevant.

5 **E. Stormer Feiler's Testimony is Relevant**

6 Stormer Feiler's testimony is relevant in two broad areas.

7 First, Mr. Feiler's testimony is directly relevant to the second part of Key Issue 2 – how an
8 implementation time schedule for corrective actions should be coordinated with the CAO's. Mr. Feiler's
9 testimony will address the CAO – the water quality investigation leading to the CAO, the findings in the
10 CAO, the corrective actions and time schedule ordered in the CAO, and the extent to which the Diverters
11 are in compliance with the CAO. Mr. Feiler's testimony includes correspondence from the Diverters' related
12 to their compliance with the CAO and responses from the Regional Water Board in the form for three
13 notices of violation. This testimony is directly relevant to Key Issue 2. Absent this testimony and related
14 exhibits, the Hearing Officer will lack sufficient information to adequately address the second part of Key
Issue 2, because no other party is submitting this evidence. If the implementation time schedule is not
coordinated with the requirements of the CAO, the Diverters could be subjected to conflicting or
inconsistent obligations.

15 Second, Mr. Feiler's testimony will address public trust beneficial use designations in the Basin
16 Plan, water quality objectives established to achieve these beneficial uses, and policies and plans further
17 established to implement water quality objectives. Of particular importance, the Thermal Refugia Protection
18 Policy specifically identifies Stanshaw Creek as thermal refugia and, as a result requires enhanced
19 protection for Stanshaw Creek through a policy directive and recommendation for State Water Board staff to
consider the impact of increased diversions. Mr. Feiler's testimony is therefore relevant to the issue of
whether the Diverters' public trust impacts constitute a misuse of water.

20 Mr. Feiler's testimony is not offered to pursue water quality enforcement action through a State
21 Water Board hearing except insofar as water quality violations identified in the CAO are caused by the
22 Diverters' misuse of water. Since the CAO is a final order of the Regional Water Board, the findings, time
23 schedule, and corrective actions in the CAO are no longer subject to judicial challenge or review. The
24 Regional Water Board is the proper forum for determining whether the Diverters are in compliance with the
CAO, in violation of other Basin Plan requirements, or if additional water quality enforcement action is
appropriate.

25 **III. THE PROSECUTION TEAM'S HEARSAY EVIDENCE IS ADMISSIBLE**

26 **A. Hearsay is Admissible in State Water Board Adjudicative Proceedings**

27 "Hearsay evidence' is evidence of a statement that was made other than by a witness while
28 testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code § 1200, subd.

1 (a.) In State Water Board proceedings, hearsay may be used for the purpose of supplementing or explaining
2 other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would
3 be admissible over objection in civil actions. (Gov. Code, § 11513, subd. (d).) An objection is timely if
4 made before submission of the case or on reconsideration. (*Ibid.*) The presiding officer has discretion to
5 exclude evidence if its probative value is substantially outweighed by the probability that its admission will
6 necessitate undue consumption of time. (*Id.*, subd. (f).) Consequently, hearsay evidence is admissible in
7 State Water Board proceedings. It is merely insufficient, on its own, to support a finding. Even then, hearsay
8 evidence may support a finding on its own if it would be admissible over objection in a civil action.

9 The Diverters' characterization of the law does not support their motion, because they do not allege
10 that hearsay is inadmissible. The Diverters also fail to allege that any of the evidence they object to fails to
11 supplement or explain any non-hearsay evidence. Furthermore, the Diverters fail to allege that the probative
12 value of any of the hearsay evidence they object to is substantially outweighed by the likelihood that it
13 would necessitate an undue consumption of time. Regardless, when parties have not yet submitted their
14 cases, it is too soon to know whether additional non-hearsay evidence or hearsay evidence admissible over
15 objection in a civil proceeding will be admitted. The Diverters motion to strike is premature and
16 unsupported by law.

17 The Diverters' motion to strike should therefore be denied. Specific hearsay exceptions for
18 categories of the Diverers' hearsay exception are discussed below.

19 **B. Correspondence With the Diverters' Legal Counsel⁷**

20 Correspondence with the Diverters' legal counsel is admissible over a hearsay objection. A statement
21 by an attorney representing a client is who has the authority to speak on the matter is admissible over a hearsay
22 objection as an authorized admission. (Evid. Code § 1222, subd. (a); *see St. Farm Mut. Auto. Ins. v. Porter*
23 (1950) 186 F.2d 834, 841; *Nissel v. Certain Underwriters at Lloyd's of London* (1998) 62 Cal.App.4th 1103,
24 1109 fn 7.)

25 WR-23 is a letter from legal counsel for the Diverters' predecessor in interest. However, the hearsay
26 exception for a statement of a declarant whose right or title is in issue extends to predecessors in interest in
27 water rights. (Evid. Code § 1225; *Wright v. Best* (1942) 19 Cal. 368, 379; *Davey v. Grigsby* (1921) 51 Cal.App.
28 220, 225; *Barlow v. Frink* (1915) 171 Cal. 165, 172-173.) As a result, statements made be legal counsel for
the Diverters' predecessor are admissible over a hearsay objection and attributable to the current Diverters.

29 **C. Memoranda, Letters, and Correspondence**

30 The Diverters object to 60 memoranda, letters, and other correspondence the Prosecution Team is
31 offering into evidence. The exhibits are WR-27, 28, 30, 31, 35, 36, 37, 38, 39, 42, 45, 46, 47, 48, 49, 51, 52,
32 54, 55, 56, 58, 59, 64, 68, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 98, 99, 105, 112, 118, 119, 125, 126, 127,
33 133, 134, 139, 141, 155, 158, 159, 161, 164, 166, 178, 179, 180, 181, 182, 187, 193. Many of these are "verbal
34

35 ⁷ The Diverters cite 33 exhibits for this objection – WR-23, 65, 66, 67, 69, 86, 91, 107, 108, 110, 115, 122, 124, 128,
36 129, 132, 135, 136, 144, 145, 146,147,150,151, 154, 156, 157, 160, 163, 168, 172, 183, and 186.

1 acts,” which are not hearsay, and one exhibit is a summary that is solely demonstrative. Insofar as these
2 exhibits are hearsay and offered for the truth of the matter asserted by the declarant, they are admissible over
an objection in a civil proceeding. Specific exhibits are discussed below.

3 WR-27, 28, 30, 31, 35-39, 42, 45-49, 51-56, 58-59, 64, 68, and 70 and excerpts from the file for
4 Application 29449 and the Diverters’ small domestic use registration 30945. WR-139 and 155 are records in
5 the State Water Board’s Division of Drinking Water. These exhibits are public records and records kept in the
6 regular course of business by the State Water Board. They are admissible over a hearsay objection in a civil
proceeding under Evidence Code sections 1270 and 1280.

7 WR-71, 72, 73, and 79 are emails sent by previous State Water Board enforcement staff. These
8 exhibits are public records and records kept in the regular course of business by State Water Board staff. They
are admissible over a hearsay objection in a civil proceeding under Evidence Code sections 1270 and 1280.

9 WR-74 through 77, 98-99, 125-134, 141-166, and 187 are not offered for the truth of the matter
10 asserted in the statements in the memoranda, letter, or correspondence, but to establish that enforcement staff
11 learned of, or were aware of, the subject matter addressed in the memoranda, letter, or correspondence. Such
“verbal acts” are not hearsay, because they are not offered for the truth of the matter asserted in the statement.
12 (*People v. Diaz* (2015) 60 Cal.4th 1176, 1187; *People v. Smith* (2009) 179 Cal.App.4th 986, 1002.)

13 WR-80, the Lennihan Report, is offered into evidence as a demonstrative exhibit that summarizes,
14 supplements, and explains other evidence.

15 WR-105 and 112 is correspondence drafted and sent by legal counsel for the Prosecution Team, who
16 is authorized to speak for and make representations for the Prosecution Team. These exhibits are admissible
over a hearsay objection in a civil proceeding under Evidence Code section 1221. (*St. Farm Mut. Auto. Ins.*,
supra 186 F.2d at 841; *Nissel, supra* 62 Cal.App.4th at 1109 fn 7.)

17 WR-118 and WR-119 are reports of inspection for Mountain Home, an upstream diverter. Skyler
18 Anderson, a witness and member of the Prosecution Team, conducted the inspection, took the photos and
19 drafted the report. Insofar as the report and photo log is an out of court statement, it is admissible over a
hearsay objection as past recollection recorded. (Evid. Code § 1237.)

20 WR-125 through 127 are emails sent by Joey Howard and Will Harling. Joey Howard will be
21 appearing as a witness at the hearing.⁸ Both were retained as consultants by the Diverters to apply for grants
22 and develop projects for the Diverters that would eliminate the misuse of water. (WR-115, p. 1, Bates 2801)
WR-125 through 127 constitute authorized admissions by agents and are therefore admissible over a hearsay
23 objection in a civil proceeding under Evidence Code section 1221.

24 WR-178 through 182 are blogs from the Diverters’ webpage. The blogs describe how the Diverters
25 represent and market themselves to the public. They constitute admissions and are therefore admissible over
a hearsay objection in a civil proceeding under Evidence Code section 1220.

26 WR-193 is supporting documentation used for the Lennihan Report. Insofar as WR-193 consists of
27

28 ⁸ See the Prosecution Team’s Revised Notice of Intent to Appear at
[https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/mmr_coleptamndn
oi.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/mmr_coleptamndn oi.pdf)

1 documents offered by the Diverters or their legal counsel, these documents constitute admissions (Evid. Code
2 § 1220), authorized admissions (Evid. Code § 1222), statements by a declarant whose right or title is in issue
3 (Evid. Code § 1225), declarations against interest (Evid. Code § 1230), and recitals in writings affecting
4 property (Evid. Code § 1330).

4 **D. Correspondence of Taro Murano**

5 The Diverters object to WR-81, 86, 91, 92, 100, 104, 111, 114, 138, and 153. The basis for
6 admitting each exhibit is discussed below.

7 WR-81 is an email from Craig Tucker. Mr. Tucker is appearing as a witness for the Karuk Tribe and
8 will be available for cross-examination.⁹ His email forwarded an email from Will Harling, who was working
9 to secure grant funding to develop physical solutions for the Diverters. In this capacity, he was working as
10 an agent of the Diverters. His statement that Doug Cole was willing to move forward with physical solutions
11 based on the 1.16 cfs in the Lennihan Report is admissible as an authorized admission by an agent and
12 therefore admissible over a hearsay objection in civil proceeding under Evidence Code section 1222.
13 Furthermore, the statement can be attributed to Doug Cole as a statement of a declarant whose right or title
14 is in issue and a declaration against interest. (Evid. Code §§ 1225, 1230). In addition, WR-81 supplements
15 and explains a statement by Mr. Cole in WR-83, where he asks “What’s wrong with the number in the
16 report?” in defense of the 1.16 cfs determination in the Lennihan Report. (WR-83, Bates 2475.)

17 WR-86 is a letter from the Diverters’ legal counsel. WR-91 is an email with the same letter
18 attached. These exhibits are admissible over a hearsay objection in a civil proceeding. (Evidence Code §
19 1221; *St. Farm Mut. Auto. Ins., supra* 186 F.2d at 841; *Nissel, supra* 62 Cal.App.4th at 1109 fn 7.)

20 WR-92, 104, 111, and 153 are not offered for the truth of the matter asserted in the correspondence,
21 but as evidence that Mr. Murano learned, or became aware of, the subject matter addressed in the
22 memoranda, letter, or correspondence. Such “verbal acts” are not hearsay, because they are not offered for
23 the truth of the matter asserted in the statement. (*Diaz, supra* 60 Cal.4th at 1187; *Smith, supra* 179
24 Cal.App.4th at 1002.) Declarants who sent the emails in WR-92 and 104, Craig Tucker and Konrad Fisher,
25 are appearing at the hearing.

26 WR-114 is an email from Will Harling. Mr. Harling, at that point in time, was retained as a
27 consultant by the Diverters to apply for grants and develop projects for the Diverters that would eliminate
28 the misuse of water. (WR-115, p. 1, Bates 2801) In that capacity, he was acting as their agent and making
29 representations within the scope of his role as a consultant. WR-114 therefore constitutes an authorized
30 admission by an agent and therefore admissible over a hearsay objection in civil proceeding under Evidence
31 Code section 1222.

32 WR-100 was an email sent by Mr. Murano to Skyler Anderson, forwarding an email Mr. Murano
33 previously sent to Craig Tucker. Mr. Murano will be testifying. Insofar as the email is an out of court

34 ⁹ The Karuk Tribe’s Revised Notice of Intent to Appear is available at
35 [https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/mmr_colektamndn
oi.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/mmr_colektamndn
oi.pdf)

1 statement, it is admissible over a hearsay objection as past recollection recorded. (Evid. Code § 1237.)

2 WR-138 is an email chain. The last email in the chain was sent by Mr. Murano on June 8, 2016.
3 Insofar as the email is an out of court statement, it is admissible over a hearsay objection as past recollection
4 recorded. (Evid. Code § 1237.) Mr. Murano’s June 8, 2016 email responded to a June 7, 2016 email from
5 Caitlin Bean of DFW. Ms. Bean is listed to appear as a witness for DFW and will be available for cross-
6 examination.¹⁰ Ms. Bean, in turn, was responding to a statement to Mr. Murano. Although Bob Pagliuco of
7 the National Oceanic Atmospheric Administration is not designated to appear as a witness, his email on
8 June 7, 2016 can nonetheless be viewed as a verbal act informing stakeholders that the Coho Enhancement
9 Fund was reluctant to fund a grant that would fail to provide long-term solutions. As a “verbal act,” Mr.
10 Pagliuco’s June 7, 2016 email is not hearsay, because it is not offered for the truth of the matter asserted in
11 the statement. (*Diaz, supra* 60 Cal.4th at 1187; *Smith, supra* 179 Cal.App.4th at 1002.) Older emails in the
12 chain were sent by legal counsel of the Prosecution Team and for the Diverters, both of which are
13 admissible over a hearsay objection in a civil proceeding as authorized admission. (Evid. Code § 1222; *St.*
14 *Farm Mut. Auto. Ins., supra* 186 F.2d at 841; *Nissel, supra* 62 Cal.App.4th at 1109 fn 7.)

12 E. Correspondence of Skyler Anderson

13 The Diverters object to WR-84, 85, 90, 93, 95, 96, 97, 101, 102, 103, 113, 116, 117, 120, 121, 123,
14 130, 131, 140, 148, 169, and 184. The basis for admitting each exhibit over a hearsay objection is discussed
15 below.

16 WR-84, 93, 96, 97, 101, 102, 103, 113, 116, 117, 120, 121, 123, 130, 131, 148, and 169 are not
17 offered for the truth of the matter asserted in the statements in the memoranda, letter, or correspondence, but
18 to establish that Mr. Anderson learned of, or was aware of, the subject matter addressed in the memoranda,
19 letter, or correspondence. Insofar as these exhibits consist of correspondence between Mr. Anderson and
20 other agencies, they demonstrate his efforts to coordinate with other agencies such as NMFS. Such “verbal
21 acts” are not hearsay, because they are not offered for the truth of the matter asserted in the statement. (*Diaz,*
22 *supra* 60 Cal.4th at 1187; *Smith, supra* 179 Cal.App.4th at 1002.)

23 WR-85 is an email Mr. Anderson sent. Insofar as the email is an out of court statement, it is
24 admissible over a hearsay objection as past recollection recorded. (Evid. Code § 1237.)

25 WR-90 is a chain of emails between Mr. Anderson and Will Harling. Insofar as Mr. Anderson’s
26 emails is an out of court statement, they are admissible over a hearsay objection as past recollection
27 recorded. (Evid. Code § 1237.) The email was received from Will Harling, who was working to secure grant
28 funding to develop physical solutions for the Diverters. In this capacity, he was working as an agent of the
Diverters. His statements are admissible over a hearsay objection in civil proceeding under Evidence Code
section 1222. His statement is also a verbal act, transmitting minutes from the December 2014 meeting in

¹⁰ DFW’s Notice of Intent to Appear is available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/mmr_colecdfwame_ndnoi.pdf

1 Orleans, which themselves would constitute a business record admissible over a hearsay objection in a civil
2 proceeding. (Evid. Code § 1270.)

3 WR-94 is the Diverters' Secretary of State filing. WR-94 is a public record and therefore admissible
4 over objection in a civil proceeding. (Evid. Code § 1280.)

5 WR-95 is an email chain between Mr. Anderson and Toz Soto. The email chain as a whole is
6 evidence of Mr. Anderson's correspondence with the Karuk Tribe to develop additional information in the
7 course of the investigation. Insofar as Mr. Anderson's email's are out of court statements, they are
8 admissible over a hearsay objection as past recollection recorded. (Evid. Code § 1237.) The emails from Mr.
9 Soto are offered as evidence of Mr. Anderson's efforts to follow-up on statements at the December 2014
10 stakeholder meeting in Orleans that fish kills had occurred in Stanshaw Creek. As a "verbal act," it is not
11 offered for the truth of the matter asserted in the statement. (*Diaz, supra* 60 Cal.4th at 1187; *Smith, supra* 179
12 Cal.App.4th at 1002.) In any event, Mr. Soto is designated to appear as a witness at the hearing and will be
13 subject to cross examination.⁹

14 WR-140 and WR-184 are emails sent by Joey Howard and Will Harling.⁸ Mr. Howard will be
15 appearing as a witness at the hearing. Both were retained as consultants by the Diverters to apply for grants
16 and develop projects for the Diverters that would eliminate the misuse of water. (WR-115, p. 1, Bates 2801)
17 WR-125 through 127 constitute authorized admissions and are therefore admissible over a hearsay objection
18 in a civil proceeding under Evidence Code section 1221.

19 **F. Correspondence of Stormer Feiler**

20 The Diverters object to WR-188, 189, 190, and 191. The basis for admitting each exhibit over a
21 hearsay objection is discussed below.

22 WR-188 and 189 are emails sent by Stormer Feiler to Toz Soto of the Karuk Tribe and Leroy Cyr of
23 the United States Forest Service. Since Mr. Feiler is testifying, emails he sent are admissible over a hearsay
24 objection as past recollection recorded under Evidence Code section 1237. Email received from Toz Soto
25 notified Mr. Feiler that the data existed and provided him with the raw data. They are admissible as verbal
26 acts, because they are not hearsay. (*Diaz, supra* 60 Cal.4th at 1187; *Smith, supra* 179 Cal.App.4th at 1002.)
27 Furthermore, insofar as the evidence represents raw data automatically collected through gages and other
28 devices, it is not hearsay, because it is not a "statement," because for the purposes of the Evidence Code
only people make "statements." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 274.) Regardless, Mr. Soto is
appearing as a witness for the Karuk Tribe and will be available for cross-examination.

WR-191 is a graph consolidating and interpreting data received from the emails. WR-191 is a
demonstrative exhibit supplementing and explaining information received from Mr. Soto and Mr. Cyr.

IV. **TARO MURANO, SKYLER ANDERSON, AND STORMER FEILER ARE PROPERLY DESIGNATED AS EXPERTS**

Agency staff qualify as experts where the type of analysis at issue is performed in the course of their
professional role. (*Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 413.) State Water Board

1 and Regional Water Board staff who appear as witnesses in adjudicative proceedings appear in the course of
2 their duties and as a consequence of the expertise they have through their personal knowledge, training,
3 experience, and skills. In this role, they provide both percipient and expert testimony that the State Water
4 Board may rely on in reaching decisions. (*Center for Biological Diversity v. California Department of*
5 *Forestry and Fire Protection* (2014) 232 Cal.App.4th 931, 948; *Oakland Heritage Alliance v. City of*
6 *Oakland* (2011) 195 Cal.App.4th 884, 900.) This is necessary to help the Hearing Officer understand
7 complex issues and provide testimony to support findings based on substantial evidence. (*Phelps v. State*
8 *Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 99; *Browning-Ferris Industries v. City Council*
9 (1986) 181 Cal.App.3d 852, 866; *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation*
10 *Com.* (1976) 55 Cal.App.3d 525, 535-536; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1417, *as*
11 *modified* on denial of reh'g (Aug. 17, 1995); Cal. Code Civ. Proc. §1094.5, subd. (c).)

12 Taro Murano and Skyler Anderson are designated experts within the scope of their duties as State
13 Water Board enforcement staff. Stormer Feiler is designated an expert within the scope of his duties as
14 Regional Water Board enforcement staff. Each of them have expertise developed through their education,
15 training, and work experience. Messrs. Murano, Anderson, and Feiler will not be providing the type of
16 expert testimony appropriate for a fishery biologist, although they may provide testimony regarding plans
17 and policies of the State Water Board and Regional Water Board established to protect public trust
18 beneficial uses are evidence that the Diverters impact public trust beneficial uses and misuse water as a
19 result. They will also provide testimony related to their cooperation with entities such as the DFW, NMFS,
20 and Karuk Tribe, who themselves have experts in fishery biology and who have witnesses appearing at the
21 hearing. This is proper, necessary, and common in State Water Board proceedings.

22 **V. THE PROSECUTION TEAM'S NEED FOR ADDITIONAL TIME IS MOOT, BECAUSE IT**
23 **PREVIOUSLY SUBMITTED A REVISED NOTICE OF INTENT TO APPEAR THAT**
24 **COMPLIES WITH THE HEARING NOTICE**

25 The Diverters' objection to the Prosecution Team's first NOI, submitted July 6, 2017, is moot. On
26 October 6, 2017, the Prosecution Team submitted a revised NOI (Revised NOI). (*Available at*
27 [https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/mmr_c](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/mmr_coleptamndnoi.pdf)
28 [oleptamndnoi.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/mmr_coleptamndnoi.pdf) (accessed October 16, 2017).) The Revised NOI is consistent with the Hearing Notice. In
the Revised NOI, the Prosecution Team states it plans to provide up to one hour of direct oral testimony,
with each witness limited to 20 minutes of direct oral testimony.

Joey Howard is appearing as a witness for the Prosecution Team, but is not a member of the
Prosecution Team or a consultant who has been retained by the Prosecution Team. As a result, the
Prosecution Team was unable to obtain a written testimony from Mr. Howard. The Prosecution Team has
planned for up to ten minutes of direct oral testimony from Mr. Howard. However, due to the Prosecution
Team inability obtain prior written testimony from Mr. Howard, the Prosecution Team requests leniency
from the Hearing Officer in allowing additional time for his oral direct testimony.

1 **VI. CONCLUSION**

2 The Diverters' objections should be overruled.

3 Evidence related to the scope and extent of the Diverters' pre-1914 claim of appropriation is a
4 relevant threshold inquiry in a reasonable use proceeding and one that has occurred in previous reasonable
5 use proceedings. Correspondence with the Diverters' legal counsel, including legal counsel for the
6 Diverters' predecessors in interest, is both relevant and admissible over a hearsay objection. Evidence
7 related to improvements at the guest ranch is relevant, because it presents an overall depiction of what the
8 ranch looks like and shows that the Diverters have the financial capacity to make improvements at the
9 ranch. Finally, the testimony of Stormer Feiler and its associated exhibits is relevant.

10 Furthermore, contrary to the Diverters' assertion, hearsay evidence *is* admissible in State Water
11 Board proceedings. Insofar as the Prosecution Team has offered hearsay evidence for the truth of the matter
12 asserted, the evidence would be admissible over an objection in a civil proceeding.

13 Expert designations for Taro Murano, Skyler Anderson, and Stormer Feiler are proper.

14 Finally, the Diverters' objection to the Prosecution Team's NOI is moot, because the Prosecution
15 Team submitted a Revised NOI that conforms to time restrictions in the Hearing Notice.

16 Respectfully submitted,

17 

18 Kenneth Petruzzelli

19 **OFFICE OF ENFORCEMENT**

20 Attorney for the Prosecution Team

SERVICE LIST OF PARTICIPANTS
Douglas and Heidi Cole and Marble Mountain Ranch
Waste and Unreasonable Use Hearing
Scheduled for August 22, 2017

PARTIES

THE FOLLOWING **MUST BE SERVED** WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)

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SERVICE LIST OF PARTICIPANTS
Douglas and Heidi Cole and Marble Mountain Ranch
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PARTIES, CONT'D

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