BEFORE THE STATE WATER RESOURCES CONTROL BOARD
STATE OF CALIFORNIA

In the matter of:
DOUGLAS AND HEIDI COLE and
MARBLE MOUNTAIN RANCH

I. INTRODUCTION
The National Marine Fisheries Service (NMFS), a component agency of the National
Oceanic and Atmospheric Administration (NOAA), administers the federal Endangered
Species Act (ESA) with respect to marine and anadromous species. In the Klamath
River basin, NMFS has ESA jurisdiction over the Southern Oregon/Northern California
Coast Evolutionarily Significant Unit (SONCC ESU) of coho salmon, which were
"Threatened" is defined in Section 4 of the ESA to mean "likely to become [in danger of
extinction] within the foreseeable future in all or a significant portion of its range." 16
U.S.C. 1532(6), (20). Critical habitat was designated for SONCC coho in 1999, and the
designation includes the accessible reaches of the Klamath River and its tributaries,
including areas of Stanshaw Creek (NMFS-7; 64 Fed. Reg. 24049). "Critical habitat" is
defined in relevant part in the ESA as "the specific areas within the geographical area
occupied by the species at the time it is listed * * * on which are found those physical or
biological features (I) essential to the conservation of the species and (II) which may
require special management considerations or protection."

Other anadromous species in the Klamath River basin not currently listed under the
ESA include steelhead and Chinook salmon.

NMFS has a long history of concern over the effects of the Coles' diversion on SONCC
coho (NMFS-1; NMFS-3; MMR-9; WR-35) and has appeared as a party in this hearing
to address the two key issues identified by the Board: (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; and (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?
II. ARGUMENT

NMFS has presented substantial evidence to the Board regarding the function and value of Stanshaw Creek habitat to the continued existence of coho in the Klamath River basin.

Shari Witmore, who has extensive experience studying coho in the Klamath River and on Stanshaw Creek in particular, testified that Stanshaw Creek “forms a cold water pond on the floodplain of the Klamath River [which] provides excellent habitat for juvenile salmonids with cold water temperatures, significant cover and overhanging vegetation, and still water for velocity refuge.” (NMFS-7). On cross examination, counsel for the Coles asked a line of questions of Ms. Witmore which invited the inference that because the pool provided high quality habitat while the Coles were diverting, there was no ecological purpose in requiring the Coles to change their diversion practices. This inference is specious. As Ms. Witmore further testified, the refugia in Stanshaw Creek is only part of the story: Stanshaw Creek flows “will create a plume of cold water in the mainstem.” (Tr. 193). That cold water plume allows fish that are “tak[ing] advantage of the extensive food resources in the very productive Klamath River” to locate the cold water pool when mainstem temperatures become too hot. (Tr. 193; NMFS-3 p.3; MMR-9 p.3). That ecological function, which is impaired by diversion of water from Stanshaw Creek (Tr. 198, 205), is important not only to listed coho, but also to nonlisted anadromous species subject to the public trust doctrine. (NMFS-3, p.2; MMR-9, p.2; Tr. 294).

No party has offered any evidence contradicting either directly or indirectly Ms. Witmore’s testimony or NMFS’ documentary evidence. Mr. Cramer, the Coles’ fisheries expert, spent almost his entire time on direct testifying about the lack of spawning habitat in Stanshaw Creek. Unfortunately, the lack of spawning habitat in Stanshaw Creek is a red herring; no party to the hearing presented any evidence suggesting that
any salmonid species, listed or not, spawned in Stanshaw Creek. When asked on cross
examination about the actual issue at hand, Mr. Cramer testified that he agreed with
NMFS' conclusion (NMFS-3 p.11; MMR-9 p. 11) that "Stanshaw Creek low flows
provide critical cold water to the Klamath River and access to cold water, off-channel
refugia and food supply during low flow months." (Tr. 125).

NMFS has also provided to the Board substantial evidence (NMFS-1; NMFS-2)
supporting the recommended flows contained in NMFS' August 2016 letter (NMFS-3;
MMR-9) to the Board's Division of Water Rights. The Coles have presented no
substantial evidence showing that the bypass flows recommended by NMFS are
scientifically unsound, are unnecessary to reduce harm to valuable natural resources
that are the property of the people of California, or unachievable in terms of eliminating
the ranch's ability to generate electricity, irrigate gardens, or use water consumptively;
their main objection is simply that changing their operations to comply with the law is too
inconvenient and costly. (MMR-1).

III. CONCLUSION

In an unimpaired, pristine environment, the Coles' diversions and their adverse effects
on fishery resources in the Klamath River may not merit the attention of the Board. But
this is not the world in which we live. Coho in the Klamath River are listed as threatened
under the ESA, and also protected under the law of the State of California. The Coles'
diversions impair the ecological function of Stanshaw Creek, which provides the most
important and productive refugia in the Mid Klamath River (Tr. 155), and also harm
listed coho salmon as well as other salmonid species that would use the thermal refugia
but for the truncated connectivity caused by the Coles. For the foregoing reasons,
NMFS submits that the Coles' diversion activities constitute waste, unreasonable use,
unreasonable method of use, or unreasonable method of diversion of water. NMFS
further submits that the flow recommendations contained in NMFS-3 are the appropriate
corrective measures that should be implemented. NMFS takes no position on the
precise timing that should be contained in an order from the Board; we note that this
issue has been pending without appropriate resolution for 18 years and that earlier
implementation of any solution is preferable to further delay.

Respectfully submitted,

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