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Via Electronic Mail and United States Mail

October 19, 2017

Steven Moore, Vice Chair and Hearing Officer
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, California 95812-2000
wrhearing@waterboards.ca.gov
Mara.Irby@waterboards.ca.gov

Re: Marble Mountain Ranch-Cole Hearing
*Comments of Klamath Riverkeeper in Response to Coles' Scheduling and Written
Testimony Objections*

Dear Mr. Moore and State Water Resources Control Board:

Water and Power Law Group ("WPLG") represents Klamath Riverkeeper, a nonprofit organization focused on fishery resources in the Klamath River watershed, in connection with the upcoming November 13-15, 2017 SWRCB Marble Mountain Ranch-Cole hearing.

On October 16, 2017 attorneys for the Coles (owners of Marble Mountain Ranch) filed an objection to Klamath Riverkeeper's scheduling inquiry requesting that Klamath Riverkeeper be allowed to present its Opening Statement and Direct Testimony on Tuesday, November 14, 2017. On October 13, 2017, attorneys for the Coles filed objections to certain written testimony submitted to the SWRCB by Klamath Riverkeeper.

Below are Klamath Riverkeeper's comments on the above-described objections made by the Coles' legal counsel.

- I. The Upcoming SWRCB Hearing on Stanshaw Creek Diversion is Certain to Continue on Tuesday, November 14, 2017 to Provide the Participating Parties with Time for Cross Examination, Rebuttal and Cross-Rebuttal.**

In their October 16, 2017 letter to the SWRCB objecting to Klamath Riverkeeper's request to present its Opening Statement and Direct Testimony on Tuesday, November 14, 2017, the Coles' legal counsel objected on the grounds that but for this request the hearing would be completed on Monday, November 13, 2017. In support of this position, the Coles' legal counsel attached the estimates of "Direct Testimony" for each of the parties that have requested time to present at the hearing. The estimates for this "Direct Testimony" add up to 8 hours, which presumably could be handled in one day.

However, the procedures for SWRCB hearings are not limited to "Direct Testimony" and also allow for participants at the hearing to present Cross-Examination, Rebuttal and Cross-Rebuttal. It is also foreseeable that the SWRCB hearing officer may have questions for the presenters. When these other components of the hearing are factored in, it becomes clear that the upcoming hearing is not going to be completed on Monday, November 13, 2017, and will continue (at least) until Tuesday, November 14, 2017. Under these circumstances, the Coles' objection to Klamath Riverkeeper's scheduling accommodation seems off-point.

II. Unlike with the Introduction of Evidence in State Courts, Hearsay Evidence May Be Submitted at SWRCB Hearings for the Purpose of Explaining and Supplementing Other Relevant Evidence

Under the California Evidence Code, there are strict prohibitions on the introduction of hearsay evidence in California state courts that do not apply in SWRCB hearings. As the Coles' legal counsel noted, in contrast to practice in state trial courts, hearsay evidence may be introduced at SWRCB hearings for the purpose of supplementing or explaining other relevant evidence.

As part of its written testimony submitted to the SWRCB for the upcoming hearing, Klamath Riverkeeper submitted exhibits identifying solar panel installation and diesel generator options for providing electricity to the Marble Mountain Ranch, and also information on more efficient micro-hydropower systems that might replace the Coles' current inefficient hydropower systems. The exhibits contained (among other information) cost-estimates associated with these other options for providing electricity to the Marble Mountain Ranch, but the purpose of Klamath Riverkeeper including this information was not to determine definitively what it would cost the Coles to implement these options. The purpose for Klamath Riverkeeper including this

information was rather to highlight that there are other potential options out there for the Coles to generate electricity for their property other than continuing to operate their currently configured hydropower system, that the Coles have not considered these options as an alternative to the continued operation of the their current hydropower system, and that the availability of such options is related to the SWRCB's analysis of whether the Coles current diversions from Stanshaw Creek are violative of California reasonable use law and California public trust law.

Because the purpose of these exhibits provided by Klamath Riverkeeper was to supplement and explain Klamath Riverkeeper's other evidence regarding the application of California reasonable use law and California public trust law to the Coles' diversions from Stanshaw Creek, the SWRCB may consider the information provided in these exhibits and accord whatever weight to this information that the SWRCB deems appropriate.

III. The *Millview* Decision and the SWRCB's 2014 Report of Investigation Only Address Claims that a Pre-1914 Appropriative Water Right Holder Has "Abandoned/Forfeited" Its Entitlement to Divert a Certain Amount of Water Due to Non-Use, and Do Not Address Claims of Engaging in Uses of Water that Are Not Allowed under a Pre-1914 Appropriative Right.

In their objection filed on October 9, 2017, the Coles' legal counsel assert that, pursuant to the California Court of Appeal decision in the *Millview* case and the SWRCB's 2014 Report of Investigation, the SWRCB is prohibited from considering any evidence testimony or evidence related to the Coles' claimed pre-1914 appropriative water right. The Coles' argument here is based on a misunderstanding of the *Millview* case and the SWRCB's 2014 Report on Investigation.

The *Millview* case and SWRCB's 2014 Report on Investigation addressed the limited question of the circumstances under which it could be alleged that a pre-1914 appropriative water right holder has abandoned/forfeited its entitlement to divert a certain amount of water due to non-use. That is not what Klamath Riverkeeper alleged in its written submission for the hearing. Rather, Klamath Riverkeeper alleged that the Coles' claimed pre-1914 appropriative water right allowed for water to be used for mining and agriculture, but not for hydropower generation. As such, the issue raised by Klamath Riverkeeper is not whether the Coles' have lost/abandoned portions of their claimed pre-1914 appropriative right due to a period of non-use,

but rather whether the Coles' are currently engaged in uses of the diverted water that are simply not part of their claimed pre-1914 appropriative right at all. Klamath Riverkeeper also presented written testimony as to why the Coles' change in use (beyond the uses allowed in their claimed pre-1914 appropriative water right) is not permitted under Section 1706 of the California Water Code.

Again, the question of the Coles' engaging in hydropower uses completely outside of their claimed pre-1914 appropriative right and the Coles' noncompliance with Section 1706 of the California Water Code are not issues addressed by either the *Millview* case or SWRCB's 2014 Report on Investigation.

Additionally, a proper identification of what uses are and are not part of Coles' claimed pre-1914 appropriative right is related to the SWRCB's analysis of the Coles' compliance with California reasonable use law and California public trust law. The underlying inquiry at the hearing will be into whether the Coles' full exercise of their claimed pre-1914 appropriative right is consistent with the reasonable use/waste requirements of the California Constitution and California Water Code, and whether the Coles' full exercise of their claimed pre-1914 appropriative right is consistent with the SWRCB's obligation to protect public trust resources and uses whenever feasible. If the Coles are in fact engaging in uses of water that are not permitted or authorized under their claimed pre-1914 appropriative water right, this is pertinent and relevant to the SWRCB's inquiry into compliance with reasonable use law and public trust law requirements.

Klamath Riverkeeper will leave it to the discretion and judgment of the SWRCB to weigh such evidence in the overall context of the hearing, but there can be little doubt that such testimony is relevant to the reasonable use and public trust issues that are the subject of the hearing and therefore such testimony should not be stricken.

Thank you for your consideration of the above comments.

Yours,

Paul Stanton Kibel

Paul Stanton Kibel
On Behalf of Klamath Riverkeeper

DECLARATION OF SERVICE

Marble Mountain Ranch-Cole Hearing

I, Emma Roos-Collins, declare that today I served the attached “Comments of Klamath Riverkeeper in Response to Coles’ Scheduling and Written Testimony Objections” and exhibit identification index by electronic mail to each person on the official service list compiled by the SWRCB in this proceeding, as well as triplicate hardcopies via USPS to the SWRCB.

Dated: October 19, 2017

By:



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**State Water Resources Control Board in the Matter of
Douglas and Heidi Cole and Marble Mountain Ranch
Waste and Unreasonable Use Hearing
SERVICE LIST OF PARTICIPANTS**

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