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10 DOUGLAS COLE, HEIDI COLE, AND
11 MARBLE MOUNTAIN RANCH

12 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

13 In the Matter of Douglas Cole and Heidi Cole
14 and Marble Mountain Ranch, Draft Order No.
15 2017-00XX-DWR

**RESPONSE TO PROSECUTION TEAM'S
OPPOSITION TO DIVERTER'S
OBJECTIONS TO TESTIMONY
SUBMITTED BY THE CALIFORNIA
DEPARTMENT OF FISH AND WILDLIFE,
THE KARUK TRIBE, THE NATIONAL
MARINE FISHERIES SERVICE, OLD
MAN RIVER TRUST, AND KLAMATH
RIVERKEEPERS**

16 **I. Introduction**

17 Douglas and Heidi Cole (the "Coles") and Marble Mountain Ranch (the "Ranch") provide
18 this response to the State Water Resources Control Board ("State Water Board"), Division of
19 Water Rights, Prosecution Team's ("Prosecution Team") opposition to the Coles' objections to the
20 California Department of Fish and Wildlife ("DFW"), the Karuk Tribe, the National Marine
21 Fisheries Service ("NMFS"), Old Man River Trust, and Klamath Riverkeepers (collectively,
22 "Related Parties").

23 First, the Prosecution Team's response is inapplicable to the Coles' objections. The Coles'
24 objections were raised to the Related Parties' Exhibits, not the Prosecution Team's. The
25 Prosecution Team fails to address how it represents the Related Parties' interest in this matter,
26 thereby, providing it with standing to submit the opposition served on Monday, October 16, 2017.
27 The Prosecution Team served its Opposition to Diverters' Objections to Testimony Submitted by
28 the California Department of Fish and Wildlife, the Karuk Tribe, the National Marine Fisheries

1 Service, Old Man River Trust, and Klamath Riverkeepers (“Prosecution Team’s Opposition”), to
2 which this reply responds on October 16, 2017, before the Coles’ objections to the Prosecution
3 Team’s Exhibits were served. The Prosecution Team’s Opposition should be stricken as it lacks
4 standing to oppose the Coles’ objections.

5 Alternatively, the Coles submit this reply to the Prosecution Team’s Opposition in the
6 event the Prosecution Team’s Opposition is not stricken for lack of standing.

7 **II. Evidence Related to the Determination of the Coles’ Pre-1914 Three Cubic Feet Per**
8 **Second Right is Irrelevant to the Use of the Coles’ Diversion and Use of Water as it**
9 **Relates to Public Trust Resources.**

10 The Prosecution Team asserts that “a threshold assessment of the scope and extent of the
11 [Coles’] pre-1914” right is within the State Water Board’s authority. (Prosecution Team’s
12 Opposition, 2:21-22.) The case the Prosecution Team cites, *Young v. State Water Resources*
13 *Control Board* (2013) 219 Cal.App.4th 397 (“*Young*”), for this proposition, does provide the State
14 Water Board with the jurisdiction to make the threshold assessment of a pre-1914 water right.
15 However, in this case, the State Water Board has already made that initial determination of the
16 Coles’ pre-1914 water right. Determining the scope of the Coles’ pre-1914 right was the focus of
17 the over 20-year investigation and negotiation process between all stakeholders, including the
18 State Water Board, that culminated in the statement in the Division of Water Rights, Report of
19 Inspection of the 12-17-2014 and 2-12-2015 Inspections (“Report of Inspection”) at the Ranch that
20 found:

21 The State Water Board or a reviewing court could reasonably conclude that
22 [the Ranch and the Coles] pre-1914 water right may be up to the full
23 capacity of the ditch, which [the Ranch and the Coles] claims to be 3 cfs.
24 On that basis, the Division concludes that [the Ranch and the Coles’]
25 diversions do not appear to be in excess of its claimed pre-1914 water right.

26 (Report of Inspection, p. 14.) Thus, the State Water Board has already exercised its jurisdiction, as
27 established under *Young*, to make an initial determination of the Coles’ pre-1914 water right and
28 found that it is “up to the full capacity of the ditch,” or three cubic feet per second (“cfs”). (Report
of Inspection, p. 14.) Consequently, the process of addressing the Coles’ water right in this case
has been bifurcated. First, the Coles’ pre-1914 three cfs right was determined, and now, through
this public hearing, the reasonableness of the Coles’ use of that pre-1914 three cfs right is to be

1 determined. Therefore, all Exhibits submitted to challenge the Coles' established three cfs right,
2 by either the Prosecution Team or the Related Parties, are irrelevant to the issue of the hearing:
3 whether the Coles are engaged in waste, unreasonable use, unreasonable method of use, or
4 unreasonable method of diversion specifically as it relates to public trust resources through their
5 diversion and use of water at the Ranch. (See Notice of Public Hearing, pp. 1-2.)

6 Additionally, the three items of precedential material the Prosecution Team relies upon:
7 *Young*, Water Right Decision 1600, and Water Right Order 2012-004, to assert that the scope and
8 extent of the Coles' pre-1914 three cfs water right are properly within the scope of this public
9 hearing are clearly *not* applicable to the circumstances of this hearing or do not stand for the
10 proposition the Prosecution Team asserts. First, *Young*, which confirmed the State Water Board's
11 authority to make a *threshold* assessment of a riparian or pre-1914 water right, involved a public
12 hearing to determine the amount of a diverter's claim of a pre-1914 right where it was alleged the
13 diverter was engaged in an unauthorized diversion of water. (*Young, supra*, 219 Cal.App.4th at p.
14 400.) The Coles are not engaged in an unauthorized diversion of water, their pre-1914 three cfs
15 water right has been established through the over 20-year investigation and negotiation process
16 with stakeholders. (See Report of Inspection, p. 14.)

17 Further, in *Young*, the State Water Board was acting under its authority pursuant to Water
18 Code section 1831 to issue a cease and desist order for the unauthorized diversion or use of water.
19 (*Young, supra*, 219 Cal.App.4th at pp. 400-401.) In this matter, the State Water Board asserts its
20 authority under Water Code section 275 to potentially issue an order finding a waste, unreasonable
21 use, unreasonable method of use, or unreasonable method of diversion. (See Water Code § 275;
22 Notice of Public Hearing, pp. 1-2; Draft Order WR 2017-00XX-DWR ("Draft Order"), p. 1.)
23 Therefore, the determination of the scope and extent of the Coles' pre-1914 three cfs water right
24 has not only already been initially determined, but is outside the scope of the authority underlying
25 the Draft Order which serves as the basis of this public hearing. (Draft Order, p. 1.)

26 The Prosecution Team also offers Water Right Decision 1600 and Water Right Order
27 2012-004 to assert that the determination of the scope and extent of the Coles' pre-1914 three cfs
28 water right is properly within the determination of this public hearing. However, in relying upon

1 Water Right Decision 1600 and Water Right Order 2012-004, the Prosecution Team acknowledges
2 that in Water Right Decision 1600 “the State Water Board proceeded to survey the various bases
3 for [Imperial Irrigation District’s] right to divert and use water” and that Water Right Order 2012-
4 004 “began with an extensive discussion of the construction and operation of Hidden Lakes Estates
5 and discussed the bases of right for diverting and using water.” (Prosecution Team’s Opposition,
6 2:12-13, 2:16-18.) Neither Water Right Decision 1600 nor Water Right Order 2012-004 reviewed
7 the water rights of the diverters in those matters to determine the scope and extent of the rights
8 claimed. (See Water Right Decision 1600, p. 9; Water Right Order 2012-004, p. 4, fn. 4.)
9 Reviewing the bases of a water right is not the same as determining the scope and extent of that
10 right. Therefore, neither Water Right Decision 1600 nor Water Right Order 2012-004 provide the
11 Prosecution Team or any of the Related Parties with the opportunity to use the public hearing to
12 address the scope or extent of the Coles’ pre-1914 three cfs water right.

13 In summary, *Young* provides the State Water Board with the authority to make “a threshold
14 assessment of the scope and extent” of a pre-1914 right. (*Young, supra*, 219 Cal.App.4th 397.)
15 However, that threshold assessment has already been made. Further, the State Water Board’s
16 asserted authority for the public hearing in this matter only addresses the reasonableness of the
17 Coles’ diversion and use of water. In *Young*, the State Water Board was exercising its authority
18 under Water Code section 1831 to issue a cease and desist order for the unauthorized diversion and
19 use of water. The Draft Order here relies on Water Code section 275 to determine the Coles’
20 reasonableness of the use of their pre-1914 three cfs water right.

21 Finally, neither Water Right Decision 1600 nor Water Right Order 2012-004 provides the
22 State Water Board with the authority to consider the scope and extent of the Coles’ pre-1914 three
23 cfs water right. Therefore, any of the Prosecution Team’s or Related Parties’ Exhibits that address
24 the scope and extent Coles’ pre-1914 three cfs water right are irrelevant to the issue of this public
25 hearing, which is, the Coles’ diversion and use of water at the Ranch, as it relates to public trust
26 resources.

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1 **III. The Notice of Public Hearing Specifies that this Public Hearing is Limited to a**
2 **Determination of the Reasonableness of the Coles' Diversion and Use of Water Under**
3 **Water Code Section 275. It Would be a Violation of the Coles' Due Process Right to**
4 **Expand the Scope of the Public Hearing to the Basis of the Coles' Pre-1914 Water**
5 **Right Under *Young*.**

6 Under the Fourteenth Amendment to the United States Constitution and Article I, Section
7 7, of the California Constitution, an individual must be provided with the due process of “ ‘notice
8 and [the] opportunity for hearing appropriate to the nature of the case’ ” before he or she may be
9 deprived of an interest in life, liberty, or property. (*Koshak v. Malek* (2011) 200 Cal.App.4th
10 1540, 1547 (quoting *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313.) In
11 order to provide the requisite notice under the requirements of due process, the notice must be
12 “ ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency
13 of the action and afford them an opportunity to present their objections.’ ” (*Ibid.*) A vested
14 property right to use water, such as the Coles' pre-1914 three cfs right, may not “be infringed
15 [upon] by others or taken by governmental action without due process” (*United States v. State*
16 *Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101.)

17 The Notice of Public Hearing limits the purpose of the public hearing to a hearing “to
18 receive evidence relevant to determining whether ... [the Coles] have diverted and used water or
19 are continuing to divert and use water in a manner that constitutes a waste, unreasonable use,
20 unreasonable method of use, or unreasonable method of diversion.” (Notice of Public Hearing, p.
21 1.) Further, the Notice of Public Hearing limits the “key issues to be addressed at the hearing” to:

- 22 1) Does the past or current diversion or use of water by Douglas and Heidi
23 Cole and Marble Mountain Ranch constitute a waste, unreasonable use,
24 unreasonable method of use, or unreasonable method of diversion of
25 water, particularly in light of any impacts to public trust resources?
- 26 2) If the past or current diversion or use of water by Douglas and Heidi
27 Cole and Marble Mountain Ranch constitutes a waste, unreasonable use,
28 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?

1 (*Ibid.*) The Draft Order, underlying the Notice of Public Hearing, relies on the State Water
2 Board's authority under Water Code section 275 to potentially issue the Draft Order as a final
3 order, following the public hearing. Water Code section 275 grants the State Water Board the
4 authority to "take all appropriate proceedings and actions ... to prevent waste, unreasonable use,
5 unreasonable method of use, or unreasonable method of diversion of water in this state."

6 None of these materials provide notice to the Coles that the scope and extent of their pre-
7 1914 three cfs water right are part of the issues to be determined through this public hearing.
8 Nowhere does the Prosecution Team or the State Water Board assert that it is engaged in a
9 determination of the scope or extent of the Coles' pre-1914 water right, nor do they provide any
10 statutory authority to engage in that determination in the Notice of Public Hearing or related
11 materials provided for the public hearing. Therefore, where determinations made at the public
12 hearing include the scope and extent of the Coles' pre-1914 three cfs water right under *Young*, the
13 Coles have not been provided with notice of " 'the pendency of the action and afforded ... an
14 opportunity to present their objections' " as required under their Constitutional due process rights.
15 (*Koshak v. Malek, supra*, 200 Cal.App.4th at p. 1547 [quoting *Mullane v. Central Hanover Bank &*
16 *Trust Co.* (1950) 339 U.S. 306, 314].) Consequently, if the Coles' objections are not granted and
17 the public hearing includes a determination of the scope and extent of the Coles' pre-1914 three cfs
18 right, the Coles' due process rights will be violated.

19 **IV. Hearsay Evidence is Inadmissible where the Truth of the Matter Asserted within the**
20 **Evidence is Used to Make a Finding.**

21 The Prosecution Team does not provide, specifically, which Exhibits of the Related Parties
22 to which it opposes the Coles' objections, instead asserting that the objections are improper under
23 the requirements of Government Code section 11513. The Coles' objections to the Related
24 Parties' Exhibits as hearsay provide that the Exhibits, where they are used for the truth of the
25 matter asserted in that Exhibit, making that Exhibit hearsay evidence, are not admissible to support
26 a finding as provided in Government Code section 11513(d). The Prosecution Team does not
27 provide any information to indicate that the Exhibits the Coles objected to are provided for any
28 other reason than for the truth of the matters asserted within them to make a finding. Therefore,

1 the Prosecution Team's Opposition fails to assert any reason not to find that each of the Related
2 Parties' Exhibits to which the Coles have objected should be stricken. Therefore, the Coles'
3 motion to strike each of the Exhibits identified in their objections to the Related Parties' Exhibits
4 should be granted.

5 **V. Conclusion**


6 The Prosecution Team fails to show that it represents the Related Parties' interests in this
7 matter. Therefore, the Prosecution Team's Opposition should be stricken. However, to address
8 the issues the Prosecution Team's Opposition raises the Coles provide this response.

9 The scope and extent of the Coles' pre-1914 three cfs water right is outside the scope of
10 this hearing. The State Water Board has already exercised its discretion to make a threshold
11 assessment of the Coles' pre-1914 three cfs right and the basis of the hearing under the Draft Order
12 does not extend to the scope of the Coles' pre-1914 three cfs water right. The public hearing's
13 purpose is only to determine whether the Coles are engaged in a waste, unreasonable use,
14 unreasonable method of use, or unreasonable method of diversion of the water under their pre-
15 1914 three cfs water right, as it relates to public trust resources. Further, allowing the
16 determination of the Coles' pre-1914 three cfs water right at this public hearing violates the Coles'
17 due process rights because they have not been provided notice that such a determination is to be
18 made at this public hearing.

19 Finally, the Prosecution Team has failed to allege that any of the Related Parties' Exhibits
20 to which the Coles have objected are submitted for any other purpose than for the truth of the
21 matter asserted to make a finding based on that Exhibit. Therefore, the Coles' motion to strike
22 those Exhibits should be granted.

23
24 Dated: October 18, 2017

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