

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

Douglas and Heidi Cole)
and Marble Mountain Ranch)
Stanshaw Creek in Siskiyou)
County)
Public Hearing)

REGION 5 AUDITORIUM
CENTRAL VALLEY WATER QUALITY CONTROL BOARD
11020 SUN CENTER DRIVE, SUITE 200
RANCHO CORDOVA, CA

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APPEARANCES

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

Division of Water Rights

Board Members Present:

Steven Moore, Vice Chair (Hearing Officer)

Hearing Team Members Present:

Lily Weaver, Staff Counsel

Mara Irby, Staff Environmental Scientist

Jean McCue, Staff Engineer

Connie Mitterhofer, Senior Water Resource Control
Engineer

Jane Farwell-Jensen, Staff Environmental Scientist

Michael Buckman, Hearing Unit Chief

Prosecution Team Members Present:

Kenneth Petruzzelli, Attorney III, Office of Enforcement

Heather Mapes, Attorney I

INTERESTED PARTIES

For Douglas and Heidi Cole, Marble Mountain Ranch (MMR)

Barbara A. Brenner, Partner, Churchwell White, LLP
Kerry Fuller, Attorney

For California Department of Fish & Wildlife (CDFW)

Nathan Voegeli, Staff Counsel

For Karuk Tribe

Drevet J. Hunt, Attorney, Lawyers for Clean Water

For Old Man River Trust

Konrad Fisher

For National Marine Fisheries Service (NMFS)

Christopher Keifer

APPEARANCES (Cont.)

INTERESTED PARTIES (Cont.)

For California Sportfishing Protection Alliance (CSPA)

Chris Shutes

WITNESSES:

Toz Soto, for Karuk Tribe

Craig Tucker, for Karuk Tribe

Konrad Fisher, for Old Man River Trust

Bryan Elder, for Division of Water Rights

Taro Murano, for Division of Water Rights

Skyler Anderson, for Division of Water Rights

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P R O C E E D I N G S

9:30 A.M.

RANCHO CORDOVA, CALIFORNIA

THURSDAY, NOVEMBER 16, 2017

HEARING OFFICER MOORE: Welcome back to the Marble Mountain Ranch hearing. I'm Steven Moore, Vice Chair of the State Water Board and Hearing Officer for this proceeding. I will be assisted by Staff Counsel Lily Weaver, Staff Environmental Scientist Mary Irby, and Staff Engineer Jean McCue. I also have other staff assisting us.

And before we get started, a reminder on evacuation procedures. Please note the exits. The easiest way to exit a building if there's a fire alarm are the doors to my left and your right. Please take your valuables and exit the building. Our evacuation location is out in the parking lot at the front door. And when we get the all clear, we'll all return to the room together.

We're broadcasting this hearing on the internet and recording both audio and video. In addition, a court reporter is present to prepare a transcript of this proceeding.

1 When you speak, please be sure to use a
2 microphone so that everyone can hear you.

3 Please take a moment to turn off or mute
4 your cell phones. Even if you think it's already
5 off or muted, please take a moment to double
6 check, and we appreciate it.

7 Today we're going to begin with the
8 direct testimony of the Karuk Tribe's remaining
9 witnesses. After completing their case in chief,
10 we will proceed to the direct testimony of Old
11 Man River Trust's remaining witnesses. After
12 concluding their case in chief, first, the
13 California Sportfishing Protection Alliance, and
14 then second, Pacific Coast Federation of
15 Fisherman's Associations and Institute for
16 Fisheries Resources will have an opportunity to
17 present opening statements. Subsequently, there
18 will be an opportunity for parties to present
19 rebuttal evidence.

20 And as a housekeeping reminder, as we
21 announced on Monday, we will stop -- be stopping
22 the hearing today at 3:30 p.m. this afternoon,
23 3:30, not 4:30.

24 And we did talk about thinking about
25 rebuttal testimony in the time frame of that.

1 If, A, you're going to be doing a rebuttal, and
2 B, how long you think you would -- it would take,
3 just for the purposes of trying to plan the time
4 the next day or two, so I would welcome that
5 discussion.

6 But first as a -- are there any questions
7 or housekeeping items before we continue?

8 MS. BRENNER: I would just like, on our
9 mid-morning break, instead of five minutes, if I
10 could get ten minutes so that I can coordinate my
11 other hearing.

12 HEARING OFFICER MOORE: Sure. You -- I
13 would think we will take more than that even. I
14 think maybe even 15 minutes, so no problem.

15 MS. BRENNER: Yeah.

16 HEARING OFFICER MOORE: Ten minutes
17 minimum, no problem.

18 MS. BRENNER: Yeah. I don't -- I'm not
19 sure I'll need that much.

20 And then I guess I had forgotten, we're
21 done at 3:30 today?

22 HEARING OFFICER MOORE: That's right.

23 MS. BRENNER: I really hope we can get
24 done-done today.

25 HEARING OFFICER MOORE: Well, I'm open to

1 the idea of a shorter lunch break, if that --

2 MS. BRENNER: Okay.

3 HEARING OFFICER MOORE: -- would work for
4 parties.

5 MS. BRENNER: That would be fine with us.

6 HEARING OFFICER MOORE: Okay.

7 MS. BRENNER: Thank you.

8 HEARING OFFICER MOORE: So maybe we could
9 do a 30-minute break, and then do -- and that way
10 accommodate schedules better.

11 MS. BRENNER: Okay.

12 HEARING OFFICER MOORE: I'm open to that.

13 MS. BRENNER: And our rebuttal is, you
14 know, maybe 10, 15 minutes max.

15 HEARING OFFICER MOORE: Okay.

16 MS. BRENNER: Thanks.

17 HEARING OFFICER MOORE: Yeah. I guess I
18 would ask -- thank you very much.

19 The Prosecution Team, do you have an
20 estimate of your rebuttal time frame?

21 MR. PETRUZZELLI: I'm going to estimate,
22 just estimate, maybe 30 minutes. We'd like it to
23 be less. We -- one of our witnesses has
24 something scheduled at 2:00. I was -- hopefully
25 we'll be done by then, or he'll be done by then.

1 HEARING OFFICER MOORE: Uh-huh.

2 MR. PETRUZZELLI: If it's not looking
3 like that, I'll check in with him --

4 HEARING OFFICER MOORE: Okay.

5 MR. PETRUZZELLI: -- and see.

6 HEARING OFFICER MOORE: Well, I
7 appreciate that. It's good to know kind of the
8 scope of the time that folks are anticipating,
9 and that sounds like a manageable amount of time,
10 so I appreciate the input.

11 HEARING OFFICER MOORE: Does anybody else
12 have any input on planned rebuttal testimony?
13 Seeing nobody raise their hand, okay, I'd like to
14 go ahead and proceed.

15 And, Mr. Hunt, Mr. Tucker and Mr. Soto
16 have come forward, or at least Mr. Soto and Mr.
17 Hunt. We will now hear the Karuk Tribe's
18 remaining direct testimony, followed by cross-
19 examination in the order I've previously
20 identified. Redirect and recross examination of
21 the witnesses may then be permitted.

22 I guess I should go ahead and administer
23 the oath because you're going to start
24 questioning; am I correct?

25 MR. HUNT: Yeah. I'm going to -- I'm

1 going to do Toz Soto and Craig Tucker separately,
2 and so we're going to do Toz Soto now.

3 HEARING OFFICER MOORE: Okay. That
4 sounds good.

5 Will the witness please stand and raise
6 your right hand?

7 (Witness is sworn.)

8 HEARING OFFICER MOORE: Thank you. You
9 may be seated.

10 WITNESS SOTO: Yes, I do.

11 HEARING OFFICER MOORE: Thank you. You
12 may be seated. I appreciate it.

13 You may proceed, Counsel.

14 TOZ SOTO,
15 called as a witness for Karuk Tribe, having been
16 duly sworn, was examined and testified as
17 follows:

18 DIRECT EXAMINATION BY

19 MR. HUNT: Thank you.

20 Good morning, Mr. Soto. Will you please
21 state your name and address for the record?

22 WITNESS SOTO: My name is Toz Soto. I
23 reside at 233 Ti Bar Road, Somes Bar, California
24 95568.

25 MR. HUNT: And what is your educational

1 background?

2 WITNESS SOTO: I have a Bachelor's in
3 Fisheries from Humboldt State University with an
4 emphasis in freshwater fisheries.

5 MR. HUNT: And where are you currently
6 employed?

7 WITNESS SOTO: I'm employed by the Karuk
8 Tribe. I work for the Department of Natural
9 Resources. And I'm the Fisheries Program Manager
10 and Senior Fisheries Biologist.

11 MR. HUNT: And what -- how would you
12 describe your responsibilities in your current
13 job?

14 WITNESS SOTO: Well, I'm responsible for
15 managing the program, administering studies,
16 monitoring -- implementing restoration projects
17 along the Klamath River.

18 MR. HUNT: And how long have you been
19 working in your current job?

20 WITNESS SOTO: I started working for the
21 Karuk Tribe in 2000, so 17 years.

22 MR. HUNT: And during those 17 years,
23 just give us kind of a description of how you
24 spend your time.

25 WITNESS SOTO: Well, I'm fortunate enough

1 to spend some of my time in the field, actually
2 getting wet and seeing fish and doing field work.
3 But I would say now most of my time is probably
4 spent doing administrative stuff and writing
5 reports, administrating budgets, that kind of
6 stuff.

7 MR. HUNT: And how long have you -- do
8 you -- where -- so Somes Bar is in the Klamath
9 Basin.

10 How long have you lived in the -- along
11 the Klamath River?

12 WITNESS SOTO: I have lived along the
13 Klamath River and Salmon River, a tributary to
14 the Klamath River in Somes Bar for my entire
15 life.

16 MR. HUNT: How many times would you say
17 you visited Stanshaw Creek?

18 WITNESS SOTO: Oh, I would say it's got
19 to be over 100 times over the course of 17 years.

20 MR. HUNT: And that's at the mouth of
21 Stanshaw Creek where it meets the Klamath River?

22 WITNESS SOTO: Correct.

23 MR. HUNT: And that's -- in those 17
24 years have you visited that location at other
25 times, as well?

1 WITNESS SOTO: Yes, just to -- there's a
2 boat launch there, so we take our drift boats out
3 there and put them in.

4 MR. HUNT: So is it fair to say that
5 you've visited Stanshaw Creek every year since --

6 WITNESS SOTO: Yes.

7 MR. HUNT: -- 2001?

8 And just generally, what are -- what is
9 the value of Stanshaw Creek to salmonids?

10 WITNESS SOTO: Well, the primary value to
11 Stanshaw Creek is it's thermal refugia value and
12 the cold water that Stanshaw Creek provides, and
13 the off-channel pond habitat that's located in
14 Lower Stanshaw Creek.

15 MR. HUNT: Just a point of order here.
16 The clock isn't ticking, so I don't know how long
17 we've been going, but --

18 HEARING OFFICER MOORE: We began around
19 9:36 or 9:37, by my recollection, so about three
20 minutes or so.

21 MR. HUNT: Do you want to adjust that
22 before we -- okay. It looks like we're back.
23 The clock is ticking now, so let's try that one
24 again.

25 Based on your observations and in

1 general, what is the value of Stanshaw Creek to
2 salmon?

3 WITNESS SOTO: Like I said before, the
4 primary value for salmon is its cold-water
5 refuge, and the off-channel pond that's located
6 in Lower Stanshaw Creek.

7 MR. HUNT: And what other value does --
8 well, why is that cold-water pond valuable and at
9 what times of year?

10 WITNESS SOTO: Well, salmon in the
11 Klamath River are dependent on thermal refuge
12 during the summer months. So as temperatures are
13 rising in the early summer, fish, primarily
14 salmonids, migrate into thermal refugia to seek
15 shelter from lethal water temperatures in the
16 mainstem.

17 MR. HUNT: And are there other values
18 that Stanshaw Creek provides to salmon at
19 different times of year?

20 WITNESS SOTO: Yeah. It's home to
21 resident steelhead. There's a very small
22 population of anadromous steelhead that spawn in
23 Stanshaw Creek. Chinook salmon use the thermal
24 refugia, as well as steelhead.

25 MR. HUNT: Okay. And although we've

1 talked about it a decent amount here at this
2 hearing, I think it would be good to get your
3 impressions, as well.

4 So what are the values of these thermal
5 refugia to salmon? And can you explain what a
6 thermal refugia is?

7 WITNESS SOTO: Well, a thermal refugia, I
8 spent a good deal in my early career studying
9 thermal refugia and at that time it was -- they
10 really weren't well defined. And so the
11 definition with thermal refugia is, in simple
12 terms, a cold-water patch in an otherwise warm-
13 water river system.

14 MR. HUNT: Are there different kinds of
15 thermal refugia?

16 WITNESS SOTO: Yeah. Generally there are
17 three types of thermal refugia. There's the
18 cold-water plume at the confluence of the
19 tributary. There's the floodplain habitat, such
20 as the off-channel pond at Stanshaw Creek. Those
21 are usually flood channels that are fed by cold-
22 water tributaries. And then the lower reaches of
23 cold-water tributaries are thermal refugia, as
24 well.

25 MR. HUNT: And if you could, if this is

1 possible, is -- could you explain which type of
2 thermal refugia that Coho salmon prefer?

3 WITNESS SOTO: Well, Coho salmon prefer
4 complex habitat, slow water, low-velocity water,
5 abundant cover. And they prefer off-channel
6 habitat, such as the off-channel pond at
7 Stanshaw. They typically will migrate out of the
8 mainstem. They don't prefer habitat that doesn't
9 fit their habitat suitability criteria which is
10 low velocity and abundant cover.

11 (Document displayed on screen)

12 MR. HUNT: Okay. So up on the screen
13 here is a Figure 1 from what you've called the
14 Coho Ecology Report, Mr. Soto. That's how you
15 referred to it to me. It's Exhibit 9, KT-9 in
16 the record, and it's page four. This is Figure 1
17 from that.

18 Can you use this figure to help explain
19 to us how the Coho salmon use thermal refugia
20 throughout the year in the Klamath River?

21 WITNESS SOTO: Okay. So this is a
22 conceptual model of how Coho salmon utilize the
23 mainstem Klamath River. So you see, the red line
24 is temperature. The blue line is flow.

25 And then -- so in the -- if you go over

1 to the left side of the chart, you'll see spring
2 runoff. That's when the Coho salmon fry emerge
3 from the gravels. They disperse into the
4 mainstem river. And then as -- they do that with
5 the spring runoff. And then as the water
6 temperature begins to rise, usually in June,
7 sometimes late May, and sometimes as late as late
8 July depending on the water year, so as those
9 temperatures are rising, Coho salmon will be
10 forced to redistribute into thermal refuge.

11 And then as the summer progresses and
12 those temperatures start to decline in the late
13 summer and early fall the Klamath will cool off,
14 and that allows Coho salmon to redistribute to
15 other locations. And then as the fall
16 redistribution -- fall-winter redistribution
17 occurs, usually in the late fall or early winter,
18 and that's with the onset of peak flows as stream
19 velocities increase in tributaries, Coho salmon
20 are forced to find winter refuge, so -- and
21 that's with the fall freshets and peak flows, as
22 you see with the blue line in the wintertime
23 there.

24 So we have a very dynamic flow regime in
25 the Klamath. It can be extremely high in the

1 wintertime and velocities can be quite high, so
2 Coho have to find, you know, not only summer
3 refuge but definitely winter refuge. And the
4 pond at Stanshaw Creek is known to be a winter
5 refuge, as well.

6 MR. HUNT: Okay. The next slide here is
7 from Exhibit 9, KT-9, as well. It's on page 24.

8 Can you, using this, just help us
9 understand a little bit more about how salmon
10 use -- the Coho salmon use the Klamath River as a
11 whole?

12 WITNESS SOTO: So there's a - so, non-
13 natal Coho, that's kind of what this depicts is
14 the use of, basically, fish that come out of
15 spawning tributaries, such as the Shasta River or
16 the Scott River. They end up in the mainstem
17 during the spring as fry. And then as summer
18 happens and temperatures rise, they distribute
19 into cold-water refuges. And this is just an
20 example of that from the Shasta River. These are
21 PIT-tagged fish from the Shasta River that end up
22 in the mainstem. And then the river miles on the
23 bottom are -- yeah, those are river miles --
24 represent locations where we've recaptured those
25 fish in cold-water refuges or off-channel ponds.

1 MR. HUNT: And so tell us where these
2 locations -- there's these red bars on the graph.
3 Tell us where these locations are along the
4 river.

5 WITNESS SOTO: So River Mile 175, that's
6 the confluence of the Shasta. And then River
7 Mile 125, roughly that area, that's around Seiad
8 Valley. That's a very large refuge for Coho.
9 And then if you go down further, I think it's
10 right around River Mile 75, that's where Stanshaw
11 Creek is located.

12 MR. HUNT: Okay.

13 WITNESS SOTO: So basically, these fish
14 are using these refuges that are scattered
15 through the river continuum.

16 MR. HUNT: So this is Figure 7 from
17 Exhibit KT-9 on page 25. Maybe just explain what
18 these yellow dots are and how they relate to the
19 issues we've been discussing.

20 WITNESS SOTO: So the yellow dots
21 represent the actual locations on a map of the
22 red bars that we were just looking at. So if you
23 go down and you look where Stanshaw Creek is
24 located, and it says Stanshaw pond, that's a
25 location that a Coho from the Shasta River was

1 recaptured. It looks like it was detected there
2 in October of 2011 and then resided there for --
3 at least through the winter. There's another --
4 the last date it was detected was, like it's
5 later in November.

6 Like I said before, once fish locate
7 these winter refuges, they typically stay. We
8 don't see a whole lot of movement during the dead
9 of winter. And then in the spring, these fish
10 leave as smolt and make their migration to the
11 ocean.

12 MR. HUNT: Do the fish also generally
13 stay if they find these refuges during the summer
14 months?

15 WITNESS SOTO: They can. They can stay
16 if there's proper habitat. Sometimes there's
17 higher densities. Density will force fish to
18 move. Low food supply will force fish to move.
19 Other things can. But typically if fish -- Coho
20 salmon find the habitat that suits their habitat
21 suitability [sic], they'll stay put.

22 MR. HUNT: So in all of the times --
23 well, let me ask you one more question about
24 this.

25 So I see these, you know, these dots are

1 sort of spread along the mainstem here of the
2 Klamath River. In your -- and what happens to
3 the Coho salmon if some of these locations are
4 not functional or completely absent?

5 WITNESS SOTO: Well, then their
6 likelihood of finding a thermal refugia is
7 decreased. Their exposure to warm water
8 increases. Their likelihood of mortality goes
9 up. Their exposure to fish disease increases.
10 So I would say their survival goes down.

11 MR. HUNT: All right. So at Stanshaw
12 Creek in particular, what harms to Coho and other
13 salmon habitat have you observed?

14 WITNESS SOTO: Could you repeat that one
15 more time?

16 MR. HUNT: At Stanshaw Creek location,
17 what harms to the salmon habitat have you
18 observed?

19 WITNESS SOTO: So the habitat at Stanshaw
20 Creek is affected by the flows, and the flows are
21 impacted by Marble Mountain Ranch diversion.

22 I've also seen the habitat affected by
23 sedimentation from Stanshaw Creek.

24 MR. HUNT: And in your opinion, what are
25 the causes of the -- these habitat alterations?

1 WITNESS SOTO: Well, the primary cause of
2 the flow impacts are the Marble Mountain Ranch
3 diversion and --

4 MR. HUNT: I guess I'm more -- you know,
5 aside from the cause, let's say, let's just talk
6 about what are the -- like what are the causes of
7 the harm, not necessarily who's responsible, but
8 what causes the types of harm that you've
9 observed?

10 WITNESS SOTO: Well, when fish can't
11 access the refugia, they're exposed to lethal
12 water temperatures in the mainstem. If fish
13 become trapped in the refugia, then they're
14 unable to move, so they're basically stuck there.
15 And if water quality degrades, they could be
16 harmed.

17 MR. HUNT: So it seems to me like you're
18 talking about situations where there's -- the
19 habitat is not getting what it needs in terms of
20 flow; is that correct?

21 WITNESS SOTO: Yes.

22 MR. HUNT: Okay. I've got a couple
23 additional slides. And I'd like to have you use
24 these to help us.

25 (Document displayed on screen)

1 MR. HUNT: These slides are data that are
2 presented on Exhibit KT-8 on page 31 of the .PDF
3 that's not internally paginated. It's flow data.
4 And I've just -- we've just excised a couple of
5 them out there for clarity.

6 So if you can explain to us what's going
7 on here, on this slide?

8 WITNESS SOTO: Well, this is just an
9 example from 2004. Our crews collect flow data
10 every year in all the tributaries. And as you
11 can see, in June there's water in Stanshaw Creek.
12 You see the left side there, that's Stanshaw
13 Creek below the diversion. And then the right
14 side is the diversion outflow before it goes into
15 Irving Creek. And you can see in August the
16 flows are significantly lower than in than in
17 early summer, and you don't see a lot of
18 difference in the actual outflow to Irving Creek.
19 So Stanshaw Creek is absorbing the flow impact
20 by -- with low flows in the late summer.

21 And the bottom chart there is just Irving
22 Creek measured above the diversion. So you can
23 see that Irving Creek has quite a bit of water,
24 even in the late summer, without the diversion
25 inflow.

1 MR. HUNT: And can you help us explain --
2 I'll note, you know, for the record that this is
3 a graphical summary of the data that we've seen
4 in that Exhibit KT-8, related to Stanshaw Creek.

5 WITNESS SOTO: So what you see here is a
6 series of four years of flow data. The blue line
7 is 2005. That was a relatively wet year. That's
8 the lighter blue. The darker blue color is 2002,
9 and that's a severe drought year. And you see in
10 the beginning of summer, flows are relatively
11 high and then -- except during the drought year.
12 And then as summer progresses the flows just all
13 pretty much bottom out at a very low level. In
14 this case, it's all less than one CFS. But note
15 that the blue line from 2002, during a drought
16 year the flows in Stanshaw Creek were extremely
17 low, even early in the summer.

18 So this is a chart of Ti Creek. Ti Creek
19 is a few miles upstream of Stanshaw Creek and
20 it's roughly the same size as Stanshaw Creek.
21 And you can see it kind of has the same pattern
22 in the early part of summer, but then in the late
23 summer there's quite a bit of variation in flows.
24 You'll see higher flows in some years, like the
25 wet year I pointed out, 2005. And, you know,

1 even in the dry year -- dry year of 2002 there
2 was higher flows in the early part of the summer.
3 So you see an actual spread in flows, you know,
4 of a couple CFS, which is normal. We have a very
5 diverse climate.

6 MR. HUNT: Okay. And so is this -- you
7 mentioned two types of impairments that are
8 created by lack of flows. Can you talk about
9 what these slides help illustrate?

10 WITNESS SOTO: Well, the slides
11 illustrate that whether it's a drought year or a
12 wet year, Stanshaw Creek is impacted by flow
13 every year.

14 MR. HUNT: Okay. I have some additional
15 time from both my opening statement and my first
16 witness that I would like to try to use some of
17 that now, as other parties have, in order to
18 finish my testimony -- the remaining testimony of
19 Toz Soto.

20 HEARING OFFICER MOORE: So how much time
21 is remaining and how much time do you need?

22 MS. MCCUE: I have 8 minutes and 54
23 seconds left from the opening statement, and 6-
24 and-a-half minutes left from Mr. Hillman.

25 HEARING OFFICER MOORE: Okay.

1 MR. HUNT: So that sounds like about 14
2 minutes. And I would say with Mr. Soto, we could
3 probably be done in five.

4 HEARING OFFICER MOORE: Okay. Please
5 proceed.

6

7 (Document displayed on screen)

8 MR. HUNT: Okay. Another harm that you
9 mentioned was the potential for fish to be
10 trapped in a cold-water refugia during the summer
11 if there's no significant flow for connectivity
12 with the river. So can you tell us about -- I'll
13 represent, these are slides from exhibit -- that
14 are from Exhibit KT-5. They're photographs that
15 Mr. Soto took or was present during -- while they
16 were taken, and of a date -- and I don't remember
17 the exact date right off the top of my head, but
18 in 2009. So can you walk us through this? If
19 you need me to move a slide, go ahead and let me
20 know.

21 WITNESS SOTO: Okay. Well, this is,
22 actually, a photo of my -- one of my technicians
23 took of me standing next to the off-channel pond
24 in, I believe it was 2009, sometime late July
25 2009. And we were there upon request from -- I

1 believe it was Konrad Fisher called me and told
2 me that he was concerned that there was a fish
3 kill going on in Stanshaw Creek at the time, so
4 we came down to look at it.

5 So this is a photo that I took, an up-
6 close photo of the same site during the same
7 time. And this is the off-channel pond during a
8 condition when the water quality was extremely
9 poor, and we observed some dead fish that day.

10 MR. HUNT: What lets you know that the
11 water quality is extremely poor?

12 WITNESS SOTO: Well, the -- when we
13 arrived on site, I noted that there was a lot of
14 algae and it looked like, basically, gas bubbles
15 on the surface. And it looked like the pond was
16 actually starting to fill again. There was
17 debris on the pond. And then we found some dead
18 salmonids in the pond.

19 MR. HUNT: This -- so what do we have
20 here?

21 WITNESS SOTO: That is a dead Coho
22 salmon.

23 MR. HUNT: And who took this photograph?

24 WITNESS SOTO: I did.

25 MR. HUNT: And how do you know it's a

1 Coho salmon?

2 WITNESS SOTO: Well, there's a number of
3 ways to tell, but from this photo you can see
4 that the parr marks are narrow. You can also see
5 that the fins are a little kind of orange-ish
6 color. If we were to look a little closer you'd
7 see that there's no spots on the dorsal fin.
8 That's an indication whether it's a Coho or
9 steelhead. And then anal fin has a sickle shape.

10 MR. HUNT: And how about this?

11 WITNESS SOTO: That's the same fish that
12 was -- when I first walked up to the pool and it
13 was floating in the margin of the pool.

14 MR. HUNT: And what does this show us?
15 What did you want to tell us about this one?

16 WITNESS SOTO: So this kind of shows the
17 headcut that the creek -- well, first of all, it
18 shows that there's very little water going into
19 the creek at that time. But there's also a
20 headcut forming there which is an indication
21 that -- and then you also see the lateral cut, so
22 that was the pond elevation at some point
23 previous. But when you have a rapid decline in
24 surface elevation of a pond or reservoir, you can
25 expect the banks to slough and the inflow delta

1 to headcut. So that's an indication that there
2 was a rapid decrease in pond elevation.

3 MR. HUNT: All right. Well, that looks
4 like all the slides we have.

5 In your opinion, would eliminating the
6 diversion on Stanshaw Creek from Marble Mountain
7 Ranch prevent the harms that you observed and
8 that we've talked about today?

9 WITNESS SOTO: Yes.

10 MR. HUNT: And would imposing conditions
11 recommended by National Marine Fishery Service on
12 the diversion prevent the harms that you
13 observed?

14 WITNESS SOTO: I believe so.

15 MR. HUNT: And would imposing the
16 conditions recommended by California Department
17 of Fish and Wildlife prevent the harms that you
18 observed?

19 WITNESS SOTO: Yes.

20 MR. HUNT: Okay. It looks like I made it
21 under five minutes. Thank you, Mr. Soto.

22 HEARING OFFICER MOORE: Thank you, Mr.
23 Hunt.

24 At this time I would offer the witness to
25 be cross-examined by, first, the Prosecution

1 Team, Division of Water Rights.

2 (Pause in proceedings)

3 CROSS-EXAMINATION BY

4 MR. PETRUZZELLI: So, Mr. Soto, thank you
5 for coming. And I wanted to bring up number --
6 WR-87.

7 (Document displayed on screen)

8 MR. PETRUZZELLI: And then bring up
9 page 19 of -- so this is the Division of Water
10 Rights Inspection Report.

11 Mr. Soto, did you take this photo?

12 WITNESS SOTO: I did.

13 MR. PETRUZZELLI: Did you take this
14 second photo?

15 WITNESS SOTO: I took that one, as well.

16 MR. PETRUZZELLI: Okay. And did you
17 provide these photos to Division Staff?

18 WITNESS SOTO: Yes, I did. Skyler, I
19 believe.

20 MR. PETRUZZELLI: Okay. That's Skyler
21 Anderson?

22 WITNESS SOTO: Uh-huh.

23 MR. PETRUZZELLI: Okay. And you
24 previously testified that you could identify the
25 fish in the photo.

1 And did you -- following the meeting in
2 Orleans in December 2014, did you correspond
3 with, you know, Mr. Anderson regarding, you know,
4 fish kills and conditions in Stanshaw Creek?

5 WITNESS SOTO: Yeah. I believe it was
6 2015 --

7 MR. PETRUZZELLI: Okay.

8 WITNESS SOTO: -- at some point when we
9 corresponded.

10 MR. PETRUZZELLI: All right. And did you
11 provide him with, you know, additional
12 information?

13 WITNESS SOTO: I provided him with these
14 photos.

15 MR. PETRUZZELLI: Okay. I apologize.
16 The mouse is being difficult.

17 Can we pause the clock? Yeah. Okay.
18 Great. Thank you. All right.

19 (Document displayed on screen)

20 MR. PETRUZZELLI: Is this an email you
21 sent to Mr. Anderson, or rather to Mr. Williams
22 at the Water Board?

23 WITNESS SOTO: Yeah.

24 MR. PETRUZZELLI: Okay.

25 WITNESS SOTO: Yes.

1 MR. PETRUZZELLI: Thank you.

2 (Document displayed on screen)

3 MR. PETRUZZELLI: And is this an email
4 that you sent to Mr. Anderson?

5 WITNESS SOTO: Yes, it is.

6 MR. PETRUZZELLI: Okay. I'll note for
7 the record, this is Exhibit WR-93. Thank you.

8 And I believe the prior email I asked
9 about was Exhibit WR-74.

10 (Document displayed on screen)

11 MR. PETRUZZELLI: And this is Exhibit WR-
12 96.

13 Mr. Soto, did you send this email to Mr.
14 Anderson?

15 WITNESS SOTO: Yes.

16 MR. PETRUZZELLI: Okay. Thank you. And
17 then next one is WR-97.

18 (Document displayed on screen)

19 MR. PETRUZZELLI: Mr. Soto, did you send
20 this email to Mr. Anderson?

21 WITNESS SOTO: Yes.

22 MR. PETRUZZELLI: And, you know, this
23 looks like an email chain.

24 Did you send these other emails in the
25 chain?

1 WITNESS SOTO: Yes, I did.

2 MR. PETRUZZELLI: Okay. I should
3 probably scroll through the rest of it, so you
4 can see it.

5 And where -- were -- the emails
6 indicating they came from you did come from you?

7 MR. PETRUZZELLI: Yes, they did.

8 MR. PETRUZZELLI: Okay. Thank you. And
9 let's see, we're at --

10 (Document displayed on screen)

11 MR. PETRUZZELLI: And did you send this email
12 to Mr. Anderson?

13 WITNESS SOTO: Yes.

14 MR. PETRUZZELLI: Okay.

15 MS. WEAVER: I'll note for the record,
16 this is Exhibit WR-103.

17 MR. PETRUZZELLI: Thank you. I apologize
18 for my absentmindedness.

19 And I think the next one is number 148.

20 (Document displayed on screen)

21 MR. PETRUZZELLI: Did you send this email
22 to Mr. Anderson?

23 WITNESS SOTO: Yes.

24 MR. PETRUZZELLI: And this email
25 indicates it includes attached, you know,

1 information, spreadsheets, stream gauging, you
2 attached that information?

3 WITNESS SOTO: Yes.

4 (Document displayed on screen)

5 MR. PETRUZZELLI: Okay. And this is
6 Exhibit number 188, WR-188. This is -- this
7 looks like an email from LeRoy Cyr at the Forest
8 Service. Do you recognize this email?

9 WITNESS SOTO: Yes.

10 MR. PETRUZZELLI: Okay.

11 (Document displayed on screen)

12 MR. PETRUZZELLI: And I think the next
13 one is 190.

14 Was this an email that you sent --

15 WITNESS SOTO: Yes, it is.

16 MR. PETRUZZELLI: -- to Mr. Feiler?

17 WITNESS SOTO: Yes.

18 MR. PETRUZZELLI: And these attachments,
19 this was -- this was attached data you included?

20 WITNESS SOTO: Yes, it is.

21 MR. PETRUZZELLI: Can you maybe explain
22 what some of these attachments are, since the
23 file extension names may look -- may appear
24 unfamiliar?

25 WITNESS SOTO: Yeah. Those are data from

1 temperature loggers that were deployed in
2 Stanshaw Creek.

3 MR. PETRUZZELLI: Okay. And is that like
4 raw data, basically?

5 WITNESS SOTO: Yeah, it's raw.

6 MR. PETRUZZELLI: I'm probably not using
7 the correct term.

8 But -- so, Mr. Soto, do you recall this
9 graph?

10 WITNESS SOTO: Yes. That's the graph
11 that Stormer presented.

12 MR. PETRUZZELLI: And do you -- do you
13 remember, did you discuss this graph with him?

14 WITNESS SOTO: No.

15 MR. PETRUZZELLI: No, you didn't. Do you
16 know how -- do you -- do you know what data he
17 used to create this graph?

18 WITNESS SOTO: I am not sure if it was
19 our data or it was LeRoy Cyr's data.

20 MR. PETRUZZELLI: Okay. Can you talk
21 about the kinds of data collections tools used
22 for flow and temperature in Stanshaw?

23 WITNESS SOTO: Well, we measure flow with
24 a Swoffer flow velocity meter. And then we do
25 some calculations using a tape and come up with

1 flow that way. Temperature data is collected
2 with, we call them HOBO temps, it's kind of like
3 a general term for them, but they're basically
4 temperature loggers that are set to record
5 temperature hourly. And they're put in a metal
6 case and attached to a cable and deployed into
7 the stream.

8 MR. PETRUZZELLI: Can you talk about what
9 parts of the stream they're in?

10 WITNESS SOTO: I believe this one --
11 well, I don't know where LeRoy Cyr put his --

12 MR. PETRUZZELLI: Okay.

13 WITNESS SOTO: -- his loggers, but we
14 attached ours to either a tree, or I think in
15 some cases there was a staff gauge there, we
16 attached it to that and placed the logger in the
17 pool, or if it was in the creek, we would put it
18 in the -- you know, attach it to some kind of
19 hard point, like a root or a tree, so when the
20 winter flows came they didn't get lost or
21 somebody didn't run off with them.

22 MR. PETRUZZELLI: Okay. If you saw this
23 kind of -- you know, the type of temperature
24 change indicated on this graph, what kind of
25 inferences might you draw from it?

1 WITNESS SOTO: When I look at that,
2 that's an indication that the logger was exposed
3 to the air.

4 MR. PETRUZZELLI: Okay. And why would it
5 get so hot?

6 WITNESS SOTO: It got so hot because the
7 flows dropped and the logger was exposed to the
8 air. The air temperatures in the Mid Klamath
9 routinely exceed 100 degrees C -- I mean
10 Fahrenheit, sorry.

11 MS. WEAVER: Okay. Counsel, can we
12 identify this exhibit before you move off it?

13 MR. PETRUZZELLI: This is Exhibit WR-191.

14 So this is Exhibit WR-190.

15 (Document displayed on screen)

16 MR. PETRUZZELLI: And is this -- does
17 this -- do the attachments here include 2009
18 data?

19 WITNESS SOTO: It appears they do, yeah.

20 MR. PETRUZZELLI: Okay. And would this
21 graph appear to reflect that 2009 data?

22 WITNESS SOTO: Yes.

23 MR. PETRUZZELLI: Okay. Fairly
24 accurately?

25 WITNESS SOTO: I think so.

1 MR. PETRUZZELLI: Okay. Mr. Soto, do you
2 recall the Stanshaw Creek Restoration Project, I
3 think this particular project?

4 WITNESS SOTO: Yes. I was involved with
5 that project.

6 MR. PETRUZZELLI: Okay. That was
7 actually probably my next question.

8 Can you talk about this project a little
9 bit, why it was necessary, what it accomplished?

10 WITNESS SOTO: Yeah. We worked with the
11 Mid Klamath Watershed Council to implement this
12 project. And the project was really designed to
13 excavate the sediment out of the pool and
14 basically make the pool volume larger. It was
15 on -- it was following some years where we'd
16 observed these fish kills and we were concerned
17 that the pool was trapping fish and fish were
18 dying. So we figured that if we expand the
19 volume of the pool, then we'd make the pool more
20 resilient.

21 So we do these kind of projects all over
22 the place. This is one of a number of projects
23 that we implemented during that time frame.

24 MR. PETRUZZELLI: Okay. And what was the
25 time frame of this project?

1 WITNESS SOTO: I believe this was 2013,
2 or maybe '14 when it was implemented. I don't
3 recall exactly.

4 MR. PETRUZZELLI: Okay.

5 (Document displayed on screen)

6 MR. PETRUZZELLI: So the project
7 description indicates that -- I will highlight
8 that portion. Okay. Can you read that
9 highlighted portion?

10 MS. WEAVER: I'll note for the record
11 that this is Exhibit WR-184.

12 MR. PETRUZZELLI: And I believe we are on
13 page four.

14 WITNESS SOTO: Okay. So,
15 "This project successfully restored
16 approximately 4,500 square feet of high-
17 quality Coho rearing habitat at the mouth of
18 Stanshaw Creek, latitude 41.477, longitude
19 123.512. Approximately 560 cubic yards of
20 gravel and rock were removed from the head of
21 an existing pool, restoring and enhancing the
22 pre-2006 form and function of this heavily
23 utilized off-channel rearing habitat
24 originating from Stanshaw Creek. The bulk of
25 the sediment plug was deposited during the

1 2005-2006 flood event when upstream ditch
2 diversion to Marble Mountain Ranch
3 overtopped, causing severe gully erosion."

4 MR. PETRUZZELLI: So that's something
5 that would have occurred in the last -- within
6 the last 20 years?

7 WITNESS SOTO: Yes.

8 MR. PETRUZZELLI: Yeah. And do you agree
9 with that description --

10 WITNESS SOTO: Yes.

11 MR. PETRUZZELLI: -- of the project?
12 Okay.

13 I think the next exhibit I'd like to ask
14 you about is WR-40.

15 (Document displayed on screen)

16 MR. PETRUZZELLI: And this is Exhibit WR-
17 40. This is a field report from State Water
18 Board inspection conducted in July of 2000.

19 WITNESS SOTO: For the record, they
20 spelled my name wrong.

21 MR. PETRUZZELLI: I was -- you know what,
22 I was going to ask you that. I think they spell
23 your name as Todd in this report, and that is an
24 incorrect spelling. Thank you.

25 Is this you in the photo?

1 WITNESS SOTO: That is.

2 MR. PETRUZZELLI: And are you also in
3 this photo?

4 WITNESS SOTO: I was much younger then,
5 but, yeah, I think that's me.

6 MR. PETRUZZELLI: Okay. So you were
7 in -- so you were involved in this Stanshaw Creek
8 process, even then?

9 WITNESS SOTO: Yes, I was.

10 MR. PETRUZZELLI: Yes. Okay. And those
11 are our questions for Mr. Soto.

12 HEARING OFFICER MOORE: All right. Thank
13 you.

14 Ms. Brenner, do you have some questions
15 for Mr. Soto?

16 MS. BRENNER: Yes.

17 CROSS-EXAMINATION BY

18 MS. BRENNER: Good morning, Mr. Soto.

19 WITNESS SOTO: Good morning.

20 MS. BRENNER: Just a clarification. Is
21 Ti Creek upstream or downstream from the Stanshaw
22 Creek?

23 WITNESS SOTO: Ti Creek is upstream --

24 MS. BRENNER: Ti Creek.

25 WITNESS SOTO: -- from Stanshaw Creek,

1 yes.

2 MS. BRENNER: Is there another name for
3 it? Does it have a longer name?

4 WITNESS SOTO: That's it, Ti.

5 MS. BRENNER: Does it have any thermal
6 refuge pools in it?

7 WITNESS SOTO: It has a thermal refuge at
8 the confluence of Ti Creek, and then at the lower
9 part of Ti Creek is thermal refuge, but it
10 doesn't have an off-channel pond.

11 MS. BRENNER: So there was an exhibit
12 that you used that showed the different pools
13 along the Klamath, and that wasn't listed there?

14 WITNESS SOTO: No. We didn't detect any
15 Coho in -- or we didn't recapture any of the
16 Shasta River Coho at Ti Creek.

17 MS. BRENNER: Okay. You -- Mr.
18 Petruzzelli discussed with you just a minute ago
19 Exhibit WR-190; do you recall that, just a few
20 minutes ago?

21 WITNESS SOTO: If you could remind me
22 which one that was?

23 MS. BRENNER: That was Mr. Feiler's graph
24 of the --

25 WITNESS SOTO: Oh, yeah.

1 MS. BRENNER: -- 2009 --

2 WITNESS SOTO: Yeah.

3 MS. BRENNER: -- temperature data.

4 And --

5 MR. PETRUZZELLI: 191.

6 MS. BRENNER: 191 was the graph?

7 And you're not sure where -- what data he
8 used to produce that graph; correct?

9 WITNESS SOTO: I don't know which data he
10 used.

11 MS. BRENNER: Okay. Were you here when
12 Mr. Feiler testified as to his interpretation of
13 that data?

14 WITNESS SOTO: Yes.

15 MS. BRENNER: Did you understand Mr.
16 Feiler to indicate that that data -- his
17 interpretation of that data was that the pond
18 temperature was actually 106 degrees?

19 WITNESS SOTO: Yeah, I recall that.

20 MS. BRENNER: Do you agree with that
21 assessment of the data?

22 WITNESS SOTO: No.

23 MS. BRENNER: That was the ambient air
24 temperature?

25 WITNESS SOTO: That's the only thing it

1 could have been.

2 MS. BRENNER: Okay. I'd like to go
3 through some of the data that you've presented,
4 Exhibits KR-6 [sic] and KR-8 [sic], and the
5 temperature data the Prosecution Team included in
6 WR-190. Is it possible that we can provide Mr.
7 Soto that -- those sets of data? Yes.

8 Mr. Hunt, can we provide that -- those
9 exhibits, or we're certainly --

10 MR. HUNT: I'm sorry, like in what way?

11 MS. BRENNER: Just hand them to him --

12 MR. HUNT: I don't have it -

13 MS. BRENNER: -- so that he has them.

14 MR. HUNT: I don't have it printed out.

15 MS. FULLER: Oh, we do.

16 MR. HUNT: Oh, absolutely. Sure. Sure.
17 Hand it to him. That's fine.

18 MR. HUNT: Is it possible to put this on
19 the screen while we go through it, so that we can
20 all follow along?

21 MS. BRENNER: I think that if you -- you
22 can certainly try. But because it's so many
23 sheets of data, it's going to be difficult to put
24 it up on the screen. It's just the same -- same
25 indication that I went through with Mr. Cramer.

1 MR. HUNT: Okay.

2 MS. BRENNER: It's interpretation of the
3 data. You're certainly welcome to have them put
4 it up on the screen. But to flip through the
5 pages of data is going to be difficult.

6 MR. HUNT: I understand. I'm going to
7 grab my computer, so at least I can keep it in
8 front of myself.

9 MS. BRENNER: Okay.

10 MR. HUNT: What are the numbers?

11 MS. BRENNER: KR-6, KR-8.

12 HEARING OFFICER MOORE: It might be KT?
13 Sorry, just to --

14 MS. BRENNER: KT?

15 HEARING OFFICER MOORE: Yeah.

16 MS. BRENNER: Sorry.

17 HEARING OFFICER MOORE: No problem.

18 MR. HUNT: Those are the only two, KT-6
19 and KT-8?

20 MS. BRENNER: KT-6, KT-8, and WR-190.

21 Mr. Soto, is Exhibit KR-6 [sic] data
22 describing observations of fish in specific areas
23 of the Klamath Basin from 2002 to 2012?

24 WITNESS SOTO: This one here? Yeah.
25 Yeah. Those are presence-absence surveys that we

1 conduct.

2 MS. BRENNER: And they include Stanshaw
3 Creek; correct?

4 WITNESS SOTO: Yes.

5 MS. BRENNER: Okay. And so I'm going to
6 focus on the Stanshaw Creek data.

7 WITNESS SOTO: Okay.

8 MS. BRENNER: Okay. And KT-8 is flow
9 data from the -- from Mid Klamath tributaries
10 from '96 through 2012, including Stanshaw?

11 WITNESS SOTO: Yeah.

12 MS. BRENNER: That's correct? And
13 Prosecution Team Exhibit WR-190 is temperature
14 data you provided to Mr. Feiler for the Stanshaw
15 pool; is that correct?

16 WITNESS SOTO: Well, I'm not sure if I
17 provided this data or this is Mr. Cyr's data.

18 MS. BRENNER: Okay. Are you familiar
19 with that data?

20 WITNESS SOTO: Yes.

21 MS. BRENNER: Okay. So I want to focus
22 for a moment on -- which data is this coming
23 from, KT-6?

24 Look at Exhibit 6, KT-6.

25 WITNESS SOTO: Okay.

1 MS. BRENNER: And do you see the date
2 07/08/2008?

3 WITNESS SOTO: Yes.

4 MS. BRENNER: What's the number of Coho
5 at that time observed?

6 WITNESS SOTO: In Stanshaw Creek, it
7 looks like there was 130 Coho observed that day.

8 MS. BRENNER: Anything else observed that
9 day with regard to fishery resources?

10 WITNESS SOTO: In the notes there were 86
11 juvenile Chinook, 336 juvenile steelhead, and 35
12 Chinook observed in the Klamath.

13 MS. BRENNER: And what were those 35
14 Chinook in the Klamath?

15 WITNESS SOTO: It says, "35 Chinook in
16 the Klamath were observed with very distended
17 stomachs." That's what it says in there.

18 MS. BRENNER: What's that mean when a
19 fish has a distended stomach?

20 WITNESS SOTO: Well, that typically means
21 it has clinical signs of Ceratomyxa shasta, which
22 is a disease that affects salmonids in the
23 Klamath River.

24 MS. BRENNER: So they're diseased? They
25 have a -- they're not doing well?

1 WITNESS SOTO: No.

2 MS. BRENNER: And the next date,
3 07/13/2009, what was observed in that -- on that
4 date with regard to fishery resources?

5 WITNESS SOTO: It looks like no Coho, 179
6 juvenile steelhead, and 1 juvenile Chinook were
7 seen.

8 MS. BRENNER: How about 07/20/2010?

9 WITNESS SOTO: In Stanshaw Creek there
10 were 55 Coho observed. And in the notes it says,
11 "66 steelhead were observed."

12 MS. BRENNER: And how about it 2011?

13 WITNESS SOTO: There were 17 Coho
14 observed. And in the notes it says,
15 "15 juvenile steelhead, 4 juvenile Chinook,
16 30 shiner, 3 sunfish, 1 juvenile steelhead,
17 and 1 juvenile Coho mortality."

18 MS. BRENNER: Okay.

19 (Colloquy between MMR Counsel.)

20 MS. BRENNER: So also on 07/08/2008 at
21 the Stanshaw confluence, was data collected at
22 that point, as well?

23 WITNESS SOTO: So that's the confluence
24 where Stanshaw Creek meets the Klamath River, and
25 it looks like there were 502 juvenile Chinook and

1 3 juvenile steelhead observed at that location.

2 MS. BRENNER: And again on 07/13/09,
3 what's the observation notes on that date?

4 WITNESS SOTO: 07/13? So in Stanshaw
5 Creek there were 179 juvenile steelhead and 1
6 juvenile Chinook. In the Stanshaw confluence, it
7 says that,

8 "Stanshaw doesn't make it all the way to the
9 Klamath River. It goes underground 30 feet
10 from the Klamath. Only 35 shiner were seen
11 at the mouth."

12 MS. BRENNER: Okay. So that's an
13 instance when the fish in the Stanshaw pond are
14 trapped? There's no connectivity; correct?

15 WITNESS SOTO: That's what it indicates,
16 yes.

17 MS. BRENNER: Okay. But there are fish
18 in the pond?

19 WITNESS SOTO: Yes.

20 MS. BRENNER: And that's July 13th, 2009?

21 WITNESS SOTO: Yes.

22 MS. BRENNER: What about July 20th, 2010?

23 WITNESS SOTO: So July 20th, 2010 there
24 were 55 Coho observed in the pond -- or in
25 Stanshaw Creek. I think it's important to note

1 that these counts include the creek and the pond.
2 Sixty-six juvenile steelhead were observed.

3 MS. BRENNER: I'm actually looking at the
4 Stanshaw confluence.

5 WITNESS SOTO: Oh. Oh, okay.

6 MS. BRENNER: Sorry.

7 WITNESS SOTO: Sorry.

8 MS. BRENNER: I wasn't -- I wasn't clear.

9 WITNESS SOTO: Okay.

10 MS. BRENNER: That's my fault.

11 WITNESS SOTO: Okay. So there were eight
12 juvenile Coho observed in the confluence. And
13 then in the notes it says, "There was four
14 juvenile steelhead and two juvenile Chinook
15 observed."

16 MS. BRENNER: And how about again on
17 08/30/2011 at the confluence?

18 WITNESS SOTO: There were zero Coho
19 observed and 1 juvenile steelhead, 2 juvenile
20 Chinook, and 20 shiner observed.

21 MS. BRENNER: Okay. And so now let's go
22 to the Exhibit 8, Karuk Tribe Exhibit 8, and
23 that's the flow data for Stanshaw Creek; is that
24 correct?

25 WITNESS SOTO: This -- well, what I'm

1 looking at is Stanshaw Creek diversion at the
2 outflow, 2000.

3 MS. BRENNER: So tell me what you're --
4 what is that data? Is that flow data for
5 Stanshaw Creek, Marble Mountain Ranch diversion?

6 WITNESS SOTO: Yes.

7 MS. BRENNER: But where's the measures
8 taken?

9 WITNESS SOTO: The measures are taken --
10 basically there's an access road that goes to
11 Irving Creek, and the Stanshaw diversion crosses
12 that. So it's right before the outflow -- or it
13 is the outflow to Irving Creek. So I saw some
14 pictures earlier of big headcuts right above
15 that, and it's right where the diversion outflow
16 crosses the road.

17 MS. BRENNER: Okay. And on 06/24/08,
18 what was the CFS at that point?

19 WITNESS SOTO: 06/24? 06/24? Did you
20 say '08?

21 MS. BRENNER: Yes.

22 WITNESS SOTO: The data I'm looking at, I
23 don't have an '08, unless -- oh, okay, it's the
24 next page, I guess, here.

25 So 06/24/08 at crossing of track at

1 Irving Creek directly in diversion the flow was
2 measured at 1.8 CFS.

3 MS. BRENNER: How about 07/31/2008?

4 WITNESS SOTO: The flow measured at that
5 location was 1.7.

6 MS. BRENNER: How about 07/01/2009?

7 WITNESS SOTO: The flow was measured at
8 1.8.

9 MS. BRENNER: Okay. Now I want to direct
10 you to the flow data for Stanshaw Creek
11 confluence, taken in various areas near Highway
12 96.

13 WITNESS SOTO: Okay. Okay.

14 MS. BRENNER: What does that --

15 MR. HUNT: Sorry. Sorry. You said
16 Stanshaw Creek confluence. I don't know that --
17 maybe you'll get there, but I'm not sure that
18 that's exactly what this is describing if you're
19 talking about below Highway 96.

20 MS. BRENNER: That's what I'm going to
21 ask.

22 MR. HUNT: Okay.

23 MS. BRENNER: Where's that data taken
24 from? I don't --

25 MR. HUNT: Okay. Sorry.

1 WITNESS SOTO: So you're asking me where
2 the data is collected?

3 MS. BRENNER: Uh-huh.

4 WITNESS SOTO: So the data is
5 collected -- at least our crews collect the data
6 in the same location. It's just above Highway
7 96, below Stanshaw Creek diversion.

8 MS. BRENNER: Okay. So on 06/24/2008,
9 what was the flow at that point?

10 WITNESS SOTO: On 06/24/2008, 100 feet
11 upstream of Highway 96 road crossing the flow was
12 1.9.

13 MS. BRENNER: And how about on
14 07/31/2008?

15 WITNESS SOTO: On 07/31 it was 1.1.

16 MS. BRENNER: And on July 1, 2009, what
17 was the flow?

18 WITNESS SOTO: 0.5.

19 MS. BRENNER: How about 07/13/2010?

20 WITNESS SOTO: 2.4.

21 MS. BRENNER: Now I want you to take a
22 look at Prosecution Team Exhibit 190. Is that
23 temperature data?

24 WITNESS SOTO: Yes. Yes.

25 MS. BRENNER: Okay. And that's

1 temperature data by the hour; is that correct?

2 WITNESS SOTO: I believe so.

3 MS. BRENNER: Okay. So again, can you
4 take a look at 06/24/08, and in that 24-hour
5 period, what was the highest temperature?

6 WITNESS SOTO: 06/24/08?

7 MS. BRENNER: Uh-huh.

8 WITNESS SOTO: 06/24/08? I'm looking at
9 2009.

10 MR. HUNT: Can I help him find it? Do
11 you mind?

12 MS. BRENNER: Oh, yeah, you can help him.

13 WITNESS SOTO: Oh, is it --

14 MR. HUNT: It's probably at the tabs in
15 the --

16 WITNESS SOTO: Okay.

17 MR. HUNT: -- in the back here. Here,
18 take the clip off, so it's easier.

19 WITNESS SOTO: Okay.

20 MS. BRENNER: Yeah. You can --

21 MS. FULLER: I apologize. I don't think
22 I tagged the right tab.

23 MR. HUNT: Okay.

24 MS. BRENNER: Is it okay if Kerry helps
25 him out?

1 MR. HUNT: I'm fine. I want to get out
2 of here as fast as we all can.

3 MS. FULLER: I apologize.

4 MS. WEAVER: If folks could be careful
5 not to bump the microphone? It's very hard on
6 our court reporter.

7 (Colloquy between MMR Counsel.)

8 MS. BRENNER: It's a lot of data.

9 WITNESS SOTO: Yeah. Okay. So --

10 MS. BRENNER: 06/24/08; could you just
11 take a look at that hourly temperature data and
12 let me know what you see is the highest
13 temperature?

14 WITNESS SOTO: So it looks like it was,
15 on 06/24/08 at 2100 hours, I believe, it was
16 58.066.

17 MS. BRENNER: I'm not good at military
18 time.

19 What -- do you know what time 2100 hours
20 is?

21 WITNESS SOTO: I believe it's like three
22 o'clock or something.

23 MR. HUNT: It's 9:00.

24 WITNESS SOTO: Is that 9:00 p.m.?

25 MS. BRENNER: It's 9:00 p.m., isn't it?

1 MR. HUNT: I thought you said you weren't
2 good at it. Are you trying to trick my witness
3 here?

4 MS. BRENNER: I just think it's curious
5 that the temperature was high at the nighttime.

6 WITNESS SOTO: Yeah, that is odd.

7 MS. BRENNER: Isn't that odd?

8 How about 07/08/2008?

9 WITNESS SOTO: 07/08?

10 MS. BRENNER: Same exercise. Just take a
11 look at the different hourly measurements of
12 temperature. And I'll just suggest to you that
13 1900 hours, 2010, 21.

14 WITNESS SOTO: So can you repeat the
15 time? You're on 07/08?

16 MS. BRENNER: 07/08/2008, if you take a
17 look at those hourly data logs' temperatures,
18 you'll see a pattern here.

19 WITNESS SOTO: Yeah. This -- I can
20 explain. Probably the error here is when they
21 downloaded the -- or when they launched the
22 logger, whoever did this, their clock was likely
23 wrong on their computer when they did that, so
24 that's --

25 MS. BRENNER: So you think --

1 WITNESS SOTO: This is -- this is raw
2 data, so that can be corrected.

3 MS. BRENNER: So you don't think that the
4 highest temperatures were at these time periods?

5 WITNESS SOTO: It wouldn't make any
6 sense.

7 MS. BRENNER: Nonetheless, what is the
8 highest temperature during that particular date?

9 WITNESS SOTO: On 07/08?

10 MS. BRENNER: Uh-huh, '08.

11 WITNESS SOTO: Okay. Let's see here. So
12 it looks like, without going to the tenths, it's
13 63.

14 HEARING OFFICER MOORE: Would you use
15 units please?

16 WITNESS SOTO: 63 Fahrenheit.

17 MS. BRENNER: And if you take a look at
18 2010 -- or 1910, I think, it's actually 64
19 degrees.

20 WITNESS SOTO: Okay. Oh, yeah. Yeah,
21 64 degrees.

22 MS. BRENNER: Okay. One more. Bear with
23 me.

24 07/01/2009? We like 2009.

25 WITNESS SOTO: Yeah.

1 MS. BRENNER: That's actually tabbed.

2 WITNESS SOTO: Oh.

3 MS. BRENNER: And outside of the time
4 period when the temperature probe --

5 WITNESS SOTO: 2009?

6 MS. BRENNER: -- was exposed to the
7 ambient air --

8 MR. HUNT: He's still looking. Sorry. I
9 think it would be better if you wait.

10 MS. BRENNER: Okay. It's actually
11 tabbed.

12 MR. HUNT: It must be.

13 WITNESS SOTO: Okay. I got it now.

14 MS. BRENNER: Okay. So we note that
15 there was, on the 1500 hour, it's the 106.9 that
16 we've already discussed, correct, 106.9
17 Fahrenheit?

18 WITNESS SOTO: Yeah. Yes.

19 MS. BRENNER: And that was as a result of
20 the logger being exposed to the ambient air
21 temperature?

22 WITNESS SOTO: That's the only
23 explanation I can think of.

24 MS. BRENNER: Right. And that wouldn't
25 be the pond temperature?

1 WITNESS SOTO: No.

2 MS. BRENNER: Does it get 107 degrees out
3 there?

4 WITNESS SOTO: Yes.

5 MS. BRENNER: So outside of that and the
6 1600 hours at 104, and 1700, 101, 1800 it's at
7 95, prior to that 106 temperature, what was the
8 highest temperature logged between 0.10 [sic] and
9 1400 hours military time?

10 WITNESS SOTO: It looks like it was 63.

11 MS. BRENNER: Okay. And you weren't at
12 the pond on July 1, 2009, were you?

13 WITNESS SOTO: No.

14 MS. BRENNER: But if the temperature of
15 the pond had gotten as high as 100 degrees, we
16 would have found all fishery resources would have
17 died?

18 WITNESS SOTO: Oh, yeah, for sure.

19 MS. BRENNER: Yeah. Okay. I want to go
20 back to the restoration effort that you discussed
21 earlier. Which exhibit is that? That's okay.
22 Do you know -- you know -- oh, go ahead. I think
23 it's WR-184; is that correct?

24 Can we pull that back up?

25 (Document displayed on screen)

1 MS. BRENNER: It's the -- is that 184?
2 That must not be the right. You know, scroll
3 down.

4 Thanks, Ken.

5 MS. FULLER: There we go.

6 MS. BRENNER: So if you go to the project
7 description again, page four?

8 And you read that into the record earlier
9 this morning, correct --

10 WITNESS SOTO: Correct.

11 MS. BRENNER: -- the project description?
12 And a part of that project description is that
13 the Stanshaw Creek pool is heavily utilized,
14 heavily used?

15 WITNESS SOTO: Yes.

16 MS. BRENNER: What does that mean?

17 WITNESS SOTO: It means fish use it
18 heavily. That's a very vague term.

19 MS. BRENNER: Okay. You also indicated
20 that the 2006, there was a Marble Mountain Ranch
21 ditch overtopping due to a flood event?

22 WITNESS SOTO: Correct.

23 MR. HUNT: Objection. I'm not sure that
24 Mr. Soto indicated that.

25 MS. BRENNER: Is that your understanding,

1 Mr. Soto?

2 WITNESS SOTO: I understand there was a
3 flood.

4 MS. BRENNER: Do you know if there was --

5 HEARING OFFICER MOORE: I'm going to
6 overrule the objection. Continue with the line
7 of questioning, but I'll hold it in
8 consideration.

9 Go ahead.

10 MS. BRENNER: Okay. Thank you.

11 Are you aware of an overtopping by the
12 Marble Mountain Ranch ditch in 2006?

13 WITNESS SOTO: I was not there during the
14 flood, so I didn't observe it.

15 MS. BRENNER: Okay. When you have a
16 flood event on a -- on Stanshaw, or another
17 similar, like was it Ti Creek, Ti Creek?

18 WITNESS SOTO: Ti Creek.

19 MS. BRENNER: I have a hard time with
20 that Ti, T-I. It seems like Tie to me.

21 On Ti Creek, what -- do you have sediment
22 outfall from those creek systems during those
23 flood events?

24 WITNESS SOTO: Yes, we do.

25 MS. BRENNER: Do you have quite a bit of

1 sediment outfall?

2 WITNESS SOTO: Yes.

3 MS. BRENNER: Does this enhancement
4 project involve moving rocks to direct the flow
5 into the Stanshaw flood plain?

6 WITNESS SOTO: Not this particular
7 enhancement project.

8 MS. BRENNER: Are you aware of rocks
9 being moved in the last year, this last year, in
10 the Stanshaw flood plain?

11 WITNESS SOTO: Yes, I am.

12 MS. BRENNER: Do you know who's doing
13 that?

14 WITNESS SOTO: The Mid Klamath Watershed
15 Council has a contract with PacifiCorp -- well,
16 it's actually with the National Fish and Wildlife
17 Foundation, funded through PacifiCorp, to do
18 creek mouth enhancement on all creeks along the
19 Mid Klamath River to enhance fish passage during
20 the summer for these juvenile fish to easily
21 access refuge.

22 MS. BRENNER: So it's your understanding
23 that the movement of the rocks along the Stanshaw
24 system is to enhance connectivity between
25 Stanshaw Creek and Klamath River?

1 WITNESS SOTO: Yes, that's the intent of
2 the project.

3 MS. BRENNER: This is Exhibit 93. Where
4 is -- where is our photo?

5 (Colloquy between MMR Counsel.)

6 MS. BRENNER: Can we take a look at
7 MMR -- Exhibit MMR-21? And you can direct this,
8 or I can pull it up. Pull that up and go to the
9 photo.

10 (Document displayed on screen)

11 MS. BRENNER: Were you here when Mr.
12 Cramer testified?

13 WITNESS SOTO: Yes, I was.

14 MS. BRENNER: So you're familiar. Did
15 you see the photos that were put up while Mr.
16 Cramer was visiting the site?

17 WITNESS SOTO: Yes, I saw them.

18 MS. BRENNER: So this is one of the
19 photos, that's MMR-21, page 14.

20 Do you recognize that as the Stanshaw
21 Creek pond area?

22 WITNESS SOTO: Well, you can -- I guess
23 that's the pond behind the man standing there.

24 And this looks like the creek entering the pond.

25 MS. BRENNER: And are those hand-placed

1 rocks along that creek?

2 WITNESS SOTO: It looks like there's some
3 hand-placed rocks on the left side of the photo.

4 MS. BRENNER: And are those to direct the
5 water into the pond?

6 WITNESS SOTO: It's to direct some of the
7 water into the pond.

8 MS. BRENNER: Were you -- are you aware
9 of who placed those rocks?

10 WITNESS SOTO: I believe this project was
11 part of a -- well, I think MKWC did it.

12 Specifically, this activity was done during a
13 restoration raft trip where they took a group of,
14 I think it might have been Friends of the River
15 or some group, to do some of this stuff, to do
16 some kind of team-building thing.

17 So, yeah, I was -- I'm aware of this.

18 MS. BRENNER: Can you go to the next
19 photo?

20 Do you recognize this photo?

21 WITNESS SOTO: It looks like the same
22 location, but I don't -- I didn't see the step
23 pools in the first photo, so it may have been
24 taken at a different time.

25 MS. BRENNER: Do you recognize that as

1 the Stanshaw Creek into the pond?

2 WITNESS SOTO: Yeah, that's the inflow to
3 the pond.

4 MS. BRENNER: Can the fish get out of
5 that system the way it's currently configured?

6 WITNESS SOTO: Yeah. These are step
7 pools. They're typically designed to create
8 little resting areas. And if you look at the
9 photo, you'll see small gaps between the rocks.
10 And keep in mind, we're talking about fish that
11 are in the 50 millimeter to 100 millimeter size,
12 so they're roughly fingerlings.

13 MS. BRENNER: Uh-huh. So this is
14 allowing the fish to go in and out of the pond
15 into the creek, not into the confluence of the
16 Klamath?

17 WITNESS SOTO: Yeah. This is -- this is
18 to allow fish to move upstream into the creek.

19 MS. BRENNER: Go to the next.

20 MS. MCCUE: Could you just say what page
21 that was for the record?

22 MS. BRENNER: That's page 15.

23 MS. MCCUE: Thank you.

24 MS. BRENNER: And page 16, do you
25 recognize this area of the Stanshaw Creek?

1 WITNESS SOTO: Yes. This looks like the
2 confluence of Stanshaw Creek with the Klamath
3 River.

4 MS. BRENNER: Does that express a
5 connectivity at the point of Stanshaw Creek and
6 Klamath?

7 WITNESS SOTO: This photo is really
8 difficult to determine that. But I can see that
9 there's water spilling out from the creek, so
10 it's much different than what I described as
11 being disconnected when there's no water flowing
12 out of the creek into the river.

13 I can't make a judgment whether this is
14 passable for fish or not.

15 MS. BRENNER: Do you know whether those
16 rocks were placed there?

17 WITNESS SOTO: Not all of them. I'm
18 sure -- it looks like over on the kind of upper
19 left side of the photo, some of the rocks look
20 like they're placed, but there's a lot of rocks
21 there. I don't think they were all placed.

22 MS. BRENNER: Do you think the rocks that
23 were placed there were to increase connectivity?

24 WITNESS SOTO: I think the attempt there
25 was to make step pools from the pond down to the

1 Klamath River to improve fish passage.

2 MS. BRENNER: Okay. But you don't
3 believe that those rocks block fish passage out
4 of the pool?

5 WITNESS SOTO: From this photo, it
6 doesn't appear so.

7 MS. BRENNER: Okay. Let's go back to
8 July 2009 when you observed the one dead juvenile
9 Coho. Do you have a date of that event? Do you
10 know what date that actually occurred?

11 WITNESS SOTO: I'm going to -- I think it
12 was July 20th, and it was later July. I may have
13 indicated in that email to Skyler the exact date.
14 But it wasn't --

15 MS. BRENNER: Did --

16 WITNESS SOTO: It wasn't early July. It
17 was late July.

18 MS. BRENNER: Any idea what the
19 temperature was at that time?

20 WITNESS SOTO: I do not know the
21 temperature that day. We had a temperature
22 logger in the pond at the time, but -- and that
23 winter it got buried by sediment and we weren't
24 able to retrieve it.

25 MS. BRENNER: Okay. So the data,

1 temperature data, you recall, ended sometime
2 early July?

3 WITNESS SOTO: I don't know when the
4 temperature data ended.

5 MS. BRENNER: Did you provide all
6 temperature data that you have in your possession
7 to the State Water Resources Control Board?

8 WITNESS SOTO: I provided everything I
9 could find, yes.

10 MS. BRENNER: Okay. Do you know the
11 actual cause of the fish death?

12 WITNESS SOTO: I believe it was
13 temperature shock at the time, but there are
14 other issues with temperature. You can have
15 crashes in water quality, such as dissolved
16 oxygen, things like that, that are related to
17 temperature.

18 MS. BRENNER: Could you have a diseased
19 fish from the Klamath River?

20 WITNESS SOTO: You could have a diseased
21 fish.

22 MS. BRENNER: And the Klamath is known to
23 have diseased fish?

24 WITNESS SOTO: It's known to have
25 diseased fish, primarily Chinook salmon.

1 MS. BRENNER: Do you have an idea how
2 many juvenile salmon and steelhead were in the
3 pond at that time?

4 WITNESS SOTO: I --

5 MS. BRENNER: Did you observe fish when
6 you found other fish in the pond at the time?

7 WITNESS SOTO: I saw a couple, what I
8 thought were dead steelhead in the pond that were
9 actually on the bottom of the pond, but I didn't
10 dive the pond. I didn't get wet.

11 MS. BRENNER: So you didn't look for any
12 other fish?

13 WITNESS SOTO: No.

14 MS. BRENNER: Other than temperature,
15 what are the other factors that can reduce a
16 habitat's desirability for rearing Coho habitat?

17 WITNESS SOTO: Well, if there's no cover
18 they're subject to predators. For Coho, they
19 specifically require velocities that are less
20 than one foot per second, so you need low-
21 velocity water. Sometimes there's a lack of
22 food. But I think for thermal refugia, the two
23 main requirements are temperature and velocity.

24 MS. BRENNER: Does human visitation have
25 any impact?

1 WITNESS SOTO: I would say it's not
2 really an impact. When humans get in the water,
3 they usually stir up the water column and cause
4 the fish to actually come out and feed because
5 there's food that's kicked up from the bottom.
6 But my experience from diving with Coho is that
7 they actually, you know, don't exhibit a lot of,
8 you know, harm from snorkeling with them.

9 MS. BRENNER: How about other activities?

10 WITNESS SOTO: Well, other activities,
11 such as like suction dredge mining or something
12 like that, yes.

13 MS. BRENNER: Okay. I'm going to go back
14 to the 2013 pool restoration.

15 Do you have a sense of the season that
16 the fish enter the pool?

17 WITNESS SOTO: Well, there's three times
18 a year that the fish typically enter the pool,
19 and I kind of showed that in my chart. In the
20 spring when the Klamath is flooded the fry will
21 enter the pool, basically because it's a nice
22 low-velocity off-channel habitat. And then in
23 the early part of summer, fish will enter the
24 pool to seek thermal refugia. And then in the
25 wintertime, during the fall redistribution, fish

1 will enter the pool to seek winter refuge.

2 MS. BRENNER: Was fish abundance in the
3 pool estimated immediately before or after the
4 restoration?

5 WITNESS SOTO: I don't recall if fish
6 abundance was measured that year. There may have
7 been some dives. I mean, if there were, they
8 might be documented on this spreadsheet, but I
9 don't know of any specific data that was
10 collected.

11 MS. BRENNER: Did the Karuk Tribe perform
12 the follow-up estimates of fish abundance the
13 report indicates?

14 WITNESS SOTO: We attempted to do some
15 population estimates. And I don't recall when or
16 what that data said. I know we did population
17 estimates when we were working with Shari
18 Whitmore there. But we did do these presence-
19 absence surveys, which I'll note that they are
20 not population estimates, they're presence-
21 absence surveys.

22 So to do a population estimate in a
23 thermal refugia, our methods are we would go out
24 and do a multiple dive survey. For example, when
25 we did our research at other thermal refugia, our

1 crews would dive, starting at 7:00 in the morning
2 and dive every hour until 7:00 in the evening,
3 and then use, you know, that entire 12-hour
4 observation to come up with the population
5 estimate.

6 And that was -- I'll also note that that
7 was done in the mid-summer. But when the
8 temperatures cool in these areas, especially
9 these off-channel ponds where there's a high
10 abundance of cover, it's really difficult to
11 observe fish, especially when temperatures drop,
12 fish are not as active. So we rely on other
13 methods, such as a mark and recapture.

14 MS. BRENNER: Okay. So you don't recall
15 any data being provided regarding fish abundance
16 before or after the restoration period to the
17 State Water Board or to anybody else?

18 WITNESS SOTO: There may have been, but
19 that would have been, I think, some data that
20 possibly MKWC would have collected by doing
21 snorkel surveys.

22 MS. BRENNER: Okay. You said done in
23 mid-summer. I didn't follow what you meant by
24 that. What was done in mid-summer?

25 WITNESS SOTO: I was just going to say

1 that this, whatever exhibit this is, is -- these
2 are surveys that were done in the mid-summer to
3 do presence/absence of fish.

4 MS. BRENNER: Okay.

5 MR. HUNT: Should we identify what
6 exhibit he held up, so that we know --

7 MS. BRENNER: Yeah. That would be --

8 MR. HUNT: -- what he's talking about?

9 MS. BRENNER: -- a good idea.

10 MR. HUNT: Okay.

11 MS. FULLER: That exhibit should be
12 marked, so if you can go to the first page.

13 WITNESS SOTO: Exhibit 6.

14 MR. HUNT: KT-6?

15 MS. BRENNER: KT-6.

16 As part of the restoration effort the
17 report notes that during the six-day construction
18 period, approximately 0.24 CFS of flow was piped
19 into the pool; is that -- do you recall that?

20 MR. HUNT: Objection. I don't know that
21 we established the report says that.

22 HEARING OFFICER MOORE: Can you respond
23 to the objection? Is there another way you
24 can --

25 MS. BRENNER: We can --

1 HEARING OFFICER MOORE: -- ask the
2 question?

3 MS. BRENNER: We can go through the
4 report and find the information, if he doesn't
5 recall.

6 WITNESS SOTO: Yeah. I'm having trouble
7 piping into the pool. We had to clear fish out
8 of a channel during the restoration effort, so
9 our task was to -- basically, as the channel was
10 dried up we used little small dip nets to capture
11 juvenile steelhead and salamanders and other
12 macroinvertebrates that were stranded as part of
13 our agreement with the State to do the project.

14 (Document displayed on screen)

15 MS. BRENNER: So can you take a look at
16 what Kerry's pulled up? Is that --

17 WITNESS SOTO: Okay. Yeah, I see that.

18 MS. BRENNER: That's --

19 MS. FULLER: Let me go to the page real
20 quickly.

21 MS. BRENNER: So that's WR-184, Exhibit
22 WR-184 at page --

23 MS. FULLER: Eleven.

24 WITNESS SOTO: Okay. Yeah.

25 MS. BRENNER: -- 11.

1 WITNESS SOTO: I see it.

2 MS. BRENNER: So does that refresh your
3 recollection?

4 WITNESS SOTO: Oh, yeah. Yeah, it does
5 now. Thank you.

6 MS. BRENNER: Okay. So a flow of about
7 0.24 CFS was piped into the pool during your
8 construction period; correct?

9 WITNESS SOTO: Correct.

10 MS. BRENNER: Do you know how the fish
11 water and quality pool impacted during that time?

12 WITNESS SOTO: I don't know how the water
13 quality of the pool was impacted at that time.
14 We put a curtain between our construction area
15 and the upper part of the pool to block sediment
16 from impacting the fish that were already in the
17 pool while we did our construction. And then
18 this pipe was used to transport water from the
19 creek to the pool while we worked on the - while
20 we put a bunch of wood in the kind of -- in the
21 inlet channel, so we had to de-water the inlet
22 channel. So this was a diversion, a temporary
23 diversion while we did our construction.

24 MS. BRENNER: But you don't know what the
25 temperature of the water --

1 WITNESS SOTO: I --

2 MS. BRENNER: Did it change or fluctuate
3 during that time period?

4 WITNESS SOTO: I don't recall that.

5 MS. BRENNER: You didn't monitor that?

6 WITNESS SOTO: We may have, but I don't
7 recall what it was.

8 MS. BRENNER: Okay. Have you observed
9 diseased, dying or dead fish in any of the other
10 cold-water refugees [sic] along the Klamath
11 River?

12 WITNESS SOTO: Yes, I have.

13 MS. BRENNER: And is that a result of
14 increased temperatures?

15 WITNESS SOTO: Well, temperature is
16 definitely an influence. As the fish are -- at
17 least for the fish that I described earlier that
18 were infected with the *Ceratomyxa shasta*,
19 typically those are fish that are infected in the
20 upper reach of the Klamath River. And it's --
21 the lifecycle of *C. shasta* is influenced by
22 temperature. And the severity of infection and
23 the prevalence of infection increases as the
24 water temperature increases.

25 MS. BRENNER: Have you participated in

1 rescue operations for juvenile salmon trapped in
2 pools of water that were near going dry along the
3 Klamath?

4 WITNESS SOTO: Yes.

5 MS. BRENNER: Have you heard of such
6 rescue actions taken by others in the Klamath
7 Basin?

8 WITNESS SOTO: Yes.

9 MS. BRENNER: Could you describe some of
10 those, or at least one of those efforts?

11 WITNESS SOTO: One of the efforts --
12 well, there's been a lot of efforts, but I can
13 give you a couple of examples.

14 I think it was 2001, along the mainstem
15 Klamath River near Independence Creek a colleague
16 and I were observing the river and we saw an off-
17 channel pond/pool that was along the flood plain.
18 We noticed fish in there. And the mainstem
19 Klamath was dropping. I'll note that it was
20 before PacifiCorp had ramping rates that were
21 prescribed under the biological opinion. So we
22 took action with the Yurok Tribe to rescue those
23 fish and relocate them off the flood plain and
24 back into the river.

25 MS. BRENNER: Okay. Your testimony

1 indicated that Marble Mountain voluntarily
2 reduced their diversions during the droughts of
3 '15 and '16 and you observed no fish kills during
4 that time; is that correct?

5 WITNESS SOTO: That's correct.

6 MS. BRENNER: Did you observe fish kills
7 in other areas along the Klamath in those years?

8 WITNESS SOTO: In 2015, I observed
9 juvenile fish that were infected with *Ceratomyxa*
10 shasta at refuges, and these are refuges at creek
11 confluences along the Klamath River. Yes.

12 MS. BRENNER: Do you know the -- do you
13 have any indication of the fish abundance in the
14 Stanshaw Creek pond in 2015 and '16?

15 WITNESS SOTO: Not offhand. I would have
16 to look at our data or find whatever data is
17 available. I believe the Mid Klamath Watershed
18 Council, since that was one of their project
19 sites, has followed up with snorkel surveys
20 during the summer, but I don't know what that
21 data looks like off the top of my head.

22 MS. BRENNER: Okay. Your testimony
23 indicates that these thermal refugia are dynamic
24 physically.

25 WITNESS SOTO: Uh-huh.

1 MS. BRENNER: Is that fair?

2 WITNESS SOTO: Yes.

3 MS. BRENNER: So these areas, these
4 refugia, they change year by year; is that
5 correct?

6 WITNESS SOTO: They can, that's correct.

7 MS. BRENNER: Sometimes they're good fish
8 habitats, sometimes they're not?

9 WITNESS SOTO: Sometimes they're better
10 than others. You know, I kind of describe them
11 as a string of light bulbs. And sometimes
12 they're a little brighter and sometimes they're
13 dim.

14 MS. BRENNER: Okay. If you didn't have the
15 manipulation of the rocks along the Stanshaw
16 pool, what would occur with the Stanshaw Creek
17 water?

18 WITNESS SOTO: Well, the Stanshaw Creek
19 being one of those dynamic areas, it has an
20 alluvial delta, and this is typical of most
21 tributaries that empty onto a flood plain.
22 You'll have an alluvial fan which is composed of
23 gravel. The creek hits the alluvial fan and
24 braids into multiple channels. And those multiple
25 channels can feed off channel pools, like

1 Stanshaw Creek. And sometimes you'll have up to
2 a dozen channels that will spread out all over
3 the flood plain. And typically that's a good
4 thing because it increases the cold- water-signal
5 along the Klamath margin, so juveniles are more
6 apt to find the refuge.

7 MS. BRENNER: So why would you place
8 rocks in that flood plain then?

9 WITNESS SOTO: I think rocks were placed
10 in Stanshaw Creek specifically to increase the
11 amount of flow reaching the pond to ensure that
12 the pond was full, or in good condition.

13 MS. BRENNER: Okay. Do you recall in
14 your testimony that you state that there's no
15 tributaries feeding the Stanshaw Creek system
16 below the Marble Mountain Ranch point of
17 diversion?

18 WITNESS SOTO: Yes.

19 MS. BRENNER: Are you aware of Mr.
20 Fisher's diversion of water from a tributary
21 downstream from the Marble Mountain Ranch point
22 of diversion?

23 WITNESS SOTO: I am aware of his
24 diversion. I didn't -- I was not aware that it
25 came from a tributary. I thought, at least from

1 my experience walking up there, I thought it was
2 just a pipe in the creek.

3 MS. BRENNER: So he has a pipe in the
4 Klamath -- or in the Stanshaw Creek collecting
5 water?

6 WITNESS SOTO: He did probably five or
7 six years ago when I observed that. I haven't
8 been up there in a long time. I don't really know
9 what his system looks like now.

10 MS. BRENNER: You haven't been up the
11 Stanshaw Creek in a long time?

12 WITNESS SOTO: I haven't been up above
13 the Highway 96 crossing where his inlet for his
14 pipe has been in at least five years.

15 MS. BRENNER: Okay. Is where he diverts
16 water in Stanshaw Creek close to the refuge pond?

17 WITNESS SOTO: Not really. It's probably
18 a half-mile up river -- I mean up the creek --

19 MS. BRENNER: Okay.

20 WITNESS SOTO: -- or maybe less than
21 that.

22 MS. BRENNER: Are you aware of other
23 subterranean contributions to the Stanshaw Creek
24 below the Marble Mountain Ranch point of
25 diversion?

1 WITNESS SOTO: You mean springs that
2 might feed the creek?

3 MS. BRENNER: Uh-huh.

4 WITNESS SOTO: There's nothing really
5 obvious. I mean, I'm sure there's probably some
6 seepage that comes from the ditch that returns
7 back to the creek. I'm sure that must be
8 occurring.

9 MS. BRENNER: How about seepage along the
10 creek bed and banks itself?

11 WITNESS SOTO: I'm not aware of any
12 springs that do that.

13 MS. BRENNER: Are you aware of whether
14 Mr. Fisher stacks rocks at Stanshaw Creek around
15 the refugia pool area?

16 WITNESS SOTO: I am not aware of what he
17 does.

18 MS. BRENNER: Okay. I have nothing
19 further.

20 HEARING OFFICER MOORE: Okay. Thank you.

21 Next, does National Marine Fishery
22 Service have any questions for Mr. Soto?

23 (Pause in proceedings)

24 MR. KEIFER: Are we ready?

25 HEARING OFFICER MOORE: Please.

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CROSS-EXAMINATION BY

MR. KEIFER: Good morning. Are you aware of a fish kill that happened in the Klamath system in 2002?

WITNESS SOTO: Yes.

MR. KEIFER: Do you know where in the system that happened?

WITNESS SOTO: The fish kill was concentrated in the Lower Klamath River, primarily from Blue Creek down to the confluence of Klamath River with the ocean.

MR. KEIFER: So it was below Trinity --

WITNESS SOTO: Yes.

MR. KEIFER: -- the confluence of Trinity and Klamath in the system?

WITNESS SOTO: Yes.

MR. KEIFER: So it would be fair to conclude that nothing in the Stanshaw Creek system had anything to do with that fish kill?

WITNESS SOTO: No.

MR. KEIFER: Are you aware of a report generated by the California Department of Fish and Wildlife analyzing the causes of that fish kill?

WITNESS SOTO: Yes.

1 MR. KEIFER: Do you recall the
2 conclusions in their report?

3 WITNESS SOTO: They concluded that the
4 fish kill was caused by a fish disease commonly
5 known as ich. And it was the result of low flows
6 released from the Klamath Project. Specifically,
7 ich is a density-dependent type of fish disease,
8 so the fish were basically trapped in the Lower
9 Klamath and were not able to migrate. And the
10 densities were such that ich was able to spread
11 rapidly among the population and killed the
12 salmon.

13 MR. KEIFER: Was C. shasta another
14 pathogen that killed the fish?

15 WITNESS SOTO: For the 2002 fish kill,
16 this was an adult kill. So while some of the
17 fish may have been -- may have been infected with
18 Ceratomyxa shasta, it was not the primary cause
19 of the fish kill.

20 MR. KEIFER: Are any of the pathogens
21 that are involved in killing those fish -- strike
22 that.

23 Among the pathogens involved in that fish
24 kill, are any of them enhanced -- is their
25 lifecycle, their propagation enhanced by warm

1 temperatures in the Klamath?

2 WITNESS SOTO: Yes. I should have
3 mentioned that columnaris, which is commonly
4 known as gill rot, and it's a bacterial infection
5 that's found on the gills, and it's influenced by
6 fish density, but also water temperatures. So
7 when water temperatures are above 18 degrees,
8 ich -- I mean columnaris begins to become a
9 problem. And then it becomes more of a problem
10 when water temperatures are above 20 C.

11 MS. WEAVER: Can you specify the units?

12 WITNESS SOTO: Celsius.

13 MR. KEIFER: If I represented to you that
14 one of the conclusions of CDFW was,
15 "Warm temperatures cause rapid amplification
16 of the pathogens ich and columnaris, which
17 resulted in a fish kill of over 33,000 adult
18 salmon and steelhead," would you agree with
19 that statement?

20 WITNESS SOTO: Yes.

21 MR. KEIFER: So given the foregoing,
22 would you agree that it's fair to say that
23 reduction of impairment of cold-water flows and
24 cold-water refugia into the Klamath, no matter
25 where they occur, is critical to the continued

1 survival of Coho in this system?

2 WITNESS SOTO: Yes.

3 MR. KEIFER: Nothing further.

4 HEARING OFFICER MOORE: Okay. Thank you.

5 Does the Department of Fish and Wildlife
6 have some questions for Mr. Soto? Please
7 approach.

8 CROSS-EXAMINATION BY

9 MR. VOEGELI: Good morning, Mr. Soto.

10 WITNESS SOTO: Good morning

11 MR. VOEGELI: Thanks for sticking around
12 for this fourth day.

13 You stated earlier in your testimony that
14 you visited Stanshaw Creek over 100 times over 17
15 years; is that correct?

16 WITNESS SOTO: That's correct.

17 MR. VOEGELI: And then in your testimony
18 on page three, and this is Karuk Tribe Exhibit 4,
19 you state that the tributaries, like Stanshaw,
20 are critical during summer months. Could you
21 explain what you mean by this?

22 WITNESS SOTO: As critical, meaning that
23 they provide cold-water refuge. And the mainstem
24 Klamath is lethal much of the summer, so the fish
25 rely on the thermal refugia.

1 MR. VOEGELI: What -- approximately how
2 many degrees in difference in temperature will
3 you see between a tributary, like Stanshaw Creek,
4 and the Klamath River?

5 WITNESS SOTO: Well, it can vary
6 depending on the water year we have and the
7 climate we have for that particular summer, but
8 it can be as much as ten degrees, or it can be as
9 much as five degrees Celsius. I've -- I think it
10 was in the summer of 2015, temperatures in
11 Orleans were roughly 27 degrees C, and
12 temperatures in Stanshaw Creek were typically 17
13 degrees C.

14 MR. VOEGELI: So you could see 12 degrees
15 Celsius or about 20 degrees Fahrenheit wouldn't
16 be uncommon?

17 WITNESS SOTO: Twelve degrees would be
18 extreme. It's usually around ten on the extreme
19 level.

20 MR. VOEGELI: So that's about 16, 18
21 degrees Fahrenheit?

22 WITNESS SOTO: Yeah.

23 MR. VOEGELI: You described thermal
24 refugia in your testimony as a cold-water patch
25 in an otherwise warm-water system, and that there

1 are three different types of thermal refugia.

2 What are these refugia types?

3 WITNESS SOTO: Well, these are
4 generally -- I mean, every refugia has a unique
5 value, but there's tributary confluences which
6 are basically just the cold-water plume that is
7 in the ambient river from the tributary. And
8 then there's these tributary-fed flood plain
9 reaches which are basically flood plain channels
10 when the -- formed by the Klamath River but are
11 fed by a cold-water tributary. And then there's
12 the -- just the lower reach of the tributary
13 itself.

14 MR. VOEGELI: And which of these three
15 types of refugia does Stanshaw Creek provide?

16 WITNESS SOTO: Stanshaw Creek is a
17 tributary-fed flood-plain-type thermal refugia.

18 MR. VOEGELI: Does it also provide
19 refugia in the tributary itself?

20 WITNESS SOTO: Yes.

21 MR. VOEGELI: And does it also provide
22 refugia as a cold-water plume in the mainstem?

23 WITNESS SOTO: It does when there's flow
24 reaching the mainstem.

25 MR. VOEGELI: You were asked on cross

1 about the 2009 temperature graph in WR-191

2 Exhibit; do you recall that graph?

3 WITNESS SOTO: Yes.

4 MR. VOEGELI: You testified that the
5 spike in temperature to 106.9 degrees Fahrenheit
6 reflected a measurement of air temperature; is
7 that correct?

8 WITNESS SOTO: Yes.

9 MR. VOEGELI: What, in your experience,
10 would cause such a spike indicating an air
11 temperature reading?

12 WITNESS SOTO: I've seen that when a
13 probe is basically exposed to the air, so it's
14 usually when a temperature -- I mean when water
15 surface elevation drops below the actual probe.

16 MR. VOEGELI: When you have air
17 temperatures over 100 degrees along the Mid
18 Klamath River, do you see fish seeking thermal
19 refugia in the mainstem and tributaries?

20 WITNESS SOTO: During the latter, mid-
21 part of summer, once the snow has melted, yes.

22 MR. VOEGELI: And then are the
23 temperatures in a pool generally consistent
24 throughout the pool's depth?

25 WITNESS SOTO: It can vary. In some

1 locations, like in Seiad Valley where you have
2 shallow groundwater, you can actually have
3 stratification. But at Stanshaw Creek there's
4 really no groundwater connection in this pool, so
5 it's dependent on the creek to maintain its
6 depth. And if the depth of the pool is -- if
7 it's not deep enough, then it won't stratify.
8 So, I mean, it can stratify if the pool is full
9 and the depth is appropriate. So it just is --
10 it's kind of a site-by-site thing.

11 MR. VOEGELI: Okay. We've heard talk
12 from various witnesses talking about the
13 relationship between flows and water
14 temperatures.

15 Are there other aspects of water quality
16 that are affected by low flows?

17 WITNESS SOTO: I think temperature is
18 probably the biggest aspect. I mean, when you
19 have a lower volume of water and you have high
20 temperatures the stream will typically heat up
21 quickly, so you'll end up with high temperatures
22 during the day. And then, in fact, at night,
23 during the cooling period you'll actually -- you
24 could get lower temperatures. You end up with
25 more diurnal variation in your temperature when

1 you have lower flows, which can be very stressful
2 on fish because they're a cold-water animal and
3 they need to adjust their metabolic rate to that
4 switch in temperature. So it's actually a really
5 high cost to fish to be adjusting to changing
6 temperatures.

7 MR. VOEGELI: So change in temperatures,
8 just even over the course of the day, can have
9 some detrimental impacts to fish?

10 WITNESS SOTO: Yeah. It can reduce their
11 growth rates.

12 MR. VOEGELI: Were you here for Mr.
13 Cramer's testimony on Monday?

14 WITNESS SOTO: I was.

15 MR. VOEGELI: Did you hear him suggesting
16 that, based on his single site visit in October
17 of this year, that one CFS would be sufficient to
18 maintain the Stanshaw Creek pool?

19 WITNESS SOTO: He provided a lot of
20 information. And I don't -- he may have said
21 that. I don't specifically recall that part of
22 his testimony.

23 MR. VOEGELI: Okay.

24 WITNESS SOTO: I was focused on other
25 stuff.

1 MR. VOEGELI: Have you reviewed the 2016
2 NMFS flow recommendation?

3 WITNESS SOTO: Yes.

4 MR. VOEGELI: And have you reviewed the
5 2015 Ross Taylor Report?

6 WITNESS SOTO: Yes.

7 MR. VOEGELI: Just for the record, the
8 NMFS flow recommendation is NMFS Exhibit 3. And
9 the Ross Taylor Flow Report is CDFW Exhibit 7.

10 Based on your experience with Stanshaw
11 Creek and your review of these reports, would you
12 consider one CFS to be adequate for Stanshaw
13 Creek to provide the various types of refugia
14 we've been talking about?

15 WITNESS SOTO: No.

16 MR. VOEGELI: Have you observed any
17 events in the past that might inform this view?

18 WITNESS SOTO: Well, I've observed the
19 creek and the pond at flows less than one CFS.
20 And typically the pond is disconnected from the
21 mainstem river at that flow.

22 MR. VOEGELI: Are there other water
23 quality impacts, such as algae growth or anything
24 like that, with lower flows?

25 WITNESS SOTO: Yes. You can have algae

1 growing on the pond. And I think you can have
2 temperature increases because the volume of the
3 pond has been reduced.

4 MR. VOEGELI: Have you noted any dead
5 salmonids in Stanshaw Creek prior to 2016?

6 WITNESS SOTO: Yes. I've seen them
7 there.

8 MR. VOEGELI: What's your experience
9 identifying juvenile salmonids?

10 WITNESS SOTO: I've been snorkeling and
11 observing and identifying fish since 1994, so
12 more than 20 years.

13 MR. VOEGELI: So you have over 20 years'
14 experience identifying these salmonids?

15 WITNESS SOTO: Yes.

16 MR. VOEGELI: Were you here for CDFW
17 Witness Jennifer Bull's testimony yesterday?

18 WITNESS SOTO: Yes.

19 MR. VOEGELI: Did you hear her relay the
20 CDFW recommendation of a minimum of 2.5 CFS
21 stream flow at the Highway 96 culverts for fish
22 passage into Stanshaw Creek?

23 WITNESS SOTO: Yes.

24 MR. VOEGELI: What would you consider a
25 necessary minimum in-stream flow to maintain fish

1 passage into Stanshaw Creek?

2 WITNESS SOTO: I would say it's between 2
3 and 2.5.

4 MR. VOEGELI: This next question relates
5 to some of the testimony of Mr. Cramer in MMR-17
6 and MMR-21, including some of the pictures you
7 were shown during cross by Marble Mountain Ranch
8 related to the rocks placed near the pond
9 entrance.

10 Have you visited this off-channel pool
11 recently?

12 WITNESS SOTO: Yes.

13 MR. VOEGELI: When was the last time you
14 visited it?

15 WITNESS SOTO: Last Thursday.

16 MR. VOEGELI: So that was subsequent to
17 Mr. Cramer's site visit --

18 WITNESS SOTO: Yes.

19 MR. VOEGELI: -- in early October?

20 Did you see the rock berms that Mr.
21 Cramer thought were preventing the connection
22 between the Klamath River and Stanshaw Creek?

23 WITNESS SOTO: Yes.

24 MR. VOEGELI: In your opinion, are these
25 rock berms preventing a connection between the

1 mainstem Klamath and Stanshaw Creek?

2 WITNESS SOTO: No.

3 MR. VOEGELI: Would you expect as much of
4 a need for such berms to enhance connectivity if
5 there was a minimum in-stream flow of at least
6 two to two-and-a-half CFS?

7 WITNESS SOTO: There may still be a need
8 if we're in a severe drought. I mean, the place
9 is dynamic, so if there's only two channels or
10 one channel feeding the pond and the majority of
11 the water is going into the Klamath, then it
12 would be prudent to go out there and maximize the
13 water flow into the pond as an enhancement thing,
14 but in general, we wouldn't have to do that as
15 much.

16 MR. VOEGELI: Okay. In Mr. Cramer's
17 testimony on page 12 of MMR-17, he poses the
18 question whether all Coho that use Stanshaw Creek
19 would be lost without the pool at Stanshaw Creek,
20 and concluded that some, if not most, of the
21 juvenile Coho would have found other creeks. And
22 yesterday we heard Ms. Whitmore testify that the
23 movement of fish increases the risk of mortality.

24 In your opinion, is it more likely than
25 not that juvenile Coho would perish or experience

1 other detrimental effects if there's no Stanshaw
2 Creek pool or access to that pool?

3 WITNESS SOTO: Well, their exposure to
4 warm temperatures would be longer, so there
5 definitely would be an impact on Coho, especially
6 if they weren't able to locate one.

7 MR. VOEGELI: Would you expect this
8 impact to vary depending, in part, on the river
9 or water year conditions?

10 WITNESS SOTO: Yes.

11 MR. VOEGELI: Are you aware whether
12 current overall juvenile Coho numbers may be
13 depressed?

14 WITNESS SOTO: I am aware. They are
15 currently depressed.

16 MR. VOEGELI: Just a few more questions.

17 The NMFS flow recommendation, again, this
18 is NMFS Exhibit 3, relies in part on gauged flows
19 in Ti Creek to estimate Stanshaw Creek flows.
20 And you discussed Ti Creek a little bit in your
21 testimony.

22 What's your familiarity with Ti Creek?

23 WITNESS SOTO: Well, I live at -- I live
24 at Ti Bar, Ti Bar Road, so I pretty much grew up
25 at -- along Ti Creek.

1 MR. VOEGELI: So you've spent a lot of
2 time there?

3 WITNESS SOTO: I've spent many, many --
4 I've probably spent more time at Ti Creek than
5 Stanshaw.

6 MR. VOEGELI: Where it is located
7 relative to Stanshaw Creek?

8 WITNESS SOTO: It's approximately four
9 miles upriver.

10 MR. VOEGELI: In your experience, is it
11 reasonable to rely on Ti Creek flow data as a
12 surrogate for Stanshaw Creek flows in the NMFS
13 analysis?

14 WITNESS SOTO: Yes.

15 MR. VOEGELI: During the cross-
16 examination by Marble Mountain Ranch, you
17 testified, in reference to Karuk Exhibit 6, that
18 Chinook observed in July 2008 with a distended
19 stomach suggested that Chinook were diseased; is
20 that correct?

21 WITNESS SOTO: Yes.

22 MR. VOEGELI: Does thermal refugia help
23 combat or minimize the risk of disease?

24 WITNESS SOTO: Yes, it does. I co-
25 authored a paper that was recently published in

1 the Journal of American Fisheries that showed
2 that thermal refugia reduced the exposure time of
3 Chinook to Ceratomyxa spores.

4 MR. VOEGELI: So for Chinook, these are
5 adult Chinook; is that correct?

6 WITNESS SOTO: These are juvenile
7 Chinook.

8 MR. VOEGELI: These are juvenile Chinook
9 in the mainstem?

10 WITNESS SOTO: In the mainstem, correct.

11 MR. VOEGELI: And the thermal refugia are
12 beneficial for these juvenile Chinook in the
13 mainstem, as well?

14 WITNESS SOTO: Yes, they are.

15 MR. VOEGELI: One second. No additional
16 questions.

17 HEARING OFFICER MOORE: Thank you, Mr.
18 Voegeli.

19 At this time, I'm going to call for a
20 break.

21 Mr. Soto, you've been here for a long
22 time, so you might need a bio break or anything
23 else.

24 And Counsel for Marble Mountain asked for
25 a ten-minute break. Will that be sufficient?

1 MS. BRENNER: Yes, that should be fine.

2 Thank you.

3 HEARING OFFICER MOORE: Okay. And after
4 that, if Old Man River Trust has questions for
5 Mr. Soto -- oh, no. Okay. You won't be -- well,
6 we'll see where we're at in terms of when we
7 return.

8 So we'll return at 11:42. Thank you.

9 (Off the record 11:31 a.m.)

10 (On the record at 11:43 a.m.)

11 HEARING OFFICER MOORE: Thanks. It's
12 11:43 by that clock, so it's been 11 minutes.
13 I'd like to call the meeting back to order.

14 And at this point, I mentioned before,
15 but I wanted to give Old Man River Trust the
16 opportunity to ask questions of the witness. No?

17 Klamath Riverkeeper?

18 California Sportfishing Protection
19 Alliance?

20 MR. SHUTES: Yes.

21 HEARING OFFICER MOORE: Mr. Shutes,
22 please come forward.

23 And as he comes forward, I wanted to let
24 folks know that I've decided that today, we will
25 have a 4:30 stop time, instead of the 3:30,

1 because I'm -- out of concern for making sure we
2 complete these proceedings tomorrow, with the
3 goal of completing them on Friday -- by Friday.
4 It's my opinion that the 3:30 stop is a problem
5 for that, so we're going to go to a 4:30 stop
6 today.

7 Mr. Shutes?

8 CROSS-EXAMINATION BY

9 MR. SHUTES: Good morning, Mr. Soto. I'm
10 Chris Shutes with the California Sportfishing
11 Protection Alliance. I want to talk a little bit
12 about your experience with ambient air
13 temperature in the Somes Bar area, since you've
14 lived in the area for a long time.

15 You mentioned that air temperatures often
16 exceed 100 degrees during the summer at Somes
17 Bar; is that correct?

18 WITNESS SOTO: That is correct.

19 MR. SHUTES: And is it also true that
20 they often exceed 100 degrees in September?

21 WITNESS SOTO: They can. It's not as
22 frequent as mid-summer, but they can.

23 MR. SHUTES: Okay. And what about in
24 October?

25 WITNESS SOTO: Rarely -- never. I mean,

1 I've never seen temperatures like that in
2 October.

3 MR. SHUTES: Ninety degrees in October?

4 WITNESS SOTO: Sometimes.

5 MR. SHUTES: Okay. Could we pull up KT-
6 9, .PDF page 21 please? And scroll down to the
7 graph please. Thank you.

8 (Document displayed on screen)

9 MR. SHUTES: So this is a generalized
10 view, sort of view of thermal patterns in the
11 Klamath Basin; is that a fair characterization?

12 WITNESS SOTO: Yes.

13 MR. SHUTES: And if you -- I call your
14 attention to the red dotted line and the area
15 where it says "High Temperatures," more or less
16 directly above July 9th.

17 Is it your experience that in some years
18 the descending limb of that line would be moved
19 over to the right, so it would start later in the
20 year than what's shown on this generalized graph?

21 WITNESS SOTO: Yeah. Typically, if it's
22 a wet year with lots of snowpack, then the --
23 then the peak will happen later in the summer
24 because in the early part of summer, you may
25 still have 100-degree temperatures, but you're

1 getting snowmelt, so that buffers your
2 temperature. But during drought cycles the
3 temperatures can peak as early as, you know, late
4 June or early July. But on average it's around
5 the early part of August.

6 MR. SHUTES: Okay. And if -- is it
7 common for there to be temperatures in excess of
8 20 degrees in the Klamath River after the first
9 of September?

10 WITNESS SOTO: You could have
11 temperatures higher than 20 degrees. But at that
12 point, you can still have really hot weather, but
13 the angle of the sun is lower, the days are
14 shorter, the nights are longer, so temperature
15 starts to decline for that reason, as well. So
16 it's -- but 20 degrees is definitely something
17 that you'll see in the mainstem Klamath in early
18 September.

19 MR. SHUTES: Okay. Could we pull up KT-8
20 please, and scroll the pages? Let's start with
21 page 28.

22 (Document displayed on screen)

23 MR. SHUTES: I'm going to have to look at
24 it off of here because I've lost it on my
25 computer. So if we -- can we scroll down to --

1 let's got to 29. And I'd like to look at the
2 bottom of page 29, the dates for 09/13.

3 Could you read the -- sort of the bottom
4 four column -- bottom four lines in the column
5 here from 09/13/11 and tell us what those say
6 about the -- about the measured flow in Stanshaw
7 Creek at different locations?

8 WITNESS SOTO: Are you talking about the
9 column that is highlighted in blue that says,
10 "Directly in Stanshaw Creek, just above
11 diversion, directly in Stanshaw Creek below
12 diversion by Highway 96?"

13 MR. SHUTES: Correct.

14 WITNESS SOTO: The third one down,
15 "Directly in Stanshaw Creek below diversion by
16 Highway 96." And then last one is "Directly in
17 Stanshaw Creek just below diversion."

18 MR. SHUTES: Correct. So starting with
19 the "Directly in Stanshaw Creek just above the
20 diversion," what's the value for September 13th?

21 WITNESS SOTO: 3.2.

22 MR. SHUTES: And -

23 HEARING OFFICER MOORE: What are the
24 units?

25 WITNESS SOTO: CFS, cubic feet per

1 second.

2 MR. SHUTES: Thank you. And just below
3 the diversion, the next line down please, same
4 date?

5 WITNESS SOTO: It's 0.6 CFS.

6 MR. SHUTES: And there's another one
7 directly below that. Would you read that for us
8 please?

9 WITNESS SOTO: 0.7 CFS.

10 MR. SHUTES: And can you explain to us
11 why there might be a difference between those two
12 readings on the same day?

13 WITNESS SOTO: Because they were measured
14 in the same location. And measuring flow is not
15 an exact science, so it can be off by maybe a
16 10th or 100th-of-a-10th. So they took two
17 measurements there to come up with roughly the
18 same thing.

19 MR. SHUTES: Very good. And where it
20 says "just below diversion" on the bottom line on
21 this page, what's the value there?

22 WITNESS SOTO: 0.5 CFS.

23 MR. SHUTES: And can you tell us, is that
24 a different location than the line immediately
25 above?

1 WITNESS SOTO: I believe the "just below
2 diversion," that's when they actually hiked up to
3 the diversion and measured flow just below the
4 diversion point.

5 MR. SHUTES: So to the -- within the
6 bounds of accuracy of their -- of the
7 measurement, the difference between those points,
8 if indeed there are different points, is how big?

9 WITNESS SOTO: Well, there's -- it's two-
10 tenths and one-tenth.

11 MR. SHUTES: Okay. Very good. And what
12 kind of water year do you recall was 2011?

13 WITNESS SOTO: It was a wet year.

14 MR. SHUTES: And so what we're seeing
15 here, are we not, is that even in a wet year, by
16 the middle of September the flow, considering the
17 diversion at the Marble Mountain Ranch intake,
18 the flow at the lower end of Stanshaw Creek was
19 about half a CFS or a little better; is that a
20 fair characterization?

21 WITNESS SOTO: Yes.

22 MR. SHUTES: Very good.

23 Could we scroll down to page 31, please,
24 of the same?

25 And I'd like to call your attention to

1 the values for September 21st, 2003. I don't see
2 that. 09/04/2003. Sorry, I can't read my
3 handwriting.

4 WITNESS SOTO: Okay. Yeah, there's -- it
5 looks like there's four measurements there.

6 MR. SHUTES: Right. And could you read
7 the top most measurement, "100 feet up from MM
8 Ranch diversion flue [sic]," what's the value
9 there?

10 WITNESS SOTO: 2.4 CFS.

11 MR. SHUTES: And three lines down, "200
12 feet below Marble Mountain Ranch diversion
13 intake," what is the value there?

14 WITNESS SOTO: 0.3 CFS.

15 MR. SHUTES: Very good. So is it fair to
16 say that in this exhibit, we have quite a range
17 of quite a number of years of different flow
18 values that you -- that the Karuk Tribe or others
19 have taken over a pretty long period of record?

20 WITNESS SOTO: Yes, that's fair.

21 MR. SHUTES: Very good. I think that's
22 all I have. Thank you.

23 HEARING OFFICER MOORE: Thank you, Mr.
24 Shutes.

25 Would anybody from Pacific Coast

1 Federation of Fisherman's Associations like to
2 question the witness?

3 And at this point, so, Mr. Hunt, do you
4 have any redirect testimony for Mr. Soto?

5 MR. HUNT: No.

6 HEARING OFFICER MOORE: Okay. Well,
7 before we let you go, our staff have a few
8 questions for you.

9 EXAMINATION BY

10 MS. WEAVER: Mr. Soto, I have a couple
11 questions about your professional experience.
12 And you testified earlier today that you've been
13 doing fisheries work in the Klamath for 20 years;
14 is that right?

15 WITNESS SOTO: Correct, more than 20
16 years.

17 MS. WEAVER: More than 20 years. Do
18 you -- you know, I think we're going to end up
19 with a range here, which is fine, but do you have
20 a sense of the number of individual fish, of
21 individual salmonids you've identified over your
22 career? Are we talking hundreds, thousands, tens
23 of thousands?

24 WITNESS SOTO: I would say it's in the
25 tens of thousands, if not millions.

1 MS. WEAVER: Okay. How common an
2 occurrence has it been in your career for you to
3 have misidentified a fish?

4 WITNESS SOTO: It's happened. Fish are,
5 at different life stages, are difficult to ID,
6 and it's happened before.

7 MS. WEAVER: Are we talking ones, tens,
8 hundreds, thousands?

9 WITNESS SOTO: I would say in probably
10 the ones or tens.

11 MS. WEAVER: Okay. And then how common
12 is it for you to have to determine the cause of
13 death or the likely cause of death for a dead
14 fish?

15 WITNESS SOTO: It's pretty common to look
16 at the clinical signs, which is basically just
17 what you see, as far as like a distended stomach
18 or pale gills or something like that. But we rely
19 on providing samples to, say the U.S. Fish and
20 Wildlife Services Fish Health Lab in Red Bluff to
21 do, you know, more detailed analysis of the fish
22 to determine the exact cause of death.

23 MS. WEAVER: Okay. So is it fair to say
24 then that there are specific indicators that you
25 would look for?

1 WITNESS SOTO: Yes.

2 MS. WEAVER: Ok-ay. Can we pull up the
3 picture of the Coho salmon from 2009 again? I
4 think it's WR-84, but I may be wrong about that.

5 MR. HUNT: Just for the record, these
6 fish are also -- these pictures are also in KT-5.

7 MS. WEAVER: Okay. Then let's actually
8 go to KT-5, since that's the one that you
9 testified to.

10 MR. HUNT: And then you have to click on
11 the hyperlink.

12 (Document displayed on screen)

13 MS. WEAVER: Okay. This is the same fish
14 you spoke about before; correct?

15 WITNESS SOTO: Yes, it is.

16 MS. WEAVER: And I recall it was your
17 testimony that you concluded this was a Coho
18 salmon based on the parr markings, fin
19 coloration, and other features like that; is that
20 right?

21 WITNESS SOTO: That's correct.

22 MS. WEAVER: Okay.

23 WITNESS SOTO: That's right.

24 MS. WEAVER: Thank you. If this fish
25 were a Chinook salmon at this life stage, what

1 would it look like?

2 WITNESS SOTO: It would look similar, but
3 the parr marks would be wider and wider spaced.
4 It wouldn't have a sickle-shaped anal fin. And
5 you can kind of see, there's a black leading edge
6 to the anal fin, but they're closely related but
7 they're -- so it would look similar, but it would
8 be-- you know, the parr marks would be, you know,
9 a giveaway. But when -- you know, Chinook have
10 parr marks as well, but they don't have a sickle-
11 shaped anal fin.

12 MS. WEAVER: Okay. If this fish were a
13 resident steelhead at this life stage, what would
14 it look like?

15 WITNESS SOTO: The parr marks would be
16 more blotchy. The fins would have more rounded
17 edges. And the primary way to tell the
18 difference is the dorsal fin that's on my index
19 finger there, it would have spots on it if it was
20 a steelhead.

21 MS. WEAVER: Okay. When you say blotchy,
22 what does that mean?

23 WITNESS SOTO: Meaning they're more oval
24 shape --

25 MS. WEAVER: Okay.

1 WITNESS SOTO: -- and not as uniform.

2 MS. WEAVER: So less of a bar and more of
3 an oval?

4 WITNESS SOTO: Yes. Yes.

5 MS. WEAVER: And not as uniform? Okay.

6 WITNESS SOTO: And if it was a steelhead,
7 it can also have more kind of like a rainbow
8 color. They're also known as rainbow trout,
9 so --

10 MS. WEAVER: For the -- for the
11 residents?

12 And if it were an anadromous steelhead at
13 this life stage, would it look the same or would
14 there be other -- as a resident, would there be
15 other differences?

16 WITNESS SOTO: Resident steelhead and
17 anadromous steelhead at this life stage are
18 identical.

19 MS. WEAVER: Okay. And the four species
20 we've just discussed or the four types -- I'm an
21 attorney, you can tell -- but the four types
22 we've just discussed are Coho, Chinook, and the
23 two varieties of steelhead.

24 Are there other salmonids known to be
25 present in Stanshaw Creek, or just those four?

1 WITNESS SOTO: Just for the record, the
2 steelhead are the same species, whether they're
3 resident or anadromous, so there's really three
4 species. And I am unaware of any other salmonids
5 in Stanshaw Creek.

6 MS. WEAVER: Okay. Thank you.

7 EXAMINATION BY

8 MS. IRBY: Good afternoon -- or, yes,
9 almost good afternoon, Mr. Soto. I have a couple
10 questions.

11 First, could we pull up KT-9 and look at
12 page 4, Figure 1?

13 (Document displayed on screen)

14 MS. IRBY: It might be page four of the
15 document, I mean like as numbered in the
16 document. Here we are.

17 Do you recall testifying about this
18 figure?

19 WITNESS SOTO: I do.

20 MS. IRBY: Could you tell us what the
21 units are for both temperature and flow on the
22 figure?

23 WITNESS SOTO: So the temperature units
24 are in Celsius, and the flow units are in cubic
25 feet per second.

1 MS. IRBY: Okay. Thank you. Also during
2 your direct testimony, you testified regarding a
3 few photos.

4 Could we go to KT-5, picture number two?

5 (Document displayed on screen)

6 MS. IRBY: While you were discussing
7 impacts during this low-volume period of the
8 pond, I believe you said, "The pond began to fill
9 again." And I'm curious if you could clarify if
10 you meant with water or sediment or something
11 else?

12 WITNESS SOTO: It was my impression that
13 when I arrived here that day that the pond was
14 starting to fill up slowly, like it had been
15 lower and it looked like it was starting to fill
16 just based on there was a bunch of debris
17 scattered on the pond where that had somehow
18 dried out and then flooded, you know, became dry.
19 And then when the water started to rise, that
20 debris was floating all over the pond. There
21 were little pieces of bark and driftwood.

22 MS. IRBY: Okay. So with water?

23 WITNESS SOTO: Yes.

24 MS. IRBY: Okay. Thank you. Lastly, you
25 testified regarding typical placement of

1 temperature gauges.

2 WITNESS SOTO: Uh-huh.

3 MS. IRBY: At what depth would you
4 typically place a temperature gauge?

5 WITNESS SOTO: We try to put them in a
6 spot that's deep enough where we believe that
7 they're going to stay wet, so we put them in, you
8 know, a deep area. I, you know, usually put them
9 in a place where, if you have, say, a channel
10 cross-section, you know, depending on the stream,
11 of course -- the Klamath River is huge, so you
12 have to be selective where you put them in the
13 mainstem -- but in small creeks, I try to put
14 them in a low spot where they're going to be wet.
15 You know, as -- when you look at the flows, they
16 drop down to a base flow. So you want to put
17 them in a place where you're going to have water
18 at the base flow, summer base flow.

19 MS. IRBY: And that would be similar for
20 a pool, you would put it in a low spot?

21 WITNESS SOTO: Yeah. I think this spot,
22 we -- our cables are all ten-foot long stainless
23 steel cable with a metal housing, and we just
24 toss them out there and attach them to a tree.

25 MS. IRBY: Okay. Thank you. That's all

1 my questions.

2 MS. WEAVER: I have a couple of follow-
3 ups, based on Ms. Irby's questions.

4 EXAMINATION BY

5 MS. WEAVER: Do you have any reason to
6 think that the temperature gauge that was
7 installed when we had this event in 2009 where
8 the temperature was above 100 degrees, do you
9 have any reason to think that that would not have
10 been installed following the protocol you just
11 described?

12 WITNESS SOTO: I assume it was installed
13 following the protocol I just described.

14 MS. WEAVER: And that's based on your
15 professional experience?

16 WITNESS SOTO: Yes.

17 MS. WEAVER: Okay. Do the gauges float
18 or anything if they become detached?

19 WITNESS SOTO: No. They're in like thick
20 metal pipe --

21 MS. WEAVER: Okay.

22 WITNESS SOTO: -- so they don't float.

23 MS. WEAVER: So there's, I mean, there's
24 no -- are you aware of any way, other than
25 changes in the water level, that could plausibly

1 have caused that gauge to be getting an air
2 temperature reading?

3 WITNESS SOTO: A human could come in
4 there and pull it out of the stream or something
5 like that, that's -- we try to hide them.

6 MS. WEAVER: Okay. Did you see any
7 evidence of recent human presence at this site
8 when you were there in late July that you recall?

9 WITNESS SOTO: Not that I recall. I
10 mean, it is a place where there's residents
11 nearby, so --

12 MS. WEAVER: Is that something you would
13 typically look for during a site visit, or just
14 if you notice it, you notice it?

15 WITNESS SOTO: I don't look for that
16 typically.

17 MS. WEAVER: Okay. Thank you.

18 WITNESS SOTO: We, just to follow up, we
19 try not to place these in places, in active
20 swimming holes, for example, where there's a lot
21 of human activities, like campgrounds and things
22 like that.

23 MS. WEAVER: Okay. Thank you. That's
24 helpful.

25 MS. IRBY: One follow-up regarding the

1 gauge.

2 EXAMINATION BY

3 MS. IRBY: Does the gauge record
4 temperature once an hour or at a different
5 interval?

6 WITNESS SOTO: We set them to record
7 temperature hourly, but you can set them to
8 record at any time interval you want to.

9 MS. IRBY: For the data that we have on
10 this gauge, can you testify that it was per hour,
11 or are you not aware?

12 WITNESS SOTO: I think it was hourly,
13 based on the spreadsheets I was looking at.

14 MS. IRBY: Okay. Thank you.

15 MR. BUCKMAN: Can I ask one additional
16 follow-up question on that?

17 EXAMINATION BY

18 MR. BUCKMAN: Do you have a hypothesis of
19 what actually happened to that gauge on that day?

20 WITNESS SOTO: Well, first of all, I
21 don't know what gauge he's using. But my
22 hypothesis is that the flow dropped to the point
23 where the gauge was exposed and -- by the air.

24 MR. BUCKMAN: But if I'm understanding
25 what you just testified to, of being placed

1 normally in like a pond, that would have to be a
2 pretty significant decrease or drop for that to
3 dry out; is that correct?

4 WITNESS SOTO: It would. And the gauges
5 are put in, in the beginning of summer, so it --
6 the flows may have already been, you know,
7 dropping through the summer, so I don't think the
8 gauge was -- or the probes were placed like
9 immediately before I was here.

10 MS. FARWELL-JENSEN: I have a couple
11 questions for Mr. Soto.

12 HEARING OFFICER MOORE: Sure. Go right
13 ahead, Ms. Farwell-Jensen.

14 EXAMINATION BY

15 MS. FARWELL-JENSEN: My first question,
16 were you here yesterday when Shari Whitmore was
17 testifying as to beaver activity along Stanshaw
18 Creek?

19 WITNESS SOTO: Yeah, I was here.

20 MS. FARWELL-JENSEN: And do you have any
21 knowledge of beaver activity along the creek?

22 WITNESS SOTO: I've seen beaver-chewed
23 sticks in this pond, and other signs, like
24 willows that have been chewed and fallen.

25 MS. FARWELL-JENSEN: Yeah.

1 WITNESS SOTO: So, yeah.

2 MS. FARWELL-JENSEN: Have you noticed
3 that activity has changed over time?

4 WITNESS SOTO: No. I still see beaver
5 sign in this pond.

6 MS. FARWELL-JENSEN: Okay. But no growth
7 or decrease of the amount of chewed sticks or
8 other signs of beaver?

9 WITNESS SOTO: No. And my observations
10 are just -- I'm not specifically looking for
11 beavers, but --

12 MS. FARWELL-JENSEN: Absolutely. Okay.

13 My second question is, is you mentioned
14 having a staff. You were working with a staff
15 when you're doing the --

16 WITNESS SOTO: My technicians, yeah.

17 MS. FARWELL-JENSEN: Your technicians?

18 WITNESS SOTO: Yeah.

19 MS. FARWELL-JENSEN: And how many do you
20 work with?

21 WITNESS SOTO: Any given year, usually
22 about six technicians during the summer.

23 MS. FARWELL-JENSEN: Okay.

24 WITNESS SOTO: Yeah.

25 MS. FARWELL-JENSEN: Real good. Thank

1 you.

2 HEARING OFFICER MOORE: Well, good.
3 Since we took a break recently, I'd like to
4 continue, and, Mr. Hunt, do you want to -- and
5 then invite Mr. Soto to be done. It's been a
6 long morning, so thank you for all your
7 assistance.

8 And, Mr. Hunt, you have another witness,
9 and can get that underway for that direct
10 testimony?

11 MR. HUNT: Sure.

12 HEARING OFFICER MOORE: Okay. All right.
13 So I want to administer the oath.

14 Mr. Tucker, welcome. Please stand.
15 Thank you. Raise your right hand.

16 (Witness is sworn.)

17 HEARING OFFICER MOORE: Thank you. You
18 may be seated.

19 And, Mr. Hunt, please proceed.

20 CRAIG TUCKER,
21 called as a witness for Karuk Tribe, having been
22 duly sworn, was examined and testified as
23 follows:

24 DIRECT EXAMINATION BY

25 MR. HUNT: Good afternoon. Will you

1 please provide us with your name and address?

2 WITNESS TUCKER: My name is Craig Tucker.

3 I live at 1289 Azalea Avenue, McKinleyville,
4 California 95519.

5 MR. HUNT: And can you tell us about your
6 educational background?

7 WITNESS TUCKER: I have a Bachelor's
8 Degree from the defending national championship
9 Clemson University Tigers. And I have a PhD
10 from -- in biochemistry from Vanderbilt
11 University.

12 MR. HUNT: Thank you. So should we refer
13 to you as Dr. Tucker?

14 WITNESS TUCKER: If you want to stroke my
15 ego, that would be how you would do that.

16 MR. HUNT: Can you tell us how long
17 you've -- what your position is with the Karuk
18 Tribe?

19 WITNESS TUCKER: I've worked for the
20 Karuk Tribe for approximately 12 or 13 years.
21 I'm the Natural Resources Policy Advocate for the
22 Karuk Tribe. And I typically engage at local,
23 state and federal level, dealing with legislation
24 or administrative proceedings or policy that
25 deals with water quality and water flows in the

1 Klamath River.

2 MR. HUNT: I think that may have covered
3 my next question.

4 Is there anything else about your job
5 responsibilities that you would like to tell us?

6 WITNESS TUCKER: I think that covers it.

7 MR. HUNT: Okay. Can you tell us how you
8 became familiar with Stanshaw Creek?

9 WITNESS TUCKER: I was familiar with
10 Stanshaw Creek for a number of years just because
11 there had been so much effort from Toz, my
12 colleague's, shop. I have a friendly
13 relationship with Will Harling at the Mid Klamath
14 Watershed Council. I have a working relationship
15 with Konrad Fisher. So I knew that there was
16 quite a bit of debate over flows in Stanshaw
17 Creek. And I knew that there was an effort by
18 the Tribe to restore and protect the off-stream
19 pond down there at the mouth of Stanshaw Creek.

20 MR. HUNT: Can you tell us in your -- the
21 time that you spent with Karuk Tribe how much of
22 the work that you've done has been related to
23 Coho salmon and other salmonids on the Klamath
24 River?

25 WITNESS TUCKER: Well, I don't have the

1 benefit of actually getting wet as often as Toz
2 does. But because Coho are ESA listed, a lot of
3 the rules and regulations from both state and
4 federal agencies revolve around the ESA listing.
5 For example, the Bureau of Reclamation's
6 diversion and use of water in the upper basin
7 is -- has to accommodate the needs of Coho salmon
8 because of that ESA listing. So Coho salmon
9 really influences a lot of policy around water
10 use in the Klamath.

11 MR. HUNT: Okay. If we can pull up Mr.
12 Tucker's written testimony. It's KT-2, so we can
13 all follow along.

14 (Document displayed on screen)

15 MR. HUNT: In that you say that Stanshaw
16 Creek -- let's see if we can scroll down. I
17 don't know the exact location. Oh, yeah, it's on
18 the bottom of page one, onto to page two. It
19 says that, "Stanshaw Creek is considered by state
20 and federal agencies to be important cold-water
21 refugia for ESA listed Coho salmon," and then it
22 goes on. Can you elaborate on this a little bit
23 for us?

24 WITNESS TUCKER: Yeah. In Forest Service
25 plans, Coho restoration plans, and the Klamath

1 Basin Plan, they identify these cold-water
2 refugial areas as being really important for the
3 life cycle of Coho salmon, and list explicitly
4 Stanshaw Creek as one of these cold-water
5 refugial areas.

6 MR. HUNT: And then in the next sentence,
7 referring to Coho salmon, Chinook salmon and
8 steelhead trout, can you explain, it says, "All
9 of these species are Karuk Tribal Trust
10 resources." Can you elaborate on that?

11 WITNESS TUCKER: The United States has a
12 special obligation to further recognize Indian
13 tribes, protect trust resources which tribes can
14 identify in a variety of ways. You know, this
15 goes all the way back to the commerce clause and
16 the United States Constitution. But there's a
17 variety of executive orders and statutes and
18 court decisions that sort of create and describe
19 this trust obligation. But it means the United
20 States has an obligation to protect these
21 resources for the use of the tribe. And trust
22 resources can be anything from archeological
23 sites to contemporary physical sites to natural
24 resources, such as salmon and acorns which are,
25 for the Karuk Tribe, of particular importance.

1 MR. HUNT: And that was the Federal
2 Government.

3 What about the State of California, what
4 obligations does the State have to protect tribal
5 trust resources?

6 WITNESS TUCKER: Well, the State of
7 California has actually, in recent years, become
8 better about articulating its obligation to
9 Indian tribes. And, in fact, in 2011, Governor
10 Jerry Brown issued Executive Order B-10-11 which
11 directed all state agencies to develop
12 consultation policies with tribes. I think the
13 California Natural Resources Agency was the first
14 agency to actually do that. And there's actually
15 been changes to the California Environmental
16 Quality Act that require mitigation to tribal
17 resources if they are identified in a CEQA
18 analysis.

19 MR. HUNT: Okay. Let's get a little more
20 focused on Stanshaw Creek specifically here.

21 Can you give us a history of the Karuk
22 Tribe's efforts to work with Marble Mountain
23 Ranch to solve the issues related to the
24 diversion and the impacts on the Stanshaw Creek?

25 WITNESS TUCKER: Well, I think some of these

1 efforts predate my time with the Tribe, actually.
2 But as the Tribe has been engaged in some of
3 these projects to enhance the cold-water pond
4 down at the mouth of Stanshaw Creek, there's, you
5 know, constantly been this concern that
6 diversions to Marble Mountain Ranch did not allow
7 enough water to reach the pond, do not maintain
8 the connectivity between the pond and the Klamath
9 River. And for many years, to the credit of the
10 Tribe, the Tribe's efforts are really focused
11 around, you know, collaboration with landowner.
12 The Tribe has been willing to help the landowner
13 find grants, whether from public or private
14 sources, to help upgrade his irrigation
15 infrastructure and energy infrastructure.

16 And, you know, I'm typically assigned to
17 projects that are difficult to resolve, and so I
18 came in to work on this. Had meetings with that
19 big stakeholder group in December of 2014. And
20 we were really -- our patience was really
21 starting to run out. We felt like we had been
22 working on this for two decades and not solving
23 the problem. And so I was directed by my boss,
24 Mr. Hillman, to develop alternative strategies to
25 resolving the impasse with Mr. Cole.

1 I attended the December 2014 stakeholders
2 meeting and left it very optimistic. It seemed
3 to me that Mr. Cole indicated a lot of comfort
4 with the information provided in the Lennihan
5 Report, a lot of comfort with the information
6 provided by Joey Howard's report. And he
7 indicated, as long as business was good, the
8 diesel fuel costs were something that he could
9 manage in the context of the economic viability
10 of his operation.

11 So I left that meeting feeling like, hey,
12 this is -- this physical solution is likely to
13 work. The landowner seems willing to, you know,
14 play ball with Mid Klamath Watershed Council.
15 And I felt like this problem was close to being
16 resolved.

17 MR. HUNT: Did you have any meetings with
18 Mr. Cole following that December 2014 meeting?

19 WITNESS TUCKER: Yes. And in January of
20 2015, Leaf Hillman and myself met Mr. Cole at
21 Marble Mountain Ranch and discussed the issue,
22 and actually walked the ditch and went and viewed
23 a diversion.

24 MR. HUNT: And when you left that
25 meeting, how did you feel the process was going

1 and --

2 WITNESS SOTO: I was very optimistic. I
3 had every indication or every reason to believe
4 that this physical solution was going to play
5 itself out and that we would be able to, you
6 know, work collaboratively with Mr. Cole to get
7 grant money and address the concern and upgrade
8 the ditch and upgrade -- you know, this is
9 infrastructure that's 150 years old. And so, you
10 know, it was clearly high time that we upgrade
11 this infrastructure and upgrade the conveyance
12 system.

13 MR. HUNT: Okay. I wonder if you could,
14 in the process, the stakeholder process and other
15 things that you've participated in, reading the
16 reports related to options available to Marble
17 Mountain Ranch, if you could -- you know, with
18 that background, can you answer this question,
19 which is: What are the options, in your mind,
20 available to Marble Mountain Ranch to ensure that
21 the public trust and tribal trust resources that
22 Stanshaw Creek provides are not harmed, while at
23 the same time obtaining the needs regarding
24 electricity that Mr. Cole has testified are
25 necessary to operate the ranch?

1 WITNESS TUCKER: Well, there's, you know,
2 been quite a few studies that's part of the
3 record that looks at the ability to use solar
4 power, to integrate solar and diesel together.
5 You know, I'm pretty familiar. I have a lot of
6 friends and colleagues who live in that stretch
7 of the Middle Klamath. And the people who are,
8 you know, off the grid have a more dependable
9 power supply than people who are on the grid,
10 actually, because of the remoteness of the area
11 and the rough winters. But no one has --
12 requires a three CFS diversion in order to meet
13 their power needs. And even there are
14 neighborhoods in the area with multiple houses
15 that meet their power needs with dramatically
16 smaller diversions.

17 I mean, three CFS, you think about -- CFS
18 is about the volume of a basketball. So three
19 CFS is like three basketballs of water passing a
20 point a second. That's a lot of water. So it
21 just, not being an engineer, it looked to me like
22 there had been quite a bit of investigation in
23 alternatives to using this amount of water to
24 power his system.

25 MR. HUNT: Can you elaborate, to the

1 extent you know, what options you -- the Karuk
2 Tribe believes would be available to Mr. Cole?

3 WITNESS TUCKER: Well, the kinds of
4 options of that were provided by Joey Howard. I
5 mean, you know, we don't want to be in the
6 position of having to solve Mr. Cole's problem
7 for him. You know, we're really -- the problem
8 we want to solve is that fish have a hard time
9 getting in and out of the thermal refuge at the
10 mouth of Stanshaw Creek. Where we would support
11 efforts by Mr. Cole and others to develop, you
12 know, engineered solutions, whether they be
13 solar, smaller scale of hydro, or some mix of
14 energy sources, we could support any of these
15 things, but we're pretty adamant there needs to
16 be a minimum bypass flow past his diversion that
17 maintains the integrity of that pool and
18 maintains connectivity to the extent possible
19 between the pool and the river.

20 MR. HUNT: Thank you. I have nothing
21 further.

22 HEARING OFFICER MOORE: Okay. Thank you,
23 Mr. Hunt.

24 And so at this time, you know, we would
25 offer up the witness for cross-examination

1 questions, but it is 12:24.

2 And so earlier we talked about
3 compressing the lunch break. But I've also
4 indicated that we are going to continue as late
5 as 4:30 today. And so as a compromise, I'm going
6 to suggest a 45-minute-approximate lunch break
7 and request everyone return here at 1:10. Thank
8 you.

9 (Off the record at 12:22 p.m.)

10 (On the record at 1:11 p.m.)

11 HEARING OFFICER MOORE: And we're going
12 to reconvene the proceeding.

13 At this point we have reached cross-
14 examination of the Karuk Tribe's witness, Mr.
15 Tucker. And first in line is the Division of
16 Water Rights Prosecution Team for cross-
17 examination.

18 CROSS-EXAMINATION BY

19 MR. PETRUZZELLI: So good afternoon, Dr.
20 Tucker.

21 WITNESS TUCKER: Good afternoon.

22 MR. PETRUZZELLI: So I wanted to ask you
23 about WR-81.

24 (Document displayed on screen)

25 MR. PETRUZZELLI: Do you recognize this?

1 WITNESS TUCKER: I do.

2 MR. PETRUZZELLI: Is this your email
3 address?

4 WITNESS TUCKER: It is.

5 MR. PETRUZZELLI: So it came from you?

6 WITNESS TUCKER: Uh-huh.

7 MR. PETRUZZELLI: And this was a message
8 that you forwarded from Will Harling; would that
9 be correct?

10 WITNESS TUCKER: That's correct.

11 MR. PETRUZZELLI: Do you recall the
12 substance of this email that you forwarded?

13 WITNESS TUCKER: Generally it
14 acknowledged or expressed the sentiment that the
15 Coles seemed to be prepared to move forward with
16 this so-called physical solution approach to
17 reconciling the dispute over the Marble Ranch
18 diversion.

19 MR. PETRUZZELLI: Okay. And it goes on
20 to discuss a Doodle poll. Was that to schedule
21 the December meeting in Orleans?

22 WITNESS TUCKER: It was.

23 MR. PETRUZZELLI: Okay. And then that
24 was the next thing I wanted to ask you about.

25 (Document displayed on screen)

1 MR. PETRUZZELLI: This is WR-83, the
2 notes from that meeting.

3 I think in your testimony you -- were you
4 present at this meeting?

5 WITNESS TUCKER: I was.

6 MR. PETRUZZELLI: And do you -- similar
7 to the substance of the email message, do you
8 remember him indicating that he was willing to
9 accept that 1.16 CFS determination in the
10 Lennihan Report?

11 WITNESS TUCKER: I got the distinct
12 impression that the Lennihan Report provided the
13 basis that we could all move forward together on
14 implementing a solution. And I felt that Mr.
15 Cole was accepting of the information presented
16 in that report.

17 MR. PETRUZZELLI: Yeah. But it was -- so
18 it was something he was, you know, okay with if
19 it was going to, you know, resolve the various
20 stakeholder issues?

21 WITNESS TUCKER: Correct. Correct.

22 MR. PETRUZZELLI: I hesitate to call it
23 settlement, but --

24 WITNESS TUCKER: Right. That's right.

25 MR. PETRUZZELLI: In your testimony you

1 talk some more about the stakeholder process.

2 You say,

3 "Generally the idea was for the Tribe and
4 MKWC to work with Mr. Cole to develop a
5 diversion and power generation system that
6 could meet Mr. Cole's energy needs with less
7 water."

8 So by less water, was it contemplated
9 that it would be less than three CFS?

10 WITNESS TUCKER: Absolutely.

11 MR. PETRUZZELLI: Okay. And was the
12 Karuk Tribe willing to support grant funding for
13 Marble Mountain to do that?

14 WITNESS TUCKER: Yes. We would have been
15 willing to write letters of support or provide,
16 you know, whatever technical expertise we could
17 to help fashion or craft proposals. We were --
18 you know, we've done this quite often with other
19 landowners throughout the Klamath where we -- you
20 know, it's not the goal of the Tribe to put
21 anybody out of business. It's not the goal of
22 the Tribe to end irrigated agriculture or
23 anything like that. But it is the goal of the
24 Tribe to have fish that they can depend on. And
25 so we're willing to work with landowners and

1 willing to put in, you know, the elbow grease, if
2 you will, to go out and find money to help solve
3 these problems.

4 MR. PETRUZZELLI: And did you ever
5 indicate that to him?

6 WITNESS TUCKER: I did.

7 MR. PETRUZZELLI: Okay. Did you meet
8 with him after the meeting, after --

9 WITNESS TUCKER: We --

10 MR. PETRUZZELLI: Excuse me. Did you
11 meet with Mr. Cole after the December 2014
12 meeting in Orleans?

13 WITNESS TUCKER: Yes. Leaf and I and Mr.
14 Cole met in January of 2015.

15 MR. PETRUZZELLI: Okay. And can you
16 recount the general substance of that meeting?

17 WITNESS TUCKER: You know, he gave us --
18 he was very kind and gave us a tour of the
19 facilities there and explained to us how his
20 ranch operated. And, you know, we just wanted to
21 be very clear that the Karuk Tribe was committed
22 to ensuring the integrity of the pool, that the
23 pool was functional and that the pool would
24 provide benefits to fish. And, you know, if this
25 was the process, okay. But if there was some

1 other process that we would have to pursue, we
2 would pursue that.

3 But I left that meeting and there was no,
4 you know, there was no, you know, settlement, as
5 you would say. But I got every indication that
6 things were going well and that the information
7 provided by the Joey Howard Report and the Martha
8 Lennihan Report was the information we needed to
9 move forward with a physical solution.

10 MR. PETRUZZELLI: Was there some point in
11 which you felt the tenor of the process changed?

12 WITNESS TUCKER: Well, I even became more
13 positive at the point that Mr. Cole, through his
14 attorneys, proposed, and I think this maybe was
15 in 2016 --

16 MR. PETRUZZELLI: Was that -- was that
17 the proposal, roughly in about March of 2016?

18 WITNESS TUCKER: Yes, that March 2016
19 sounds right. And this is where the Coles
20 proposed an implementation schedule to comply
21 with the Board's order. And they themselves
22 provided the time table, specified the various
23 activities and when they would be completed. And
24 at that point I felt like, hey, this is -- this
25 problem may be solved, and I was pleased because

1 I didn't have to do a whole lot, to be honest,
2 myself. Everybody else had done the heavy
3 lifting. But I presumed that the problem was
4 solved at that point.

5 MR. PETRUZZELLI: This is Exhibit WR-115.

6 (Document displayed on screen)

7 WITNESS TUCKER: Yeah. That's it.

8 MR. PETRUZZELLI: Do you recognize this
9 letter?

10 WITNESS TUCKER: I do.

11 MR. PETRUZZELLI: Is this where the legal
12 counsel for the Coles proposed what I'll describe
13 as a project, loosely?

14 WITNESS TUCKER: Yes.

15 MR. PETRUZZELLI: Okay. And were you --
16 did your positivity continue after this?

17 WITNESS TUCKER: Well, I kept sort of
18 checking in.

19 MR. PETRUZZELLI: Okay.

20 WITNESS TUCKER: And at this point, as
21 that summer wore on it appeared that these
22 performance -- the items and the deadlines are
23 not being met. And so, you know, my, you know,
24 my optimism quickly gave way to jaded pessimism,
25 that maybe this wasn't going to happen after all.

1 And I never really understood why the change of
2 heart or why Mr. Cole failed to follow through on
3 the commitments outlined in this letter. But I'd
4 say the failure to do that is why we all have
5 been down here all week together, is because the
6 commitments made in this letter were never made
7 good on.

8 MR. PETRUZZELLI: Yeah. So you -- I
9 think you mentioned previous -- in your testimony
10 previously that, you know, you've -- you and the
11 Tribe have been trying to, you know, find these
12 collaborative solutions with Mr. Cole, ongoing
13 for, you know 20 years. And, you know,
14 landowners in general, you try to work with them
15 collaboratively.

16 What has generally been your experience
17 with Mr. Cole in particular?

18 WITNESS TUCKER: Well, I have to say, I
19 don't have a lot of direct personal experience
20 with Mr. Cole, aside from the meeting in December
21 and the follow-up meeting in January. You know,
22 a lot of the information on the Tribe's efforts
23 and the performance of the pool's habitat, I just
24 picked up through various staff meetings with my
25 colleagues at the Tribe, and Mr. Soto, and that's

1 sort of typical. It just was a general sense
2 that this was going to be dealt with as a
3 community.

4 You know, this is -- I don't live in the
5 mid -- in the community, I live out on the coast.
6 And so my advice sometimes to my boss and to my
7 tribal council is to pursue things in an
8 aggressive manner. But the -- I think the
9 reality for people that live here is neighbors
10 have to depend on one another. All their kids go
11 to school together. If there's a natural
12 catastrophe, if there's a forest fire, if there's
13 an ice storm, it doesn't matter if you like your
14 neighbor or not, you might need them in a way
15 that those of us who live in town don't -- you
16 know, we can get away with not knowing my
17 neighbor and survive. But if you live in
18 Orleans, you better know your neighbor because
19 you might need them before the winter is over.

20 And so I think that sort of sense of
21 community is why the Tribe, you know, wants to
22 collaborate and solve these problems in a
23 different manner --

24 MR. PETRUZZELLI: Uh-huh.

25 WITNESS TUCKER: -- than maybe pursuing

1 either a legal remedy or administrative action.
2 So that's why it's taken two decades to get here
3 is because of that attitude.

4 MR. PETRUZZELLI: Okay. And then lastly,
5 I believe it's lastly, I'd like to ask you
6 about -- it's WR-184, the Stanshaw Creek Coho
7 Enhancement Project.

8 (Document displayed on screen)

9 MR. PETRUZZELLI: Are you familiar with
10 this project?

11 WITNESS TUCKER: I am.

12 MR. PETRUZZELLI: Okay. And I think --
13 and I -- if you recall previously during the
14 testimony of Mr. Soto, I asked him about a
15 sediment plug deposited from -- a reference to a
16 sediment plug in the project description that was
17 deposited from a 2005-2006 flood event when the
18 upstream ditch diversion to Marble Mountain Ranch
19 overtopped and caused severe gully erosion.

20 Are you knowledgeable of that
21 overtopping?

22 WITNESS TUCKER: My knowledge does not
23 extend beyond just having reviewed the --

24 MR. PETRUZZELLI: Okay. Thank you.

25 WITNESS TUCKER: Yeah.

1 MR. PETRUZZELLI: Those are my questions.

2

3 HEARING OFFICER MOORE: Okay. Thank you,
4 Mr. Petruzzelli.

5 Next, Ms. Brenner for Marble Mountain
6 Ranch.

7 MS. BRENNER: No cross for me.

8 HEARING OFFICER MOORE: No? No cross?

9 Next, National Marine Fishery Service?

10 CROSS-EXAMINATION BY

11 MR. KEIFER: Good afternoon. I just
12 have a couple quick questions for you.

13 Are you aware that the Karuk Tribe has
14 petitioned the National Marine Fishery Service to
15 list Chinook salmon in the Klamath River?

16 WITNESS TUCKER: I am intimately aware.

17 MR. KEIFER: Were you involved in
18 drafting the letter that was sent under the
19 signature of the chairman of the Tribe?

20 WITNESS TUCKER: I was involved, yes.

21 MR. KEIFER: Do you recall that the
22 letter states, "Historically, KTS Chinook," and
23 KTS stands for?

24 WITNESS TUCKER: Klamath Trinity Spring.

25 MR. KEIFER: Thank you. "Historically,

1 KTS Chinook runs numbered in the hundreds of
2 thousands."

3 WITNESS TUCKER: Yes.

4 MR. KEIFER: Do you agree with this
5 following sentence; "In recent years, KTS Chinook
6 runs have plummeted, with only 2,133 natural
7 spawning salmon observed in 2016?"

8 WITNESS TUCKER: Yes.

9 MR. KEIFER: Regardless of the outcome of
10 the federal listing process, do you believe those
11 differences, that decline in population numbers
12 underscores the importance of reducing the
13 impairment of cold-water refugia, no matter where
14 they occur in the Klamath-Trinity system?

15 WITNESS TUCKER: I do.

16 MR. KEIFER: No further questions.

17 MS. WEAVER: Counsel, you had asked Dr.
18 Tucker about a letter. Was that an exhibit?

19 MR. KEIFER: No, but Dr. Tucker has
20 affirmed as his own testimony under cross-
21 examination some of the statements in that
22 letter. We did not provide that as an exhibit.

23 MS. WEAVER: Okay. Thank you.

24 HEARING OFFICER MOORE: Okay. Thank you.
25 Department of Fish and Wildlife, any

1 questions?

2 Old Man River Trust? And I don't see Mr.
3 Fisher. Maybe he's in traffic, getting back from
4 lunch or something.

5 Klamath Riverkeeper?

6 California Sportfishing Protection
7 Alliance? Mr. Shutes?

8 CROSS-EXAMINATION BY

9 MR. SHUTES: Good afternoon, Dr. Tucker.

10 WITNESS TUCKER: Everybody's buttering me
11 up.

12 MR. SHUTES: Chris Shutes for the
13 California Sportfishing Protection Alliance.
14 Just a couple of questions.

15 You said you have -- you don't live in
16 the Klamath Basin itself; is that correct?

17 WITNESS TUCKER: Correct. My residence
18 is in the Mad River Basin.

19 MR. SHUTES: But you've spent quite a bit
20 of time in the Klamath Basin?

21 WITNESS TUCKER: I have spent quite a bit
22 of time, and I did live there for over a year at
23 one point, and I recreate there often.

24 MR. SHUTES: And is it fair to say
25 that -- do you ever visit any of the stream

1 tributaries to the Klamath River, just for
2 recreational purposes?

3 WITNESS TUCKER: I do.

4 MR. SHUTES: And how do the -- do you do
5 that in the summertime?

6 WITNESS TUCKER: I do.

7 MR. SHUTES: In the summertime, say in
8 July or August, how do the temperatures, the
9 ambient air temperatures in those -- along those
10 smaller streams compare with the temperatures,
11 say on Highway 96?

12 WITNESS TUCKER: Well, if you -- if you
13 go to Orleans area on a Saturday in August,
14 almost everybody is sitting in a tributary of the
15 Klamath River. It's -- people seek out these
16 cold-water streams, whether it's just to hang out
17 in a lounge chair or swim, because the
18 temperature in many of the tributaries of the
19 Klamath is, you know, a welcome relief to
20 temperatures that can be in the 100 -- over 100
21 degrees.

22 MR. SHUTES: And is it common that the
23 temperatures are ten degrees lower than say along
24 the highway?

25 WITNESS TUCKER: The temperature between

1 the air temperature and the water temperature
2 or --

3 MR. SHUTES: No. The air temperature --

4 WITNESS TUCKER: Uh-huh.

5 MR. SHUTES: -- along some of these
6 tributary streams, is it common that the ambient
7 air temperature is ten degrees cooler than the
8 ambient air temperature, say if you pulled off
9 along the highway?

10 WITNESS TUCKER: I would say that's
11 accurate.

12 MR. SHUTES: Fifteen?

13 WITNESS TUCKER: I don't know.

14 MR. SHUTES: Maybe not? Okay.

15 WITNESS TUCKER: I think somewhere around
16 in there.

17 MR. SHUTES: Very good. So you talked
18 before about the tribal trust responsibilities of
19 the government and the tribal trust values that
20 the government has a responsibility to defend.

21 Would you consider the human use of what
22 you might call human thermal refugia along these
23 tributaries to the Klamath in the summer to be a
24 tribal trust use?

25 WITNESS TUCKER: Yeah. I think that was

1 really demonstrated by Mr. Albers testimony
2 earlier this week, that his family used Stanshaw
3 Creek's thermal refugia throughout his life as a
4 place of recreation, a place where values and
5 practices are passed down from generation to
6 generation. So, absolutely having these kinds of
7 areas, and I think what, you know, maybe we would
8 call it recreation, but I think it is sort of
9 part of the fabric of the lifestyle and culture
10 of Karuk people to spend time in these places.

11 MR. SHUTES: And --

12 WITNESS TUCKER: -- whether they're
13 fishing or not.

14 MR. SHUTES: And to your knowledge, would
15 that also extend to the other tribes along the
16 Klamath River?

17 WITNESS TUCKER: Well, I might get in
18 trouble if I speak for neighboring tribes, but I
19 do think this is common among Klamath River
20 tribes, yes.

21 MR. SHUTES: Thank you. That's all I
22 have. Thank you.

23 MS. WEAVER: Counsel, you had referenced,
24 I believe it was ten degrees in one of your
25 questions. Was it --

1 MR. SHUTES: Fahrenheit.

2 MS. WEAVER: Fahrenheit. Thank you.

3 HEARING OFFICER MOORE: Good. Good.

4 Is there anyone from PCFFA?

5 And at this point, I would ask Counsel,
6 Mr. Hunt, if you have any redirect testimony for
7 this witness?

8 MR. HUNT: No.

9 HEARING OFFICER MOORE: Okay. For Dr.
10 Tucker. Sorry, my bad. All right. I'm not
11 great at that. Good. So there will be no
12 recross.

13 And so at this point, I request that --
14 or unless Staff has anything for this witness?

15 MS. WEAVER: So I have one just small
16 question to be torturously correct.

17 EXAMINATION BY

18 MS. WEAVER: You had been asked about ten
19 degrees. You said, "Yes." He clarified,
20 Fahrenheit.

21 Was that your understanding of the
22 question?

23 WITNESS TUCKER: I presumed he was
24 speaking in Fahrenheit.

25 MS. WEAVER: Okay. Thank you.

1 HEARING OFFICER MOORE: Okay. Yeah.

2 This is going to be -- this is a theme.

3 MS. WEAVER: I know; right?

4 HEARING OFFICER MOORE: Right. Okay.

5 Very good. Thank you, Counselor.

6 So at this point, I'd like to request the
7 Karuk Tribe offer exhibits into evidence.

8 MR. HUNT: The Karuk Tribe offers
9 Exhibits KT-1 through 9 into evidence.

10 HEARING OFFICER MOORE: Thank you. And
11 do any parties have objections? No objections.

12 So for the record, these exhibits are
13 entered into the record.

14 (Exhibits KT-1 through K-9 are received.)

15 HEARING OFFICER MOORE: And we will
16 now -- the next part of our proceeding is to
17 continue Old Man River Trust's opening statement
18 and direct testimony, followed by cross-
19 examination in the order I've previously
20 identified. Redirect and recross examination of
21 the witnesses may then be permitted.

22 And have you taken the oath? Forgive me
23 if I've forgotten.

24 MR. FISHER: We could do it again, to be
25 safe.

1 HEARING OFFICER MOORE: Okay. Will you
2 raise your right hand?

3 (Witness is sworn.)

4 HEARING OFFICER MOORE: Thank you. You
5 may be seated. Make yourself comfortable and
6 proceed.

7 Yes, Counsel?

8 MS. BRENNER: I just wanted
9 clarification. He's done his opening statement,
10 so we're just having testimony; right?

11 HEARING OFFICER MOORE: I suppose so,
12 because you're right, he did the opening
13 statement. I wasn't clear that you had completed
14 it though.

15 MR. FISHER: I hadn't necessarily. We
16 were trying to accommodate schedules of other
17 people on Monday and Tuesday.

18 HEARING OFFICER MOORE: Okay. Counselor?

19 MR. FISHER: I mean, go ahead.

20 MS. WEAVER: So I just wanted to note, I
21 mean, you're not an attorney; right?

22 MR. FISHER: No.

23 MS. WEAVER: Okay. Yeah. So we're --
24 this is an administrative hearing. We're sort of
25 a hybrid between court and everyday life. So,

1 you know, you're giving factual testimony.

2 MR. FISHER: I would like to, and
3 referring to the exhibits that we've submitted.

4 MS. WEAVER: Right. So, I mean, as long
5 as you stay in your lane, I think we'll -- or
6 near your lane, I think we'll be fine.

7 MR. FISHER: So we're calling it direct
8 testimony?

9 MS. WEAVER: Yeah. This is your direct
10 testimony.

11 MR. FISHER: Okay.

12 MS. WEAVER: And you'll have the
13 opportunity to do a closing brief, too, so for --

14 MR. FISHER: Okay. Then --

15 MS. WEAVER: -- legal and policy
16 arguments, you may not have --

17 MR. FISHER: And you're --

18 MS. WEAVER: -- covered.

19 MR. FISHER: And this is 20 minutes?

20 MS. WEAVER: Correct.

21 MR. FISHER: Okay. And one
22 clarification. My expert witness, I could not
23 afford to have him come in person. I was hoping
24 by phone, but he didn't come. So he's -- that's
25 not going to happen, I guess.

1 MS. WEAVER: Remind me, has he submitted
2 written testimony or --

3 MR. FISHER: He submitted a statement of
4 qualifications and estimate of cost of solar and
5 hydro alternatives. And my hope was that he
6 could answer questions about remedies, but I
7 couldn't afford to bring him here.

8 MS. WEAVER: One second. So this is --
9 this will be the same as the CDFW situation
10 yesterday where one of their witnesses couldn't
11 make it. It's hearsay. There's some weight of
12 the evidence issues. But, you know, it can still
13 be admitted for what it is --

14 MR. FISHER: Okay.

15 MS. WEAVER: -- without him here to speak
16 to it.

17 MR. FISHER: Okay. So I'm going to do my
18 best to explain my knowledge of alternatives,
19 based on personal experience, based on speaking
20 with the expert, and we can -- yeah.

21 KONRAD FISHER,
22 called as a witness for Old Man River Trust,
23 having been previously duly sworn, was examined
24 and testified as follows:

25 DIRECT TESTIMONY BY

1 WITNESS FISHER: Okay. Thanks. So
2 again, my name is Konrad Fisher. I own the only
3 property on Stanshaw Creek, downstream from
4 Marble Mountain Ranch's point of diversion. This
5 property is commonly known as Old Man River, or
6 simply as Stanshaw.

7 For my entire life the Klamath region has
8 been where I feel most at home. My family
9 acquired the Stanshaw Creek property in 1994,
10 which is the same year the Coles purchased Marble
11 Mountain Ranch. As legal owner of this property,
12 I hold a riparian water right, and at least a
13 portion of any pre-1914 water right resulting
14 from Sam Stanshaw's original mining claim. Most
15 of the historic mining and water use conducted
16 under Sam Stanshaw's 1867 Water Claim occurred on
17 what is now my land. This claim is included as
18 Exhibit WR-15 and Exhibit WR-16. Details of the
19 historic water diversion are in the Cascade
20 Stream Solutions' report, WR-82.

21 Throughout my life, I have helped my
22 family maintain an open-ditch water system on a
23 low-gradient property in Shasta County. I have
24 also managed two diversions that serve my home
25 and property on Stanshaw Creek. I have managed

1 these two diversions intermittently from 1994
2 until 2011, and consistently since 2011. In
3 these two locations, I use pipes, not ditches,
4 because pipes are must less expensive, more
5 efficient and less likely to wash out. And these
6 things are especially true on steep gradient
7 land, as opposed to flat land.

8 I have observed the Stanshaw Creek mouth,
9 the Marble Mountain Ranch point of diversion and
10 Marble Mountain Ranch outflow intermittently from
11 1994 until 2011, and consistently since 2011.
12 Throughout these periods of time I have
13 frequently requested and -- requested adjustments
14 and/or made adjustments to the Marble Mountain
15 Ranch diversion to preserve my own water supply
16 and/or to prevent salmonids from dying near the
17 mouth of Stanshaw Creek.

18 The quantity and method of diversion of
19 water from Stanshaw Creek affects me personally
20 and financially. The confluence of Stanshaw
21 Creek and the Klamath River is my home, and it's
22 my favorite place on this Earth. The water in
23 the creek is the most essential part of that
24 property.

25 Since Marble Mountain Ranch has stopped

1 diverting for hydropower use in the summer, very
2 recently, I can now hear the creek from my house
3 in the summer for the first time since last
4 century. For me, this has a value beyond words
5 and beyond dollars.

6 The plume of water that goes into the
7 Klamath River when Stanshaw Creek is allowed to
8 flow to the river is also a public trust asset
9 and valuable to me personally. It's essentially
10 clean water in the river at the time when -- at
11 many times when the Klamath River has toxic algae
12 and is unsafe for contact. The pool near the
13 mouth of the creek is valuable, not just for
14 Coho, but for paddling, as you saw in Phil Albers
15 testimony, and swimming and cooling off in the
16 summer.

17 The dead fish and de-watering events, we
18 heard about a lot from other people at certain
19 moments in time. I have witnessed on an ongoing
20 basis for most of my time on -- since Marble
21 Mountain Ranch is on the property. They have
22 occurred less since the summer of 2016, after
23 regulatory actions were taken.

24 What often occurs when fish die is -- the
25 most common result is later in the summer as the

1 natural flows go down in the creek, it's
2 necessary for Marble Mountain Ranch to fortify
3 their diversion. This, in the period of a few
4 hours or half a day, decreases the stream by as
5 much as 90 percent, sometimes as little as 50
6 percent, but that rapid decrease in the creek
7 strands fish.

8 So I've responded to this very
9 differently in many different years. Sometimes
10 I've called CDFW's office in Yreka and said, "The
11 pool is going down, fish are dying, what do I
12 do?" It's hard for me to see them flopping in
13 the sun and dying. I've been asked to call them
14 as soon as they come, but traditionally, the
15 agencies, NOAA Fisheries or CDFW, cannot get
16 there before the predators. So the creek gets
17 de-watered. The fish are flopping. Fish die.
18 It's usually not very long, especially in a
19 remote place like this, where the ecosystem is
20 intact, for a bird to come eat them. So I've
21 also picked them up after they have died and
22 saved them, even though it's illegal, and called
23 the agencies then. Then the statement is, well,
24 it's difficult to prove correlation, even though
25 I personally saw the fish die, saw the diversion.

1 So it's been difficult. This is not to
2 persecute Marble Mountain Ranch. I truly believe
3 there are ways to not kill fish and for both of
4 us to have our needs met.

5 So the saving fish efforts have taken
6 many different turns. We've heard a lot about
7 moving rocks. Again, the most common thing that
8 happens is the creek, due to increased diversion,
9 goes down. It becomes necessary to either rescue
10 fish by -- and it requires a lot of people to do
11 that. But if the creek is going down, often
12 times the natural thing that happens is the creek
13 will go to the pool, a portion to the river. As
14 the flow goes down unnaturally, it becomes
15 necessary to choose, all the water going to the
16 pool or all the water going to the river.
17 Without the diversion, these choices often
18 wouldn't have to be made.

19 The quantity and method of Marble
20 Mountain Ranch's diversion impair my ability to
21 divert water and to exercise my water rights and
22 earn money from my land to pay taxes, insurance,
23 maintenance and upgrades. Fluctuations in water
24 levels from the Marble Mountain Ranch diversion
25 leave my point of diversion out of the water at

1 times, causing my house to run out of water until
2 I'm able to adjust the point of diversion to new
3 water levels. So just picture a pipe in a creek.
4 The water level goes down. It's hard to choose a
5 place if you don't know what level the creek will
6 be at.

7 Because I travel a lot for work, having
8 my water system go out a lot unexpectedly has
9 harmful impacts. It has prevented me from
10 keeping a fruit orchard alive because I can't
11 afford to pay someone there and I'm away for work
12 a lot. I have invested a lot of time into this
13 orchard, and it has been a dream of mine to grow
14 more fruit trees that I could ever eat from so
15 that I can share with the community or let people
16 pick fruit, but that hasn't -- that hasn't come
17 true yet.

18 It has been difficult for me to rent
19 cabins because it's hard to find people who are
20 willing to manage a water system that requires
21 frequent adjustments at the point of diversion.

22 And I like to offer my place for free to
23 entities, nonprofits that try to do certain
24 events. And if I'm away and I want to say yes,
25 it's very difficult to say yes because you never

1 know if the water will be -- will be working at
2 my place.

3 And finally, Marble Mountain Ranch's
4 diversion thus far has prevented me from
5 installing a fish-friendly hydropower system to
6 meet my own electricity needs. Since my family
7 acquired the Stanshaw Creek property in 1994, we
8 have relied on propane and gas generators.

9 I'd like to speak about potential
10 remedies that use a reasonable quantity of water
11 and a reasonable method of diversion. And I've
12 spoken of these -- about these with Doug Cole.
13 In January 2013, I met with Doug to discuss
14 alternatives, and walk and visit an alternative
15 point of diversion, which I somewhat discussed
16 yesterday. When I got there Doug didn't want to
17 walk to this specific point of diversion. He had
18 a pistol on his waist, so I didn't argue.

19 We did agree to the following, however,
20 on that day. We agreed that for the purposes of
21 determining a physical solution, we would
22 evaluate pros and cons, including cost per
23 kilowatt hour of the following three options.

24 Hydropower use: hydropower using the
25 current point of diversion with the return flow

1 at Highway 96, which is what we've heard almost
2 exclusively about. Option number two that we
3 agreed to, to pursue, discuss, evaluate, was
4 hydropower with a higher point of diversion and
5 returning the flow higher than the bypass reach
6 of a future hydro system for my property. And
7 solar or solar power generator combo.

8 This agreement was on January 13th, 2016.
9 I followed up that same day with an email that
10 listed these three options and said, to Doug, I
11 said, "Please let me know if you agree to these.
12 If you agree, can one of us share this with Will
13 Harling before the meeting tomorrow?" -- the
14 meeting we've heard a lot about where all the
15 stakeholders came together.

16 Doug responded and cc'd Barbara Brenner,
17 "Yes, we -- yes, share the ideas. They are
18 accurate."

19 The next day at the meeting in Orleans,
20 Doug reiterated his commitment. And this is
21 detailed in Exhibit WR-109, page eight, where he
22 again agrees to what we agreed to in the email
23 and in the meeting the previous day.

24 Ken Petruzzelli followed up asking, "If
25 there are more stable locations up the creek,"

1 meaning more stable, less likely to wash out.

2 Doug said, "I don't see that, but I'm
3 willing to explore."

4 Yesterday Mr. Cole said he would not
5 consider changing his point of diversion. He
6 also said that solar and generator combo alone
7 would not suffice, that hydro must be part of the
8 mix.

9 I would ask the Water Board, as you
10 contemplate the economic impacts and reasonable
11 water use and balance these, that you please
12 consider all three of these options which Doug
13 and I previously agreed to evaluate, not just the
14 first one.

15 Option one, again, that's what we've
16 spent most of our time on. Diversion using
17 current point of diversion has drawbacks. It
18 requires more water than the other options,
19 significantly more because it's a low-head
20 system. It would require a very expensive return
21 flow project. I agree, it's expensive. That was
22 an option, I believe, when the taxpayers were
23 possibly going to fund it. It's not so much
24 feasible without that, I don't think. And option
25 one violates my right to install a fish-friendly

1 hydropower system.

2 Option two, again, these are the ones
3 Doug and I agreed to evaluate, diversion using a
4 higher point of diversion. We agreed previously
5 and yesterday he said, no, we -- diversion using
6 a higher point of diversion. And I can explain
7 this in more detail if you want from looking at
8 the map. But this proposal, I've had -- this is
9 the expert I would have had, generated a proposal
10 that would have applied to my land, or to Doug
11 Cole's land. The measurements are similar.

12 OMR -- Exhibit OMR-3 -- OMRT-3 shows what
13 you can do with a 0.23 CFS diversion, it could
14 produce 4.1 kilowatts at a cost of \$11,200. If
15 you quadruple that amount of water to 0.92 CFS,
16 you could get 16.7 kilowatt of output. And 16.7
17 translates to 146,000 kilowatt hours per year.
18 This number, 146,000 kilowatt hours per year, is
19 more than the total Marble Mountain Ranch power
20 consumption calculated in Exhibit MMR-19, which
21 is cost estimates for alternative energy systems.
22 So I'll try to restate that. In other words,
23 0.92 cubic feet per second could produce more
24 power than the total power consumption estimates
25 provided by Marble Mountain Ranch.

1 The alternative point of diversion and
2 point of return flow for this scenario would
3 negate the need for an expensive return flow
4 project on Highway 96, and it would preserve my
5 ability to install a fish-friendly hydro system
6 of my own.

7 Just a quick -- a few things about
8 Exhibit MMR-19, alternative energy systems. The
9 first estimate in there was by someone named
10 Pablo, whom I know. It refers to an attachment
11 describing how the power needs were calculated to
12 come up with this total annual kilowatt hours. I
13 would note that that attachment was not included
14 in the exhibit. If it's not in here somewhere, I
15 would ask that Marble Mountain Ranch provide it
16 to the State Water Resources Control Board.

17 Option -- speaking a bit more about -- to
18 option three, solar or solar generator options.
19 We've heard a lot about how expensive those are.
20 I think it's important to look into where those
21 different costs comes from. The first estimate
22 by Pablo, \$425,000 cost, it is my understanding
23 that this includes the cost of rewiring the ranch
24 and new power distribution systems, more than
25 just producing power. So this is upgrades that

1 are needed with our without the water use
2 curtailments.

3 Similarly, the second estimate includes a
4 500 kilowatt battery bank and replacement of an
5 underground storage grid. That's, again,
6 upgrades that may be needed, but not as a result
7 of the regulatory actions we contemplated, not as
8 a result of bypass flow requirements. So, yes,
9 it's a big number, but it's not a big number
10 because of what the fish need.

11 In addition, I would say another reason
12 that these estimates are high is because they're
13 based on, more or less, energy consumption rates
14 that are typical for on-grid living. And I
15 know -- it's not common for people to experience
16 what it's like to live off the grid. I do. But
17 people do things very differently, usually by
18 necessity. Whether you have power from generator
19 or solar or hydro, there are certain things you
20 just don't do with electricity.

21 First off, off-grid living. For off-grid
22 living, it is customary and necessary, typically,
23 to heat with propane or wood, not electricity.
24 That's -- if you know people off the grid, ask
25 them. That's usually what happens. In our area

1 it's reasonable and customary to go with a swamp
2 cooler, not AC. And most off-grid living, it is
3 reasonable and customary to use propane, rather
4 than electricity, for refrigeration, water
5 heaters, clothes dryers and cooking. These
6 things, if you do the math and look at what
7 consumes large amounts of electricity, I've
8 included an exhibit that talks about what uses
9 how much electricity, Energy Savers Home Energy
10 Use Guide, OMRT-8, you will see what uses
11 different amounts of power. But again, what is
12 customary for off-grid living is not the same for
13 on-grid.

14 But that is secondary to the excessive
15 cost when we think of these solar estimates.
16 Again, I think I would attribute most of it to
17 improvements that are maybe not part of the
18 actual -- improvements that are not directly a
19 result of ceasing hydropower production.

20 So I guess my general ask of the
21 California Water Board, I would ask you to hold
22 Marble Mountain Ranch and me to the same
23 standards, and I would put those in three key
24 points.

25 One is to meet the NMFS and CDFW bypass

1 flow requirements. I would ask that you impose
2 those on both of us. I would ask that any
3 unexercised -- or non-consumptively-used water
4 for hydropower by either of us be returned to the
5 creek above the point of anadromy.

6 Number two, I would request that you
7 require us to divert consumptive water needs
8 based on State Water Resources Control Board's
9 standard calculations for different consumptive
10 uses. Those are fair.

11 And three, which will make number one and
12 two possible, if our -- either of our energy
13 consumption and production relies on water from
14 Stanshaw Creek, please require us to produce and
15 consume electricity at rates that are reasonable
16 and customary for off-grid living in our area.

17 And again, the hydro option I laid out
18 would preclude an expensive return flow project
19 on Highway 96. And the solar - solar/hydro -
20 solar/generator options would preclude any non-
21 consumptive use of water.

22 I guess that will be it.

23 HEARING OFFICER MOORE: Thank you, Mr.
24 Fisher. You, in your remarks, requested that an
25 attachment to a certain MMR exhibit be submitted.

1 WITNESS FISHER: Yeah. Forgive me if it
2 is somewhere in here, but I did not see it.

3 HEARING OFFICER MOORE: There is a cost
4 estimate that's MMR-15, I think.

5 WITNESS FISHER: Okay.

6 HEARING OFFICER MOORE: But there is an
7 attachment mentioned, but the attachment is
8 included, so I'm confused.

9 WITNESS FISHER: MMR-19, I did not see
10 the --

11 HEARING OFFICER MOORE: Oh. Okay.

12 WITNESS FISHER: -- attachment that was
13 referred to in --

14 HEARING OFFICER MOORE: Okay. It was 19?

15 WITNESS FISHER: Yeah.

16 HEARING OFFICER MOORE: My --

17 WITNESS FISHER: Yeah.

18 HEARING OFFICER MOORE: My -- I got the
19 wrong --

20 WITNESS FISHER: So the very first solar
21 estimate --

22 HEARING OFFICER MOORE: -- one.

23 WITNESS FISHER: -- by Pavel, the
24 Electron Connection --

25 HEARING OFFICER MOORE: Thank you.

1 WITNESS FISHER: -- I believe it's
2 called. Yeah.

3 HEARING OFFICER MOORE: Okay. So there's
4 an attachment and there's information there that
5 you believe would answer some questions about --

6 WITNESS FISHER: I'm opening --

7 HEARING OFFICER MOORE: -- these bills?

8 WITNESS FISHER: I'm opening it right
9 now, yeah, so -- or we could open it on the
10 common thing, if you want. I'm looking at the
11 electrician incorporated, and it's one page. And
12 in parenthesis, last line first paragraph, it
13 says, "See attached."

14 HEARING OFFICER MOORE: Oh, calculations.
15 Okay. And that's not part of the exhibit?

16 WITNESS FISHER: I don't believe so.
17 Forgive me if I missed it, but I think the very
18 second page starts with a different
19 email/estimate.

20 HEARING OFFICER MOORE: Okay.

21 WITNESS FISHER: And -- go ahead.

22 HEARING OFFICER MOORE: Okay. Okay.
23 Well, I just, yeah, I wanted to have an
24 understanding of specifically what you were
25 talking about, so that helps.

1 WITNESS FISHER: Just to explain my
2 logic, I think this is the parallel to using --
3 the Water Board using standard calculations for
4 water use. This, to me, is the parallel for
5 electricity, when it results in water diversion.

6 HEARING OFFICER MOORE: Okay. That
7 clarifies your point. Thank you. Okay. Any --
8 let's see. Thanks for answering the question.

9 And so at this point, we want to offer
10 all the parties the opportunity to cross-examine
11 Mr. Fisher, Old Man River Trust.

12 So first, Division of Water Rights
13 Prosecution Team?

14 CROSS-EXAMINATION BY

15 MR. PETRUZZELLI: Good afternoon, Mr.
16 Fisher.

17 Do you recall the video I presented in my
18 opening statement?

19 WITNESS FISHER: Yes.

20 MR. PETRUZZELLI: Did you shoot that
21 video?

22 WITNESS FISHER: Yes.

23 MR. PETRUZZELLI: Is that your voice in
24 the video?

25 WITNESS FISHER: Yes.

1 MR. PETRUZZELLI: Consistent with the
2 date caption in the video, was that video taken
3 in January 2014?

4 WITNESS FISHER: Whatever date it said on
5 it. I don't have that on the top of my head.

6 MR. PETRUZZELLI: Okay.

7 WITNESS FISHER: The date in the email
8 was truthful.

9 (Document displayed on screen)

10 MR. PETRUZZELLI: Okay. And is this that
11 email?

12 WITNESS FISHER: Yes.

13 MR. PETRUZZELLI: And you sent this?

14 WITNESS FISHER: I did.

15 MR. PETRUZZELLI: Okay. And this is --
16 this is the link to the video?

17 WITNESS FISHER: Yes.

18 MR. PETRUZZELLI: Okay. And if it's
19 okay, I will not click the link because we've
20 already seen it.

21 HEARING OFFICER MOORE: And please
22 identify the exhibit.

23 MR. PETRUZZELLI: It's Exhibit number 75.
24 This is the --

25 HEARING OFFICER MOORE: WR-75?

1 MR. PETRUZZELLI: WR-75.

2 HEARING OFFICER MOORE: Thank you.

3 MR. PETRUZZELLI: This is the email that
4 has the link to the YouTube video, the video
5 which is WR-76.

6 WITNESS FISHER: And I would note that
7 that was a common occurrence, what you saw in
8 that video. I could have shot multiple videos
9 like that over the last 20 years.

10 MR. PETRUZZELLI: Okay. Could you --
11 could you generally characterize what you saw in
12 that video?

13 WITNESS FISHER: Yeah. I mean, it
14 typically starts with me walking out my front
15 door and seeing the creek not reaching the river
16 or the pool sinking, so I capture footage of the
17 cause and the affect, which is the point of
18 diversion and the effect on the pool and the
19 effect on the connectivity between the pool and
20 the river.

21 MR. PETRUZZELLI: Okay. So we'll --
22 would you -- we'll come back to that.

23 And -- but about the video, would you
24 characterize that as -- visually, would you
25 characterize that as a high-flow condition or a

1 low-flow condition for Stanshaw Creek?

2 WITNESS FISHER: When you say high or low
3 flow, it depends on if you're talking about as a
4 result of nature or the diversion. Usually --

5 MR. PETRUZZELLI: Is it naturally?

6 WITNESS FISHER: An average. Average for
7 that time year --

8 MR. PETRUZZELLI: Okay.

9 WITNESS FISHER: -- an average summer.

10 MR. PETRUZZELLI: So you'd say that's
11 about average --

12 WITNESS FISHER: Above the point of
13 diversion.

14 MR. PETRUZZELLI: -- for January?

15 WITNESS FISHER: Above the point of
16 diversion --

17 MR. PETRUZZELLI: Above the point of
18 diversion?

19 WITNESS FISHER: -- it was average.

20 MR. PETRUZZELLI: Okay. Are you aware of
21 Blue Heron Ranch?

22 WITNESS FISHER: I am.

23 MR. PETRUZZELLI: Does it still operate?

24 WITNESS FISHER: By operate, I assume you
25 mean as a business. No, not as a business. It's

1 usually been a second home. And I knew the
2 owners there before I had my place and before the
3 Coles had their place.

4 MR. PETRUZZELLI: Do they still divert
5 for hydropower, to your knowledge?

6 WITNESS FISHER: No.

7 MR. PETRUZZELLI: Okay. And you
8 previously -- you testified that you own the
9 property downstream from the diverters.

10 WITNESS FISHER: Yeah. OMRT-1, you can
11 see the map.

12 MR. PETRUZZELLI: That's where I'm going.

13 WITNESS FISHER: Other direction.

14 MR. PETRUZZELLI: Oh, thank you.

15 WITNESS FISHER: Uh-huh.

16 MR. PETRUZZELLI: It saves me a lot of
17 scrolling.

18 WITNESS FISHER: You may have passed it.
19 There is it.

20 MR. PETRUZZELLI: There it is. This is
21 OMRT-1.

22 WITNESS FISHER: Yes.

23 MR. PETRUZZELLI: There is a green box
24 that says "Fisher." Is that your property?

25 WITNESS FISHER: That's our best attempt

1 at overlaying property ownership with this lidar
2 map.

3 MR. PETRUZZELLI: Does this -- and the
4 blue line indicated on the map, that's Stanshaw
5 Creek?

6 WITNESS FISHER: Just below the word
7 "Fisher?" Correct.

8 MR. PETRUZZELLI: Okay. So Stanshaw
9 Creek goes through your property?

10 WITNESS FISHER: Correct.

11 MR. PETRUZZELLI: And is your property
12 all one parcel?

13 WITNESS FISHER: No, it's three parcels
14 here, and three around the next creek over --

15 MR. PETRUZZELLI: Okay.

16 WITNESS FISHER: -- which is Sandy Bar
17 Creek.

18 MR. PETRUZZELLI: So the portion above
19 the creek, is that one parcel? Because you said
20 it's three, so --

21 WITNESS FISHER: But it's three, so one
22 is on the other side of the highway, next to
23 Marble Mountain Ranch property, right next to
24 their gun range.

25 MR. PETRUZZELLI: Okay. And that's where

1 I have the cursor?

2 WITNESS FISHER: Yeah, I'm trying to find
3 the mouse. Yes. Correct.

4 MR. PETRUZZELLI: Okay. But it is east
5 of the highway and west of the Cole's property?

6 WITNESS FISHER: Correct.

7 MR. PETRUZZELLI: I'm trying to describe
8 it for the record.

9 So that's one parcel?

10 WITNESS FISHER: Correct.

11 MR. PETRUZZELLI: Okay. And what -- can
12 you describe a second parcel?

13 WITNESS FISHER: And if you see the
14 bottom left rectangle, that is one. And the --

15 MR. PETRUZZELLI: So this is one entire
16 parcel?

17 WITNESS FISHER: Correct.

18 MR. PETRUZZELLI: Okay.

19 WITNESS FISHER: And the remainder is
20 another.

21 MR. PETRUZZELLI: Okay. And then this is
22 a third parcel?

23 WITNESS FISHER: Yes.

24 MR. PETRUZZELLI: Okay. Were any of
25 these parcels previously smaller parcels?

1 WITNESS FISHER: The original Stanshaw
2 Claim, I believe, was slightly larger. It
3 included some land on the other side of the
4 highway.

5 MR. PETRUZZELLI: But -- okay. But each
6 of these is one whole -- one whole parcel? Like
7 if you look on an assessor parcel map, do you --
8 are you familiar with the items --

9 WITNESS FISHER: I am.

10 MR. PETRUZZELLI: -- on the parcel map?

11 WITNESS FISHER: There are three --

12 MR. PETRUZZELLI: Okay.

13 WITNESS FISHER: -- AP parcels, but it
14 was --

15 MR. PETRUZZELLI: Okay.

16 WITNESS FISHER: -- one original land
17 claim by Sam Stanshaw.

18 MR. PETRUZZELLI: So when you -- so this
19 long north-south parcel, that's one assessor
20 parcel?

21 WITNESS FISHER: Correct. And the bottom
22 rectangle on the right -- on the left is one, as
23 well as all the land --

24 MR. PETRUZZELLI: Okay.

25 WITNESS FISHER: -- on the east side of

1 the highway is --

2 MR. PETRUZZELLI: Okay.

3 WITNESS FISHER: -- a third parcel.

4 MR. PETRUZZELLI: Okay. And Stanshaw
5 Creek goes through this long north-south parcel,
6 and it passes by the parcel that is closest to
7 the Klamath River?

8 WITNESS FISHER: Through both of them, to
9 my knowledge.

10 MR. PETRUZZELLI: It passes through both
11 of them?

12 WITNESS FISHER: To my knowledge, yeah.

13 MR. PETRUZZELLI: It's difficult to tell
14 from the --

15 WITNESS FISHER: Yeah.

16 MR. PETRUZZELLI: -- from the map. Okay.
17 And is it correct that you're also the
18 Executive Director for Klamath Riverkeeper?

19 WITNESS FISHER: I am.

20 MR. PETRUZZELLI: And what -- can you
21 talk about what you do in that role?

22 WITNESS FISHER: Essentially, it's
23 advocacy and public education to restore
24 fisheries and water quality for the people who
25 most depend on them.

1 MR. PETRUZZELLI: And in the -- is that
2 in the Mid Klamath region?

3 WITNESS FISHER: Our geographic region is
4 the entire Klamath Basin.

5 MR. PETRUZZELLI: Okay. And what kind of
6 things do you do in that role, more specifically?

7 WITNESS FISHER: A lot of boring
8 administration, people management, fund raising.
9 At this current time, I'm delegating most of the
10 more enjoyable tasks, but --

11 MR. PETRUZZELLI: Okay.

12 WITNESS FISHER: -- my core competencies,
13 I would say, are policy advocacy.

14 MR. PETRUZZELLI: Okay. And how long
15 have you been doing -- in this role?

16 WITNESS FISHER: My entire adult life,
17 I've worked for public interest organizations.

18 MR. PETRUZZELLI: Okay. And specifically
19 Klamath Riverkeeper?

20 WITNESS FISHER: No. Klamath Riverkeeper
21 since 2011.

22 MR. PETRUZZELLI: Okay. All right. I
23 wanted to ask you about the Coho Enhancement
24 Project.

25 WITNESS FISHER: Uh-huh.

1 MR. PETRUZZELLI: And I am going to
2 scroll down and open Exhibit WR-184, once I find
3 it.

4 (Document displayed on screen)

5 MR. PETRUZZELLI: Are you familiar with
6 this project?

7 WITNESS FISHER: Yes.

8 MR. PETRUZZELLI: Okay. What was your --
9 how are you related to this project?

10 WITNESS FISHER: Well, as the landowner,
11 I signed on -- off on it. I was consulted as the
12 grant was being written. I was asked about my
13 knowledge of how the pool has looked over the
14 years, based on being there. I know what happens
15 at high floods. I was the only person I know who
16 was -- I was the only person there during the '98
17 flood, which after that, that pool was amazing.
18 It was probably at its best.

19 So, yeah, I've been there the most and
20 I've seen how the river and the creek behaves at
21 different levels.

22 MR. PETRUZZELLI: And when you say as the
23 landowner, you have to sign off on the project,
24 that means you had -- because you owned the
25 property, you gave consent for the -- for the

1 project to be done on your property?

2 WITNESS FISHER: Correct. Bulldozers and
3 dump trucks driving right by my house --

4 MR. PETRUZZELLI: Okay.

5 WITNESS FISHER: -- for a very long time.

6 MR. PETRUZZELLI: I highlighted a portion
7 of the project description. I'm going to
8 highlight a portion that I have previously
9 referenced in this proceeding.

10 Can you read that please?

11 WITNESS FISHER: "Originating from
12 Stanshaw Creek, the bulk of sediment -- of
13 the sediment plug was deposited during the
14 2005-2006 flood event when the upstream ditch
15 diversion to Marble Mountain Ranch
16 overtopped, causing severe gully erosion."

17 Did you witness that flood event?

18 WITNESS FISHER: I witnessed it
19 immediately after it happened, so I saw the mud
20 come down and I walked up and saw what happened.

21 MR. PETRUZZELLI: So you saw the flood
22 event. And when you say you walked up --

23 WITNESS FISHER: To the --

24 MR. PETRUZZELLI: -- did you walk up --
25 does that mean you walked up to the diversion

1 ditch?

2 WITNESS FISHER: To below it where you
3 could see it, not on top of it but below it, so
4 you could see the whole thing.

5 MR. PETRUZZELLI: And what could you see?

6 WITNESS FISHER: I would characterize it
7 as a mudslide.

8 MR. PETRUZZELLI: Okay. From the ditch?

9 WITNESS FISHER: Yeah.

10 MR. PETRUZZELLI: And what did the ditch
11 look like?

12 WITNESS FISHER: Red mud on the hillside,
13 probably --

14 MR. PETRUZZELLI: Okay. Just --

15 WITNESS FISHER: -- as tall as a --

16 MR. PETRUZZELLI: All right.

17 WITNESS FISHER: -- I don't know, seven-
18 story building.

19 MR. PETRUZZELLI: Okay. So similar to
20 this event, have you witnessed other mudslides
21 near your property?

22 WITNESS FISHER: Yeah. I would say in
23 the time we've owned the property, most likely
24 four to five.

25 MR. PETRUZZELLI: Okay. And then --

1 WITNESS FISHER: Four to five large ones
2 where I would consider them a mudslide, yeah.

3 MR. PETRUZZELLI: And after witnessing
4 these mudslides, did you ever walk up to the
5 diversion ditch?

6 WITNESS FISHER: Most of the time, unless
7 there was some reason I could not. I not only
8 walked to the diversion ditch to see the cause, I
9 walked -- I drove upstream to Sandy Bar Creek to
10 see its clarity. I would drive down to Irving
11 Creek to see its clarity at its mouth. And if I
12 had time, see more, to just kind of understand
13 what the difference was.

14 MR. PETRUZZELLI: Okay. And where is
15 Sandy Bar Creek, just for reference?

16 WITNESS FISHER: Roughly three-quarters
17 of a mile upstream. So it enters the Klamath.
18 In the winter, you can see it from my porch.

19 MR. PETRUZZELLI: Okay. And when you
20 would go to Sandy Bar Creek, how would it look
21 when you -- strike that.

22 When you would go to Sandy Bar Creek
23 after one of these mudslides, how would it look
24 as compared to Stanshaw Creek?

25 WITNESS FISHER: Both Irving and Sandy

1 Bar were significantly more clear. On two
2 occasions, I grabbed jar samples of each three
3 places to show the difference.

4 MR. PETRUZZELLI: Okay. And about how
5 many times has this happened?

6 WITNESS FISHER: As I said, about roughly
7 four over the last 20 years. If I dug through
8 electronic calendars and emails, I could piece
9 together the timeline.

10 MR. PETRUZZELLI: Okay.

11 WITNESS FISHER: And by this, I'm talking
12 about events I would consider a mudslide.

13 MR. PETRUZZELLI: All right. In general,
14 in the time you've been living at your property
15 have you -- did you notice changes in the thermal
16 refugial pool?

17 WITNESS FISHER: Yes --

18 MR. PETRUZZELLI: Okay. I mean --

19 WITNESS FISHER: -- kind of consistently
20 with what Phil saw when was younger, shortly
21 after 1994 after he bought the place.

22 MR. PETRUZZELLI: Yeah. And can you
23 describe that?

24 WITNESS FISHER: It was clear that more
25 water was being diverted shortly after we bought

1 the place.

2 MR. PETRUZZELLI: So, well, what -- so
3 what did it look like early in -- earlier in your
4 memory?

5 WITNESS FISHER: Well, it --

6 MR. PETRUZZELLI: Was it bigger?

7 WITNESS FISHER: I mean, I --

8 MR. PETRUZZELLI: Was it --

9 WITNESS FISHER: -- I floated by there
10 before we owned the property, but we bought the
11 property in '94, so that's --

12 MR. PETRUZZELLI: Okay. So can you
13 remember back to '94?

14 WITNESS FISHER: Yeah.

15 MR. PETRUZZELLI: Okay. And what did it
16 look like then?

17 WITNESS FISHER: I can remember sitting
18 at the mouth of the creek, when we very first got
19 the place, in the sands and there was water
20 entering the Klamath. There were a few adult
21 salmon, and it was a nice place to swim. There
22 was sand and there was clean water, a clean-water
23 plume in the Klamath. I was there with my father.
24 And we could swim and sit in the sand.

25 MR. PETRUZZELLI: And how did that change

1 over time?

2 WITNESS FISHER: It changed relatively
3 quickly.

4 MR. PETRUZZELLI: How quickly?

5 WITNESS FISHER: With -- I will say
6 within roughly two years of us having purchased
7 the place.

8 MR. PETRUZZELLI: So within two years,
9 what kind of changes did you notice?

10 WITNESS FISHER: The total volume of
11 the -- the total flow of the creek diminished
12 dramatically to the point that at many times it
13 was no longer reaching the Klamath River. And at
14 other times, and I'm speaking over a longer
15 period, but starting two years after we purchased
16 it, that pool would sink to the point that it was
17 a warm cesspool.

18 MR. PETRUZZELLI: Okay. You mentioned
19 that occurrences, such as those you documented in
20 the video, were not uncommon.

21 How often did -- have you observed the
22 point of diversion at Marble Mountain Ranch
23 diverting all or most of the creek flow?

24 WITNESS FISHER: I would say definitely
25 most years between about 2000 and 19 -- or 2014,

1 most of the middle 15 years of the time we've
2 owned the place.

3 MR. PETRUZZELLI: Okay. Is there a time
4 of year when it happens more?

5 WITNESS FISHER: Yeah. There's a common
6 event that happens in the spring or early summer,
7 and this is where I usually hope I'm there. It's
8 the time when a lot of fish will die. So as a
9 result of natural decreases I'm -- as a result of
10 a natural decrease in flow above the point of
11 diversion, Marble Mountain Ranch will fortify
12 their diversion to capture enough water, and at
13 that time the flow decreases dramatically. And
14 at those times, I try to do what I can to prevent
15 fish from dying.

16 MR. PETRUZZELLI: Is this fortification
17 of the diversion, as you describe it, what you
18 mean by the common event? So you mentioned, you
19 said there's a common event every spring?

20 WITNESS FISHER: Yeah.

21 MR. PETRUZZELLI: By -- is this common
22 event the fortification of the diversion, as you
23 described it?

24 WITNESS FISHER: Yes. But I see the flow
25 decrease first, then I go verify what caused it.

1 MR. PETRUZZELLI: Okay. And this
2 routinely happens every spring?

3 WITNESS FISHER: Yes.

4 MR. PETRUZZELLI: Okay.

5 WITNESS FISHER: Spring or early summer,
6 yeah.

7 MR. PETRUZZELLI: So you see the flow
8 drop, and then you go upstream and you see the
9 point of diversion substantially diverting?

10 WITNESS FISHER: Correct. And around
11 that time, I try to rally volunteers because it's
12 hard as one person to save the fish.

13 MR. PETRUZZELLI: How -- have you noticed
14 significant flow changes in the creek where the
15 diversion did not appear to be diverting all or
16 most of the flow?

17 WITNESS FISHER: There are dramatic
18 fluctuations between the summer and the winter.
19 In the summer the --

20 MR. PETRUZZELLI: Okay.

21 WITNESS FISHER: Yeah.

22 MR. PETRUZZELLI: Okay.

23 WITNESS FISHER: But never by an order of
24 50 to 90 percent in one day.

25 MR. PETRUZZELLI: All right. Those are

1 my -- those are all my questions for Mr. Fisher.

2 HEARING OFFICER MOORE: Thank you.

3 And next, Marble Mountain Ranch, would
4 you like to ask any questions of Mr. Fisher?

5 MS. BRENNER: May I have just a few
6 minutes?

7 HEARING OFFICER MOORE: Yes.

8 WITNESS FISHER: Can I, too?

9 HEARING OFFICER MOORE: Yes. We'll
10 take -- we'll look until a quarter after. We'll
11 reconvene at 2:15.

12 (Off the record at 2:11 p.m.)

13 (On the record at 2:16 p.m.)

14 HEARING OFFICER MOORE: All right.

15 Thanks everybody.

16 And good, Ms. Brenner.

17 MS. BRENNER: Thank you. I just have one
18 quick question.

19 CROSS-EXAMINATION BY

20 (Document displayed on screen)

21 MS. BRENNER: Pulled up on the screen is
22 Water Rights Exhibit 184. Can you just read into
23 the record the sentence that's highlighted, Mr.
24 Fisher?

25 WITNESS FISHER: "In addition, chronic

1 wasting of Stanshaw Creek banks adjacent to
2 the Fisher driveway below Highway 96 culverts
3 continue to deposit material into the pool."

4 MS. BRENNER: Thank you. That's all I
5 have.

6 HEARING OFFICER MOORE: Thank you, Ms.
7 Brenner.

8 And next, National Marine Fishery
9 Service, any questions for Old Man River Trust?
10 Oh, I don't see Mr. Keifer.

11 Department of Fish and Wildlife?

12 MR. VOEGELI: No.

13 HEARING OFFICER MOORE: No questions?
14 Karuk Tribe?

15 MR. HUNT: No.

16 HEARING OFFICER MOORE: No questions.

17 Klamath Riverkeeper? I don't think that
18 would be appropriate somehow. Don't -- strike
19 that. This is a serious proceeding. Sorry.

20 California Sportfishing Protection
21 Alliance?

22 MR. SHUTES: No questions.

23 HEARING OFFICER MOORE: And PCFFA, which
24 I'm convinced is not in the room? Okay. And,
25 okay, that's not appropriate.

1 So, well, Staff, any questions for Mr.
2 Fisher?

3 MS. WEAVER: I have a couple questions.

4 EXAMINATION BY

5 MS. WEAVER: So you had described your
6 personal experience of seeing the water level in
7 the pool change, seeing stranded fish. I
8 couldn't quite tell from your testimony how
9 common an event that is. Can you expand on that?

10 WITNESS FISHER: The majority of years
11 that I've owned the property.

12 MS. WEAVER: So -- and once a year when
13 it happens or --

14 WITNESS FISHER: The specific event I
15 described, which is the early summer event,
16 usually happens, the most severe, once in a
17 summer when I have to rally the troops to save
18 the fish when the diversion increases. And fish
19 will die, do we not round up a bunch of
20 volunteers to save them and to channel the -- to
21 make a choice because --

22 MS. WEAVER: Okay.

23 WITNESS FISHER: -- there's so little
24 water to keep the pool full.

25 MS. WEAVER: So this -- but this happens

1 most years all at once, or it kind of goes in
2 stages or --

3 WITNESS FISHER: It will go in stages. I
4 think the first, it seems -- yeah, from the mouth
5 the biggest step is usually early -- early
6 spring, late summer when the -- late spring,
7 early summer when it becomes necessary to fortify
8 the diversion. Does that make sense? I want it
9 to make sense to you.

10 MS. WEAVER: I think so.

11 WITNESS FISHER: But then there has to be
12 incremental adjustments. So for most of the
13 time, we have both (indiscernible) properties.

14 MS. WEAVER: Well, I mean, I understand
15 you have your -- we've heard your testimony, your
16 opinion about what the cause is. I'm just trying
17 to figure out what it looks like --

18 WITNESS FISHER: Right.

19 MS. WEAVER: -- at the pool, whether

20

21 it's --

22 WITNESS FISHER: Let's -- can we look at
23 the way it commonly looks?

24 MS. WEAVER: Yeah, if there's an --

25 WITNESS FISHER: OMRT-5.

1 MS. WEAVER: Okay.

2 (Document displayed on screen)

3 WITNESS FISHER: Go down to where you can
4 see the pool.

5 So this is an example of what happens
6 when I go away for a long time and come back.
7 The diversion gets out of hand and the pool ends
8 up looking like that. So that's a severe
9 version.

10 But when I'm there to catch it, it goes
11 down, fish start dying, and I usually have to do
12 something to prevent the fish from dying.

13 MS. WEAVER: And you testified, I
14 believe, about you personally have picked up some
15 fish and put them in the pool?

16 WITNESS FISHER: Oh, often, I mean,
17 probably --

18 MS. WEAVER: Okay.

19 WITNESS FISHER: Yeah. Yeah.

20 MS. WEAVER: And --

21 WITNESS FISHER: And not just me
22 personally, but you have to get volunteers so
23 you --

24 MS. WEAVER: I've got it.

25 WITNESS FISHER: I can explain, if you

1 want --

2 MS. WEAVER: No.

3 WITNESS FISHER: -- how it works.

4 MS. WEAVER: I --

5 WITNESS FISHER: Because, no, sometimes
6 it's relocating fish to save them.

7 MS. WEAVER: Right. I get that. You had
8 expressed thoughts about your doing that, so I
9 have a couple of questions --

10 WITNESS FISHER: Okay.

11 MS. WEAVER: -- about that. I'd
12 appreciate kind of short answers.

13 WITNESS FISHER: Okay.

14 MS. WEAVER: So do you recall testimony
15 from the Karuk Tribe, NMFS, CDFW and other
16 witnesses about there are different species of
17 salmonid that are routinely present in this pool?

18 WITNESS FISHER: Yes.

19 MS. WEAVER: And do you recall testimony
20 from various witnesses that some of those species
21 are federally or state protected and others are
22 not?

23 WITNESS FISHER: Yes.

24 MS. WEAVER: And do you recall testimony
25 from the Karuk Tribe witness earlier today about

1 ways to distinguish between the different kinds
2 of fish?

3 WITNESS FISHER: Yeah. The way -- yes.

4 MS. WEAVER: And, I mean, my impression
5 was that it could be challenging if you're not an
6 expert. Do you consider yourself an expert in
7 identifying --

8 WITNESS FISHER: Challenging to relocate?

9 MS. WEAVER: To identify, you know, is
10 this a Chinook salmon or a steelhead I'm looking
11 at, just for an example?

12 WITNESS FISHER: I don't try to identify
13 when I save them. I save them all --

14 MS. WEAVER: Okay. Got it.

15 WITNESS FISHER: -- as many as possible.

16 MS. WEAVER: So you save them all?

17 WITNESS FISHER: As many as possible.

18 MS. WEAVER: Got it.

19 WITNESS FISHER: Yeah.

20 MS. WEAVER: There's no particular
21 species that you're concerned with?

22 WITNESS FISHER: I'm concerned with all
23 of them. You can save them all.

24 MS. WEAVER: Right. So isn't it possible
25 then that you've never picked up a protected

1 fish? You've only handled non-protected fish?

2 WITNESS FISHER: No. I mean, I'm not an
3 expert IDer, but I'm sure, in probability, I've
4 picked up every single type.

5 MS. WEAVER: Okay.

6 WITNESS FISHER: Yeah. I mean, I --
7 yeah.

8 MS. WEAVER: Well --

9 WITNESS FISHER: I'm not trying to hide
10 that.

11 MS. WEAVER: -- but it sounds like you
12 can't say with certainty whether you've actually
13 handled a Coho salmon?

14 WITNESS FISHER: I've -- the only time
15 I'm certain is when I have picked up dead ones,
16 put them in my freezer, called NOAA Fisheries and
17 had them look at it, or had other experts look at
18 it to verify.

19 MS. WEAVER: Got it. Thank you for
20 clarifying.

21 HEARING OFFICER MOORE: Okay. Okay.

22 Ms. Irby?

23 EXAMINATION BY

24 MS. IRBY: Good afternoon, Mr. Fisher.

25 WITNESS FISHER: Hello.

1 MS. IRBY: Again, some of these
2 questions, I may have missed part of your
3 testimony. So if they're repetitive, I
4 apologize.

5 WITNESS FISHER: Uh-huh.

6 MS. IRBY: Where is your point of
7 diversion located?

8 WITNESS FISHER: My point of -- I have
9 two points of diversion, one on the mainstem of
10 Stanshaw Creek, roughly between Highway 96 and
11 Marble Mountain Ranch's diversion.

12 MS. IRBY: Uh-huh.

13 WITNESS FISHER: The other is on a
14 tributary to Stanshaw Creek, which is only
15 visible on the map I've provided, the tributary,
16 so OMRT-1 again.

17 MS. IRBY: And was that identified in
18 your testimony?

19 WITNESS FISHER: What, OMRT-1?

20 MS. IRBY: The tributary on this map? I
21 don't see it labeled.

22 WITNESS FISHER: Oh, if you see OMRT-1,
23 it doesn't really have a name, but you can see,
24 it looks like a creek going into Stanshaw Creek
25 above the highway.

1 (Colloquy)

2 MS. IRBY: No. But follow-up question?

3 In your written testimony, you describe
4 flooding on a road from the outfall at Irving
5 Creek. Could you give me more details about
6 that?

7 WITNESS FISHER: Correct. If you can see
8 the Blue Heron Ranch property, you can see where
9 Highway 96 goes over Irving Creek. Just to the
10 left of that there is a road that goes to the
11 Marble Mountain Ranch water outflow. So that's
12 an easily accessible place from Highway 96. So
13 if you were driving --

14 MS. IRBY: Do you have the mouse?

15 WITNESS FISHER: I wish.

16 MS. IRBY: Oh, I think it's over here.

17 Could you give --

18 WITNESS FISHER: So this, where the mouse
19 is right now, that's essentially where Highway 96
20 crosses Irving Creek.

21 MS. IRBY: Uh-huh.

22 WITNESS FISHER: Just north on 96 and go
23 right, and there's an outfall where the water
24 previous to like the last two summers came out of
25 Marble Mountain Ranch and went into Irving Creek.

1 And at those times, I mean, you can very easily
2 see how much water is here versus how much water
3 is coming out.

4 MS. IRBY: And there's a road there?

5 WITNESS FISHER: Yes. Yes. It's not
6 shown on here, but it's a public dirt road that
7 goes really just a little ways in to the place
8 where what was a creek coming out of Marble
9 Mountain Ranch used to come. And that's what
10 Blue Heron used to use for their hydro system.
11 So it's fairly easy to monitor the difference
12 between Marble Mountain Ranch outflow and what's
13 actually going into the Klamath at the mouth of
14 Stanshaw.

15 MS. IRBY: Okay. Under what basis of
16 right do you claim?

17 WITNESS FISHER: Riparian, and a portion
18 of the pre-1914 established by Sam Stanshaw.

19 MS. IRBY: Do you have an amount?

20 WITNESS FISHER: I've filed a statement
21 of diversion and use. I can't remember what I
22 put on it. I know what -- I know what my purpose
23 is, but I don't, off the top of my head, know how
24 to calculate it. I can --

25 MS. IRBY: Do you have an estimate for

1 what your need would be if you were able to meet
2 your hydropower needs and whatever other needs
3 you might have?

4 WITNESS FISHER: Well, the estimate I got
5 was my hope, like he hasn't yet come, but that
6 estimate, 0.23 CFS to produce more than 4,000
7 watts 24/7 with a battery bank and a solar system
8 would be, honestly, overkill and allow me to do
9 what I would dream to do in the long run, which
10 is have multiple -- have more than is there now.

11 MS. IRBY: So 0.23 would be --

12 WITNESS FISHER: Would allow --

13 MS. IRBY: -- your --

14 WITNESS FISHER: It depends on what my
15 future plans are. I don't want to --

16 MS. IRBY: For both consumptive and
17 hydropower?

18 WITNESS FISHER: Consumptive is so
19 negligible, even with a huge garden, that, yeah.

20 MS. IRBY: Okay. Now I'm finished.

21 EXAMINATION BY

22 MS. WEAVER: So we've been having a
23 conversation about this map. So what I want to
24 do is just bring down a copy for you to mark a
25 couple things.

1 WITNESS FISHER: Okay. And I just want
2 to clarify that overlaying property with this
3 LiDAR, there is -- the only way to do it
4 perfectly takes a lot more time than we had,
5 but --

6 MS. WEAVER: So this is all kind of an
7 estimate and it's not exact --

8 WITNESS FISHER: Well --

9 MS. WEAVER: -- correct?

10 WITNESS FISHER: -- no, I would say the
11 creek is exact, but the property overlay --

12 MS. WEAVER: Got it.

13 WITNESS FISHER: -- could be adjusted up
14 or down.

15 MS. WEAVER: Got it.

16 WITNESS FISHER: Yeah.

17 MS. WEAVER: Yeah. Well, I'm sure
18 there's some other record there that would speak
19 for itself.

20 But the -- can you mark the three
21 different parcels you described to Mr.
22 Petruzzelli?

23 I mean, it sounded like there's one on
24 one side of the highway, there's one that's in
25 the rectangle, and then everything else is the

1 third one; is that right?

2 WITNESS FISHER: That's my best memory.

3 MS. WEAVER: Okay. Got it.

4 WITNESS FISHER: I mean, I didn't bring
5 an AP map, but that is my best memory. I mean --

6 MS. WEAVER: And then can you circle the
7 creek that you were discussing with Ms. Irby just
8 now?

9 WITNESS FISHER: The tributary to
10 Stanshaw Creek?

11 MS. WEAVER: Yes.

12 WITNESS FISHER: Yeah.

13 MS. WEAVER: Okay. And then if you could
14 also mark the outfall that you were discussing?

15 WITNESS FISHER: Okay. And there are
16 maps out there that do a better job of this.
17 This is my best guess.

18 MS. WEAVER: Well, I mean, I just -- I
19 know that -- my concern is making sure we have a
20 record of what you indicated with the cursor, if
21 that makes sense.

22 WITNESS FISHER: Yeah.

23 MS. WEAVER: I mean, because, I mean,
24 this is a LiDAR map. I mean, it's -- you've
25 talked about what the limitations of this map

1 are. I just want to make sure it's clear --

2 WITNESS FISHER: Yeah. Okay.

3 MS. WEAVER: -- what you pointed to.

4 WITNESS FISHER: Okay. I did one, two,

5 three on the parcels. I circled the tributary.

6 And I put a line indicating the outfall from Cole

7 property to Irving Creek.

8 MS. WEAVER: Okay. Thank you.

9 WITNESS FISHER: Uh-huh.

10 MS. IRBY: Did you mark the road that is

11 occasionally flooded?

12 WITNESS FISHER: Yeah.

13 MS. IRBY: Thank you.

14 MS. WEAVER: And if you could also label

15 them? I think we're going to end up appreciating

16 that.

17 WITNESS FISHER: Okay. I'm going to

18 label one water and one road. And this is,

19 again, outflow that was there before the

20 curtailment, not so much now, or the -- yeah,

21 it's not flowing as much anymore.

22 MS. WEAVER: Right. Okay.

23 WITNESS FISHER: Okay.

24 MS. WEAVER: When is your --

25 WITNESS FISHER: I put the word water on

1 one and road on the other.

2 HEARING OFFICER MOORE: Okay. Good. And
3 so that's going to be our Exhibit 3; right?

4 MS. WEAVER: This will be Staff 3, that's
5 right -- or State Water Resources Control Board
6 3, that's right.

7 HEARING OFFICER MOORE: Okay.

8 (SWRCB Exhibit 3 is marked.)

9 MS. WEAVER: So if we can --

10 WITNESS FISHER: I'll make it prettier if
11 you going to make it like a permanent thing.

12 MS. WEAVER: That's okay.

13 WITNESS FISHER: Okay.

14 HEARING OFFICER MOORE: It's just for
15 information. Okay.

16 With that, I would request that Old Man
17 River Trust offer exhibits into evidence.

18 WITNESS FISHER: I offer all the exhibits
19 that are on the website and this into evidence.

20 HEARING OFFICER MOORE: Well, that's
21 going to be ours.

22 WITNESS FISHER: Okay. That's yours. I
23 offer all the exhibits previously submitted.

24 HEARING OFFICER MOORE: Thank you.

25 And are there any objections? With no

1 objections, these exhibits are entered into the
2 record.

3 (OMRT Exhibits 1 through 11 are received.)

4 HEARING OFFICER MOORE: Okay. And now we
5 reach a point in the proceeding where we have
6 opening statements by parties participating in
7 cross and rebuttal only.

8 And first, that is California
9 Sportfishing Protection Alliances opening
10 statement, then followed by the Pacific Coast
11 Federation of Fisherman's Associations and
12 Institute for Fisheries Resources opening
13 statement. And we have 20 minutes for this.

14 Sure, Mr. Shutes?

15 MS. WEAVER: I just want to quickly note
16 for the record that the map we had Mr. Fisher
17 mark as Staff-3 was originally OMRT-1; right?

18 WITNESS FISHER: Yes.

19 MS. WEAVER: OMRT-1, just so it's clear.

20 HEARING OFFICER MOORE: Ready? Please
21 proceed.

22 MR. SHUTES: Thank you very much.

23 OPENING STATEMENT BY

24 MR. SHUTES: Good afternoon again. Chris
25 Shutes with the California Sportfishing

1 Protection Alliance.

2 CSPA, otherwise California Sportfishing
3 Protection Alliance, is often known by the
4 acronym CSPA or CSPA. CSPA originally developed
5 an interest in this watershed in 2000 with its
6 Protest of Water Rights Application 29449. It is
7 one of the exhibits. I don't recall the number
8 in the Water Rights Team Exhibit List.

9 Our biggest concern coming into this
10 proceeding was the fact that it's been 17 years
11 without a resolution. Even though the
12 particulars have changed, the actual application
13 has been withdrawn, still many of the issues
14 related to that application and that protest
15 remain pending today.

16 CSPA does not plan to put on rebuttal
17 testimony. And I frankly hadn't planned to come
18 and give an opening statement. However, since
19 I'm afforded the opportunity, I'd like -- I'm
20 going to say a few things.

21 I realize that most of the people who
22 participated in this hearing have way more skin
23 in the game than CSPA does on this particular
24 issue. The Karuk Tribe, the diverter, the
25 fisheries' agencies, as well, have a lot more

1 personally and culturally at stake than CSPA
2 does. We do have an overriding interest in
3 protection of fisheries, and in the Klamath River
4 fisheries in particular.

5 We would like to see a resolution, but we
6 don't have any way of presuming to recommend one
7 or know what is appropriate, both because we
8 don't have the technical level of detail that the
9 fisheries' agencies or that the diverter or that
10 the -- and the diverter's witnesses, or that the
11 Karuk Tribe has been presented, or Mr. Konrad,
12 for that matter. And it would be presumptuous,
13 frankly, for us to recommend any kind of
14 agreement that might be appropriate.

15 Nonetheless, we're hopeful that this
16 matter can somehow be resolved, and that it gets
17 resolved sort of with some level of permanence.
18 It's really a problem for us that this protest,
19 which dated to two predecessors of mine ago, is
20 still, at least in substance if not for the
21 particular protest, dealing with a situation that
22 hasn't been resolved. Water rights processes are
23 often considered to be glacial. Sometimes that
24 is perhaps more rapid than they actually take --
25 transpire under.

1 I'd really like to see something come of
2 this. I'd like to see people resolve the
3 problems and spend more time working on solutions
4 and less time fighting amongst one another. I'm
5 hopeful that they can. But in any case, I'm very
6 hopeful that this is going to get resolved out of
7 this proceeding and that unlike what's happened
8 to us in another proceeding, El Sur Ranch in 2011
9 where we still haven't gotten a decision from the
10 Board, this is not going to be a prolonged
11 process.

12 Thanks very much.

13 HEARING OFFICER MOORE: Thank you, Mr.
14 Shutes.

15 Do we have someone from PCFFA? No.
16 Well, let the record show, PCFFA did not attend
17 the hearing. And I don't recall them attending
18 any days of the hearing. Okay. Okay. Okay.

19 Well, then let's see, we'll do a time
20 check, 2:35. If everyone's okay, we'll just
21 continue with the proceeding.

22 At this point we reach rebuttal and, if
23 any, cross-examination. So rebuttal testimony is
24 in the same order as presentation of cases in
25 chief and cross-examination.

1 We will now hear the Prosecution Team's
2 rebuttal testimony, followed by cross-examination
3 in the order I previously identified.

4 And also, as we -- as the Prosecution
5 Team comes up and gets ready to perform this part
6 of the proceeding, are there any new witnesses
7 that need to take the oath?

8 UNIDENTIFIED FEMALE: Yes.

9 HEARING OFFICER MOORE: Okay. Well, that
10 new witness should approach.

11 MR. PETRUZZELLI: So we will have three
12 witnesses for rebuttal. We will have Taro
13 Murano, Skyler Anderson and Bryan Elder. Bryan
14 Elder must take the oath.

15 HEARING OFFICER MOORE: Okay.

16 MR. PETRUZZELLI: And I have ten printed
17 copies of a memorandum and curriculum vitae for
18 Mr. Bryan Elder.

19 HEARING OFFICER MOORE: Okay. All right.

20 MR. PETRUZZELLI: Any PowerPoints and
21 electronic copies of this have already -- have
22 been provided.

23 HEARING OFFICER MOORE: Well, before you
24 sit, Mr. Elder, can you remain standing and raise
25 your right hand?

1 (Witness is sworn.)

2 HEARING OFFICER MOORE: Thank you. You
3 may be seated. Okay.

4 MS. WEAVER: I'm going to ask Staff who
5 are closer to the control room to just confirm
6 that we have everything set up.

7 MS. WEAVER: I see them nodding, yes.
8 Thank you.

9 (Pause in proceedings)

10 MR. PETRUZZELLI: Okay. And so I'd like
11 to introduce Mr. Bryan Elder.

12 BRYAN ELDER,
13 called as a witness for Division of Water Rights,
14 having been duly sworn, was examined and
15 testified as follows:

16 DIRECT REBUTTAL TESTIMONY BY

17 MR. PETRUZZELLI: The memorandum that I
18 distributed, Mr. Elder, did you author that
19 memorandum?

20 WITNESS ELDER: I did.

21 MR. PETRUZZELLI: And is the curriculum
22 vitae attached to that memorandum, is that your
23 curriculum vitae?

24 WITNESS ELDER: Yes, it is.

25 MR. PETRUZZELLI: Okay. So go for it.

1 WITNESS ELDER: All right. Well, again,
2 I'm Bryan Elder. I'm a Senior Water Control
3 Engineer with the Office of Enforcement, State
4 Water Board, Special Investigations Unit. I'm
5 also the Supervisor of that Unit.

6 Just a bit of background. I oversee six
7 Staff. I provide technical support on a variety
8 of programs. And I also develop economic benefit
9 of noncompliance and ability to pay analyses for
10 cases statewide.

11 Just a quick summary of qualifications.
12 As I've stated, I'm an engineer. I also have a
13 Master's in Business Administration from
14 Pepperdine, where I completed graduate-level
15 course work in accounting, finance and asset
16 valuation. I've been through the United States
17 EPA Training Course on economic benefit and
18 ability to pay financial models that they use.
19 And I've completed over 100 economic benefit
20 cases, as well as over 25 ability to pay analyses
21 since I started with the Water Boards in 2014.

22 As an aside, I also provide financial
23 training, both in ability to pay and economic
24 benefit, to Enforcement Staff in all nine
25 regions, as well as to State Board Staff.

1 So the basis of ability to pay, and this
2 is essentially the process of reviewing financial
3 health, ability to pay, and the ability to
4 continue in business is applied the same way
5 across all cases in each region. And essentially
6 it's broken down into two critical analyses, an
7 assessment of the net cash flow which is
8 essentially cash receipts minus cash payments,
9 which gives a good measure of financial health,
10 and is also used regularly to evaluate the value
11 of a company. In addition, we look at net worth,
12 which is an assessment of both the assets and
13 liabilities that a company or entity has, which
14 plays into the ability of a company to finance or
15 leverage their equity.

16 And so in this particular case, this is a
17 summary of the information that I reviewed and
18 their associated evidence number, tax filings
19 from 2013 to 2016, the Ability to Pay Claim Form
20 that was submitted by Mr. Cole in December of
21 2016, a public records search using our Westlaw
22 Legal Database, Mr. Cole's written testimony, an
23 engineering proposal presented from KASL
24 Engineering, and alternative energy quotes
25 provided.

1 So just a quick summary of the IRS tax
2 filings. And what this breaks down is
3 essentially a net income evaluation. Essentially
4 you have gross income. These would be cash
5 receipts. This would be revenue that was
6 generated minus total business expenses or
7 deductions results in a total profit or loss.
8 And as you can see here in the last two years,
9 Marble Mountain Ranch has experienced fairly
10 significant net losses. The issue here, though,
11 is that these are reported taxable income to the
12 IRS, which is not representative of financial
13 health or ability to pay.

14 So instead we look at cash flow, which
15 is, again, based on only actual cash expenses
16 that were incurred by the company in a given time
17 period, for example, a taxable year. We exclude
18 non-cash expenses, such as depreciation or
19 amortization. And the reason being that these
20 expenses are not real expenses, not cash expenses
21 that were incurred on a given annual basis.

22 And so if you look at Marble Mountain
23 Ranch's summary here, you can see that
24 depreciation in the last two years, that expense
25 that has been recorded has been significant. And

1 backing out those numbers, we have cash flow.
2 And what I've written here is a simplified cash
3 flow that's been positive for all four years.
4 And where I've mentioned that it's pre-principal
5 loan payments, typically the principal on a given
6 loan, for example, a mortgage, is not tax
7 deductible, so it doesn't factor into the
8 expenses that you saw on the previous slide. And
9 so we want to bring those principal expenses back
10 into the equation, as well.

11 But again, just in summary, 2016 pre-
12 principal loan payment cash flow, over \$177,000
13 for the year.

14 So using information that was provided on
15 the Ability to Pay Claim Form, again, submitted
16 by Mr. Cole, there is -- there are estimated loan
17 payments of approximately \$50,000 that were
18 obligations of both the Coles and Marble Mountain
19 Ranch in 2016. Unfortunately, those loan
20 estimate -- those estimated payments were not
21 available for any of the previous years, so we
22 can only look at 2016. But essentially what you
23 can see here is the approximate net cash flow,
24 again, fairly significant, but over \$125,000.

25 Sorry, my screen went black here. There

1 we go. Just a minute.

2 (Pause in proceedings)

3 WITNESS ELDER: Okay. So again,
4 estimated loan payments in 2016 of approximately
5 \$50,000. The important thing to note, though, is
6 that one thing that is deductible from a business
7 standpoint is interest. These loans that were
8 indicated on the Ability to Pay Claim Form are
9 inclusive of interest. However, the amortization
10 schedule or essentially how the interest and
11 principal payments that are broken down for those
12 payments is not immediately clear because I
13 didn't have that, you know, the exactly
14 amortization schedule that he's using.

15 So therefore, as a conservative estimate
16 this estimated loan payment is not just the
17 principal loan. It includes the interest for
18 conservative purposes in evaluating cash flow.
19 It's my expectation that the actual principal
20 payment here is less than the \$50,000
21 represented.

22 So moving on to the net worth analysis,
23 again, in terms of -- which is, again, equal to
24 assets minus liabilities, these are the types of
25 things that we would be looking at when we assess

1 the asset value for the company. Those would
2 include property, water or mineral rights,
3 structures that may exist on the property,
4 equipment and vehicles, livestock, accounts
5 receivables, that is the money that would be
6 coming in that maybe is not in a cash form yet,
7 and then cash investments that the company may
8 hold.

9 These were the assets that were reviewed
10 with Marble Mountain Ranch. The value of the
11 property was obtained from the 2017 assessed tax
12 value. It should be noted that this is a tax
13 assessed value by the county and does not
14 necessarily -- is not necessarily indicative of
15 the market value which may be assessed based on
16 potential future cash flows and other assets that
17 the company may have. So at least in terms of
18 valuing the property itself, this is a very
19 conservative estimate.

20 Other known assets were included on the
21 Ability to Pay Claim Form. Those totaled
22 approximately \$212,000. And also on that form,
23 Mr. Cole indicated that Marble Mountain Ranch had
24 cash in value of \$2,000.

25 In terms of liabilities, we look at

1 mortgages, loans payable, accounts payable, so
2 again, accounts that the company would have to
3 pay, so these could be insurance or utility-type
4 accounts payable, something that would be seen on
5 the -- on the balance sheet for a company, and
6 any liens against the company.

7 These were the liabilities that were
8 indicated on the Ability to Pay Claim Form.
9 There is one mortgage with a current value as of
10 December 2016 that Mr. Cole indicated of
11 approximately \$247,000. And he also indicated
12 five loan payables totaling \$148,000. These loan
13 payables include two which appear for tractor
14 equipment through Kubota, one for a newer 2017
15 vehicle, one for consulting services, and one for
16 legal services. These five loans, I should note,
17 the -- if Mr. Cole had indicated an associated
18 payment with those, it would be included in those
19 principal loan payments that I discussed earlier.
20 So these have been subtracted from the cash flow,
21 the payments associated with these.

22 So doing a simplified net worth analysis,
23 again, total asset values of \$1.1 million minus
24 approximately \$400,000 leaves us with a net worth
25 of just over \$700,000. The important thing to

1 note is the, you know, approximate debt-to-equity
2 ratio here. And in a typical case a debt-to-
3 equity ratio of, in this case, between 20 and 30
4 percent is very healthy for a company, in my
5 opinion.

6 And what this actually means, so
7 Marble -- what this means is that Marble Mountain
8 Ranch is not significantly leveraged and likely
9 has the ability to take on additional debt based,
10 in part, on positive cash flow and increasing
11 revenue stream, which I didn't discuss, and I
12 think I missed that during the mix-up here.

13 But essentially, year over year, revenue
14 increases for Marble Mountain Ranch are
15 approximately 20 percent. Just between 2016 and
16 2013, I believe the generated revenue is an
17 increase of 70 percent.

18 So one other point that I was asked to
19 look into was excessive expense analysis. It had
20 been argued in Mr. Cole's testimony that utility
21 expenses had increased substantially as a result
22 of using a diesel generator. And so, in summary
23 -- as well as increased costs associated with
24 compliance which have driven those net losses
25 that were on one of the first slides. So in

1 summary, these business expenses are where some
2 of those actions would be typically captured.

3 In terms of repairs, as a percent of
4 gross income, there hasn't -- there's been some
5 fluctuations, but they have not increased
6 dramatically in 2015 and 2016. As a dollar
7 amount, there has been some increase. However,
8 according to the depreciation schedules included
9 in the tax filings, there has been some
10 significant acquisitions with the company, which
11 may be associated with some of those repairs and
12 maintenance. Some additional structures have
13 been built or purchased, and so that may be, as a
14 result, some increases in repairs and
15 maintenance.

16 From a utilities standpoint, not much has
17 changed, if anything. In the most recent year,
18 utilities have represented a smaller percentage
19 of gross revenue.

20 And as far as legal and professional
21 services, there has been a significant increase
22 in the most recent year from years -- two years
23 back. However, as far as the filings and the tax
24 returns, it's unclear whether these are legal in
25 nature of professional services, such as

1 consulting or engineering.

2 So I also looked at an alternatives
3 analysis. These were really broken down into to
4 two main proposals that had dollar figures
5 associated with them. The KASL Consulting
6 Engineers, these, I believe, were engineering and
7 survey services associated with upgrading the
8 existing diversion channel. That proposal was in
9 the amount of \$44,250. Based on cash flow alone,
10 that is a completely reasonable expense.

11 As far as design implementation costs,
12 those were not provided and I did not review any.
13 Based on the equity that the corporation has, in
14 addition to positive cash flows, there is
15 significant room for taking on additional debt or
16 incurring additional cash expenses.

17 As far as the alternative energy
18 proposal, the main costs I looked at were the
19 more expensive alternative of \$526,000 from
20 Golden West Energy which provided some options
21 for Marble Mountain Ranch to satisfy that
22 obligation, one of which being a six-year lease
23 which would be approximately \$55,000 per year
24 with \$142,000 buyout at the end of the lease
25 period. Essentially, by implementing this

1 particular alternative, it would result in an
2 increase of \$21,000 per year in the existing
3 utility expenses which, again, if you look back
4 to that cash flow for 2016 of approximately
5 \$127,000, it's well within their current cash
6 flow. And it represents 7.9 percent of gross
7 revenue, the total amount, the \$55,000 per year,
8 which is less than what that percentage was in
9 2014.

10 And so in summary, again, Marble Mountain
11 Ranch has positive net cash flow. They have
12 substantial equity in the property and business.
13 There is no indication to me of any excessive
14 expenses incurred over the last year. And the
15 alternatives that I reviewed are financially
16 feasible, based on current cash flow and equity.

17 And that concludes my presentation.

18 MR. PETRUZZELLI: Bryan, Mr. Elder, one
19 question. I believe in your memorandum you have
20 a brief discussion about utility expenses after
21 the Golden West option would be paid -- would be
22 paid off. Can you talk about that a little bit?

23 WITNESS ELDER: I'm sorry. Can you
24 repeat that?

25 MR. PETRUZZELLI: Okay. So I think it's

1 slide 14. Okay.

2 (Document displayed on screen)

3 MR. PETRUZZELLI: Okay. So this
4 alternative energy quote, six-year lease with a
5 buyout, it has an annual increase of \$21,000 over
6 existing utility expenses.

7 In your memorandum, I think you talk
8 about what the overall expenses look like once
9 this example would be paid off.

10 WITNESS ELDER: Well, I think in general,
11 assuming the lease is paid off and the buyout is
12 satisfied. If the buyout is satisfied with
13 existing assets, such as cash or using the actual
14 cash flow from the business, where they incur no
15 additional debt, ongoing utility expenses would
16 be essentially zero, unless there are other
17 utilities that Marble Mountain Ranch is currently
18 incurring.

19 But certainly, assuming the \$142,000
20 buyout is paid for, then ongoing utility expenses
21 would be significantly reduced, if not entirely
22 eliminated.

23 MR. PETRUZZELLI: Perfect. So does that
24 complete your presentation?

25 WITNESS ELDER: That completes my

1 presentation.

2 MR. PETRUZZELLI: Okay. So next we have
3 Mr. Murano and Mr. Anderson.

4 TARO MURANO AND SKYLER ANDERSON,
5 called as witnesses for Division of Water Rights,
6 having been duly sworn, were examined and
7 testified as follows:

8 DIRECT REBUTTAL TESTIMONY BY
9 (Document displayed on screen)

10 MR. PETRUZZELLI: So go ahead. Okay. So
11 let's go to WR-5, I think it's page 92. I'm not
12 sure whether Mr. Anderson or Mr. Murano are best
13 to answer this question. Can you explain what
14 this is?

15 WITNESS MURANO: It's a Division letter
16 that we issued to Blue Herring [sic] Ranch's
17 attorneys on December 6th, 2006. This letter was
18 in response to Blue Herring protesting in a
19 letter they sent to the Diversion on November
20 22nd, 2006. In the letter they -- in the
21 November 22nd letter, they were asserting a
22 riparian right, also asserting a certificate, and
23 that they had -- that they were authorized to
24 divert water from the tributary to Irving Creek
25 that MMR discharges their effluent water to under

1 a Forest Service right.

2 MR. PETRUZZELLI: Can you talk about
3 whether the Division determined whether or not
4 Blue Heron had any valid riparian claim or claim
5 of appropriation for the discharge from Marble
6 Mountain?

7 WITNESS MURANO: Basically, this letter
8 states to the attorneys of Blue Herring Ranch
9 that they don't have a riparian right to the
10 water discharged by Marble Mountain Ranch.
11 They're not riparian to the source. And you
12 can't have a riparian claim of right over foreign
13 water, foreign in source or time. They also said
14 that their Certificate R-590 is for Irving Creek
15 but in Shasta County, and MMR's effluent
16 discharge to the tributary to Irving Creek is
17 actually located in Siskiyou County. And that
18 basically all these matters that were raised in
19 their November 22nd letter is unrelated to Marble
20 Mountain Ranch's Application 29449.

21 MR. PETRUZZELLI: And they mentioned,
22 this letter mentions a Certificate number R-590.
23 Is that for a domestic? A small domestic
24 registration?

25 WITNESS MURANO: I believe it is, yes.

1 MR. PETRUZZELLI: Okay. And is
2 hydropower a covered use under a small domestic
3 registration?

4 WITNESS MURANO: It is not. One sec.
5 Under California Water Code section 1228.1(b)(1),
6 it defines a small
7 domestic use as that use that is defined by a
8 Board rule or used for aesthetic, fire
9 protection, recreation, fish and wildlife
10 purposes that are associated with the dwelling or
11 a facility for a human occupation. And that
12 diversion cannot exceed 4,500 gallons per day, or
13 diversion to storage of ten acre feet per annum.

14 So in short, no.

15 MR. PETRUZZELLI: Okay.

16 WITNESS MURANO: It does not.

17 MR. PETRUZZELLI: Okay. And then let's
18 go to WR-24.

19 Oh, before we move on from this, what was
20 the date of this correspondence?

21 WITNESS MURANO: The Division letter was
22 sent to Blue Herring on December 6, 2006.

23 MR. PETRUZZELLI: So over ten years ago?

24 WITNESS MURANO: Correct.

25 MR. PETRUZZELLI: Okay. So this was a

1 closed issue over ten years ago?

2 WITNESS MURANO: Yes, it was.

3 MR. PETRUZZELLI: Yeah. So, okay, so can
4 we go on to WR-24 please? And can you explain
5 what this is, either Mr. Murano or Mr. Anderson?

6 WITNESS MURANO: This is a letter that
7 the Division issued to Douglas and Heidi Cole,
8 dated November 17th, 1994.

9 MR. PETRUZZELLI: Okay.

10 WITNESS MURANO: And in this letter,
11 we're addressing Mr. Cole to do an ownership name
12 change for the applications that were on file
13 from his predecessor's Application number 29449,
14 and Application 29450.

15 MR. PETRUZZELLI: So how long ago was
16 this?

17 WITNESS MURANO: It dates back to '94.

18 MR. PETRUZZELLI: So how many years?

19 WITNESS MURANO: Twenty-three.

20 MR. PETRUZZELLI: Okay. So 23 years the
21 Water Board has been dealing with the Coles?

22 WITNESS MURANO: That's correct.

23 MR. PETRUZZELLI: Okay. And could we go
24 on to Exhibit WR-40?

25 (Document displayed on screen)

1 MR. PETRUZZELLI: And again, Mr. Anderson
2 or Mr. Murano, either of you can, you know
3 explain what this is.

4 WITNESS ANDERSON: To summarize this
5 document, in 2000, Division Staff, NMFS, CDFW,
6 Karuk Tribe and the Coles met at MMR and toured
7 MMR in an effort to resolve protests on
8 Application A029449. The -- excuse me --
9 recommendations were made to resolve the protest.
10 The recommendations included improve the
11 diversion structure at the POD, such as a more
12 permanent structure, improve the delivery system
13 to the hydro plant, such as piping or lining the
14 ditch, improve the efficiency of the hydro plant,
15 such as increasing the drop, installing a
16 smoother penstock, and installing a more
17 efficient generator, redirect water diverted for
18 hydropower back to Stanshaw, explore alternative
19 energy sources, such as solar and propane.

20 At the time this field report was
21 conducted, Doug maintained that he could not
22 afford these improvements.

23 MR. PETRUZZELLI: Could we go to page
24 four of this exhibit please?

25 (Document displayed on screen)

1 MR. PETRUZZELLI: And could we scroll down just
2 a little bit. Okay, I think that covers it.

3 These are -- so are these the alternate
4 project improvements that were recommended -

5 WITNESS ANDERSON: Yes.

6 MR. PETRUZZELLI: Okay.

7 WITNESS ANDERSON: Those are alternative
8 -- or, excuse me -- the recommendations to
9 resolve the protests that I just summarized.

10 MR. PETRUZZELLI: And are these, you
11 know, generally similar to the types of
12 recommendations or to the types of corrective
13 actions in the draft order?

14 WITNESS ANDERSON: Yes, very similar.

15 MR. PETRUZZELLI: Okay. And how long ago
16 was this?

17 WITNESS ANDERSON: Seventeen years ago.

18 MR. PETRUZZELLI: Okay. And then I
19 wanted to ask Mr. Anderson, Mr. Murano, do you
20 recall the site tour with Mr. Cole in December --
21 December 17, 2014?

22 WITNESS ANDERSON: Yes, I do.

23 WITNESS MURANO: Yes.

24 MR. PETRUZZELLI: And do you recall the
25 discussion in the pickup truck?

1 WITNESS ANDERSON: Yes.

2 WITNESS MURANO: Yes.

3 MR. PETRUZZELLI: And can you recount
4 part of that discussion?

5 WITNESS MURANO: So we were there for the
6 facility tour prior to a meeting that took place.
7 Mr. Cole was nice enough to show us around the
8 property, basically showing us his diversion.
9 And I can't recall when, but some time he was
10 expressing, you know, the -- the needs of his
11 business and that the 1.16 CFS would be some --
12 would be an amount from the Lennihan report that
13 would allow his business to still function.

14 WITNESS ANDERSON: I recall the same
15 conversation. I recall the conversation took
16 place in Mr. Cole's pickup truck when we were
17 driving from the hydro facility up to the
18 location of pretty much where he accesses the
19 ditch where his measurements are made you could,
20 you know, access the penstock and also below that
21 the water treatment facility. So it was on our
22 drive from the hydroplant to the locations I just
23 stated.

24 MR. PETRUZZELLI: Okay. So, Mr. Murano,
25 Mr. Anderson, have you been back to the ranch

1 since the February 12, 2015 inspection?

2 WITNESS ANDERSON: Yes. We made a trip
3 back in the winter of 2017. Division Staff made
4 the trip to the Stanshaw Creek Watershed for the
5 purpose of scouting out potential stream gaging
6 locations.

7 MR. PETRUZZELLI: And --

8 WITNESS ANDERSON: Can you open up the --
9 yeah.

10 MR. PETRUZZELLI: Oh, this is the second
11 PowerPoint.

12 WITNESS ANDERSON: Can I control the
13 PowerPoint from the...

14 MR. [SPEAKER]: Yeah.

15 MR. PETRUZZELLI: Or just ask him to
16 advance the slide.

17 WITNESS ANDERSON: No, I can -- I got it.
18 So Division Staff --

19 MS. WEAVER: Just a quick housekeeping
20 question. Are these pictures in the record
21 already or are they new?

22 MR. PETRUZZELLI: These are new.

23 MS. WEAVER: Okay. Thank you.

24 MR. PETRUZZELLI: This is rebuttal
25 evidence.

1 MS. WEAVER: Thank you.

2 WITNESS ANDERSON: So I'm going to just
3 slowly flip through these as I read the next
4 paragraph. Division Staff also walked -- during
5 our scouting visit, we also walked a portion of
6 the ditch at Marble Mountain Ranch. We photo-
7 documented numerous cut bank slumps, areas where
8 the diversion ditch had overtopped and resulted
9 in mudslides down gradient toward Stanshaw Creek
10 and into Stanshaw Creek.

11 Notice the following slide is going to be
12 the left of this photo, which is down gradient to
13 Stanshaw Creek. And you can see the slide that
14 occurred into Stanshaw Creek, which in this photo
15 is -- I don't have, but I don't have the mouse,
16 but you can see kind of the raging torrent of the
17 river in this photo. This is Stanshaw Creek and
18 here is the slide that discharged into Stanshaw
19 Creek.

20 Another view of the same slide from a
21 different angle.

22 This is a view of efforts of Marble
23 Mountain Ranch to block water that's coming into
24 Stanshaw Creek. This is above the first outfall
25 structure, so you can see an attempt at a rock

1 barrier to prevent water from coming in. And
2 this is what water looked like discharging from
3 the first outfall structure. And you can see the
4 flashboards that are used to prevent water from
5 continuing to flow in.

6 That concludes the presentation.

7 WITNESS MURANO: One point I'd like to
8 add is these photos were taken on Forest Service
9 property. At no point were we on Marble Mountain
10 Ranch's property.

11 MR. PETRUZZELLI: And then I believe the
12 last item is Exhibit WR-158.

13 So, Mr. Murano or Mr. Anderson, so is
14 this a record of the State Water Board?

15 WITNESS MURANO: Yes, it is.

16 MR. PETRUZZELLI: Okay. And there is --
17 I believe there is something of a companion
18 exhibit that goes with this, which is WR155. So
19 if we need that for context we can pull it up,
20 but --

21 WITNESS MURANO: I have a copy of it.
22 Just for the record, WR155 is a letter that our
23 Division of Drinking Water sent to Marble
24 Mountain Ranch on -- dated -- wait -- yes, I'm
25 sorry -- dated December 20, 2016.

1 I'm sorry. Could you repeat your
2 question again?

3 MR. PETRUZZELLI: So -- so, first of all,
4 are these records of the State Water Board?

5 WITNESS MURANO: Yes, they are.

6 MR. PETRUZZELLI: Okay. And between
7 these two exhibits, can you generally explain
8 what -- what is happening?

9 WITNESS MURANO: Okay. So the Division
10 of Drinking Water sent Marble Mountain Ranch a
11 letter requesting Marble Mountain Ranch to again
12 declare whether their drinking water system has
13 more than 14 service connections or serves 25
14 people or more for at least 60 days out of the
15 year. The last declaration that the Division of
16 Drinking Water received from Mr. Cole was in
17 December 21st, 2005.

18 The Division of Drinking Water issued
19 this declaration in 2016 to Mr. Cole based on
20 information that he was serving more than 25
21 individuals and more than 60 days out of the
22 year.

23 So along with the letter, WR155, we sent
24 him a blank declaration form, which is WR158.

25 MR. PETRUZZELLI: So is the blank

1 declaration form, was it attached to 155? And
2 then is 158 the version that was filled out and
3 signed?

4 WITNESS ANDERSON: Yes. I apologize. My
5 correction. Yes, it was. The declaration was
6 attached with the letter and 158 is the copy that
7 we received back from Mr. Cole.

8 MR. PETRUZZELLI: Okay. And can you
9 summarize what the copy back from Mr. Cole
10 indicates?

11 WITNESS MURANO: Yes. So the declaration
12 form that we received back, WR158, declared that
13 Mr. Cole -- or Mr. Cole, rather, declared that
14 Marble Mountain Ranch is not serving at least 25
15 individuals at least 60 days out of the year. He
16 signed and dated on January 1st, 2017 -- no, I'm
17 sorry -- January 4th, 2017.

18 MR. PETRUZZELLI: Okay. And can you
19 generally recount, I think it was, Tuesday how
20 Mr. Cole summarized the number of people visiting
21 the ranch during his season?

22 WITNESS MURANO: Yes. I recall yesterday
23 in his testimony that I believe he referred from
24 April, his busy season was from April to
25 November, sometimes past November, that 35 to 50

1 individuals which include both guests and staff
2 for that duration of time, which is about 244
3 days.

4 MR. PETRUZZELLI: Okay. So between Mr.
5 Cole's testimony and the declaration here, can
6 you explain what kind of inferences you might...

7 WITNESS MURANO: It's either -- it's
8 either that he serves more than 60 -- or, I'm
9 sorry -- more than 25 people, exceeding the 60
10 days per year or he doesn't. It can't be both.

11 MR. PETRUZZELLI: Okay. So -- so would -
12 - would this declaration be consistent with the -
13 - with the level of demand or, more specifically,
14 the number of people he testified are typically
15 at the ranch during his season?

16 WITNESS MURANO: No.

17 MR. PETRUZZELLI: Okay.

18 WITNESS MURANO: So during his testimony
19 yesterday, he clearly articulated that he
20 regularly serves during his busy season more than
21 25 people during the calendar year.

22 MR. PETRUZZELLI: Yeah. And can you
23 explain what happens, what would have happened if
24 Mr. Cole had said otherwise, if he said that --
25 that the system does serve at least 25

1 individuals at least 60 days out of the year?

2 WITNESS MURANO: I'm not entirely
3 familiar with all the drinking water
4 requirements, but I think in general if he did
5 need to get a permit, obviously he would need to
6 get a permit, his drinking water system would be
7 noticed as part of the process. I believe he
8 needs a drinking water operator and that operator
9 needs to go through certification. That
10 certification has to be renewed, I believe, every
11 other year, potentially as well as continuing
12 education credits that the operator needs to
13 maintain. They would have to develop a
14 monitoring plan. As part of that monitoring
15 plan, Mr. Cole or MMR would be required to do
16 monitoring and testing of the drinking water and
17 report those test results to the Division of
18 Drinking Water.

19 MR. PETRUZZELLI: So -- and are there
20 penalties associated with, you know, falsely
21 representing the demands on this declaration?

22 WITNESS MURANO: Yes. In this
23 declaration, again Water Right 158, if you don't
24 mind I can read from it, it's basically
25 indicating that the individual filling out this

1 declaration is declaring that they understand how
2 the Code Section 116725: "Any person who
3 knowingly makes any false statement or
4 representation in any application, record,
5 report, or other document that is submitted,
6 maintained, or used for the purposes" of -- "for
7 compliance with this chapter may be liable for a
8 civil penalty not to exceed \$5,000 for each
9 separate violation or for continuing violations
10 for each day the violation continues."

11 In addition, California Health and Safety
12 Code Section 116730 states, "The violators may be
13 prosecuted in criminal court and upon conviction
14 be punished by a fine of not more than 25,000 for
15 each day of violation or imprisonment in a county
16 jail not to exceed a year, or both fine and
17 imprisonment."

18 MR. PETRUZZELLI: Okay. Thank you.

19 And that is our rebuttal. That's all we
20 have.

21 MS. WEAVER: So before we get to cross,
22 just a quick housekeeping item on exhibit
23 numbers. I think this will help facilitate
24 cross. I have been going next in order, I have
25 Mr. Elder's memo as WR-194, Mr. Elder's CV as WR-

1 195, his PowerPoint as WR-196. I didn't see
2 whether the Blue Heron letter you crossed on, Mr.
3 Petruzzelli, is that an exhibit already?

4 MR. PETRUZZELLI: It -- I believe it's in
5 Exhibit WR-4 and I think it's page 92 of that
6 exhibit.

7 MS. WEAVER: Can we confirm that?

8 MR. PETRUZZELLI: As soon as my computer
9 wakes up again.

10 WITNESS MURANO: It's actually the -- the
11 Blue Herring [sic] letter they sent was WR-5,
12 page 92.

13 MR. PETRUZZELLI: That -- that is
14 correct.

15 MS. WEAVER: Okay. And then the 1994
16 letter from the Board --

17 MR. PETRUZZELLI: That's --

18 MS. WEAVER: -- to the Coles is an
19 exhibit?

20 MR. PETRUZZELLI: Yes. It's WR-24 and
21 it's actually an excerpt from either WR-4 or WR-
22 5, I don't recall.

23 MS. WEAVER: Okay. And then so if that's
24 the case, then the second PowerPoint would be --
25 the photographs that Mr. Anderson presented would

1 be WR197.

2 MR. PETRUZZELLI: Yes. And the
3 inspection report from the year 2000, and that
4 was also a previous exhibit.

5 MS. WEAVER: Right.

6 MR. PETRUZZELLI: It's WR-40 and I
7 believe it is an excerpt from -- it's either WR-4
8 or WR5, I don't recall --

9 MS. WEAVER: Okay.

10 MR. PETRUZZELLI: -- specifically.

11 MS. WEAVER: And then there weren't any
12 other documents --

13 MR. PETRUZZELLI: Nothing else new.

14 MS. WEAVER: Okay.

15 MR. PETRUZZELLI: I don't think there was
16 anything else new that has not been mentioned.
17 The letters, the correspondence with the Division
18 of Drinking Water are WR-155 and WR-158 which
19 have already been offered into evidence as part
20 of our case in chief.

21 MS. WEAVER: Okay. So then, just to
22 recap, we have Water Rights 194, Mr. Elder's
23 memo; Water Rights 195, his CV; Water Rights
24 Number 196, the PowerPoint that Mr. Elder
25 presented; and then Water Rights Number 197,

1 which is the second PowerPoint that Mr. Anderson
2 presented.

3 MR. PETRUZZELLI: Were the previous
4 PowerPoints presented in association with the
5 case in chief, have those also been numbered?

6 MS. WEAVER: We --

7 MR. PETRUZZELLI: Or will they be?

8 MS. WEAVER: My understanding is that
9 those have not been assigned numbers.

10 MR. PETRUZZELLI: Okay.

11 MS. WEAVER: Those were, I believe, just
12 summarizing written testimony. Right?

13 MR. PETRUZZELLI: Correct. Yes.

14 MS. WEAVER: Okay.

15 MR. PETRUZZELLI: But in -- in other
16 hearings I've been involved in, they have been
17 numbered, so I wasn't certain.

18 MS. WEAVER: Okay. Why don't -- why
19 don't -- we'll figure out on our end how to
20 proceed, but we can -- we can always just number
21 them next in order after 197.

22 MR. PETRUZZELLI: Yeah. That was why I
23 didn't number them myself, --

24 MS. WEAVER: Right.

25 MR. PETRUZZELLI: -- so.

1 MS. WEAVER: Thank you.

2 HEARING OFFICER MOORE: Thank you.

3 Next we go to cross rebuttal, and first
4 is Douglas and Heidi Cole, Marble Mountain Ranch.

5 MS. BRENNER: I need five minutes.

6 HEARING OFFICER MOORE: Okay. We'll
7 reconvene at 3:35.

8 (Off the record at 3:25 p.m.)

9 (On the record at 3:41 p.m.)

10 HEARING OFFICER MOORE: All right. Are
11 we ready for cross rebuttal?

12 MS. BRENNER: Yes.

13 HEARING OFFICER MOORE: Thank you, Ms.
14 Brenner.

15 MS. BRENNER: Thank you.

16 HEARING OFFICER MOORE: You're welcome.

17 MS. BRENNER: And these are all addressed
18 to Mr. Elder. I won't have any questions for Mr.
19 Anderson or Maro.

20 I'm sorry, I always forget your last
21 name.

22 WITNESS MURANO: Murano. That's okay.

23 MS. BRENNER: Murano. I always think --
24 so I apologize.

25 REBUTTAL CROSS-EXAMINATION BY

1 MS. BRENNER: So, Mr. Elder, I'd like to
2 go back to your assessment of the 2000 -- let's
3 just use the 2016 tax return information. Just
4 in a general sense, does a tax return reflect all
5 of personal -- this is an S corp. tax return,
6 right?

7 WITNESS ELDER: That's correct.

8 MS. BRENNER: Does that reflect all the
9 personal expenses a family may have?

10 WITNESS ELDER: No.

11 MS. BRENNER: In fact, it excludes many
12 expenses a family may have, doesn't it?

13 WITNESS ELDER: It might. That's
14 correct.

15 MS. BRENNER: Because it only -- it only
16 includes things that are relevant to a
17 determination of a net taxable income, correct?

18 WITNESS ELDER: For the corporation,
19 correct.

20 MS. BRENNER: For the corporation. How
21 does depreciation work; can you just explain
22 that?

23 WITNESS ELDER: Sure. Depreciation is
24 the -- where the total expense for a piece of
25 equipment or whatever it is that's depreciable is

1 then allocated over a depreciation schedule over
2 a certain period of time.

3 MS. BRENNER: So you incur the expense,
4 perhaps, in one year, correct?

5 WITNESS ELDER: Possibly. Yes, you could
6 --

7 MS. BRENNER: So --

8 WITNESS ELDER: -- also finance that
9 asset as well, but, yes, you would acquire that -
10 - that asset in year zero, essentially.

11 MS. BRENNER: And then you -- so you
12 don't get to deduct that total asset purchase in
13 that year, do you?

14 WITNESS ELDER: You could, but that's the
15 purpose of depreciation, is not incurring that
16 expense from a business standpoint in that the
17 initial year you want to spread that expense out
18 over several years to reduce your tax liability
19 over several years.

20 MS. BRENNER: It's your opinion that you
21 have the option of deducting a capital asset --

22 WITNESS ELDER: That is -- that is --

23 MS. BRENNER: -- or depreciate it?

24 WITNESS ELDER: That is not my opinion.

25 MS. BRENNER: Okay. Actually the IRS

1 says that you must depreciate that asset, isn't
2 it?

3 WITNESS ELDER: I believe so.

4 MS. BRENNER: Okay. So you incur a large
5 expense for a capital asset and you depreciate it
6 over a number of years, correct?

7 WITNESS ELDER: Correct.

8 MS. BRENNER: Okay. I just want to make
9 sure I'm on the same page with you.

10 WITNESS ELDER: Okay.

11 MS. BRENNER: Okay. And that's what's
12 reflected in -- the depreciation line in the
13 Coles' taxes, that's what's reflect, correct,
14 that -- that type of accounting system?

15 WITNESS ELDER: Yes.

16 MS. BRENNER: Okay. Were you here when
17 Mr. Cole testified regarding his expenses for
18 2016, his loan expenses?

19 WITNESS ELDER: I believe I was only here
20 for a portion of it and I don't know that I could
21 testify to exactly what I heard. I came in, I
22 believe, during that testimony.

23 MS. BRENNER: Okay. So you weren't here
24 when Mr. Cole testified that he had approximately
25 \$70,000 worth of loan payments in 2016?

1 WITNESS ELDER: I heard the number
2 70,000. I wasn't exactly sure what he was
3 referring to. Again, that's probably about the
4 time I walked in the door yesterday.

5 MS. BRENNER: Okay. And did you also --
6 were you also here when he estimated
7 approximately 70,000 of additional expenses that
8 were not reflected in his tax return were
9 incurred in 2016?

10 WITNESS ELDER: I can't testify to that.
11 I don't -- I don't recall what I -- what I heard
12 yesterday and what it was in relation to exactly.

13 MS. BRENNER: Okay. So you actually
14 don't have a full picture of the Coles' income
15 and expenses for any particular year, do you?

16 WITNESS ELDER: A full and complete
17 picture, no.

18 MS. BRENNER: Can you give me just some
19 examples that you may have of certain expenses
20 that one would incur that are not reflected in a
21 tax return?

22 WITNESS ELDER: I had a few examples
23 of -- you're essentially asking me of a few
24 examples of personal expenses that someone may
25 incur?

1 MS. BRENNER: I'll give you one example.
2 What about health expenses?

3 WITNESS ELDER: Health expense -- direct
4 health expenses may not be incurred -- or may not
5 be reflected on a tax return. However, any
6 expenses towards insurance would be reflected.
7 The individual -- individual tax filings would
8 also include health expenses as well. Those were
9 not provided by Mr. Cole.

10 MS. BRENNER: Is there a -- is there a
11 floor or ceiling, do you -- do you have to reach
12 a certain health cost before it's deducted from
13 your taxes?

14 WITNESS ELDER: I'm not sure that I can
15 answer that.

16 MS. BRENNER: Okay. You talked about the
17 solar costs of 526,000, correct?

18 WITNESS ELDER: That's correct.

19 MS. BRENNER: Do you know, is that the
20 only cost associated in installing that -- the
21 solar system that was estimated in that cost?

22 WITNESS ELDER: As far as -- can you --
23 can you repeat the question?

24 MS. BRENNER: Do you know whether there
25 would be additional expenses beyond that

1 necessitated by installing that system?

2 WITNESS ELDER: I can't testify to any
3 additional costs that, again, weren't provided
4 for me to review.

5 MS. BRENNER: Okay. Did -- did you
6 consider any O and M costs associated with that
7 system?

8 WITNESS ELDER: If they were not
9 provided, which they were not. I can't testify
10 to that.

11 MS. BRENNER: Did you consider any O and
12 M costs associated with running a diesel 24/7, a
13 diesel generator 24/7?

14 WITNESS ELDER: In the future, no. But
15 those maintenance expenses for what is currently
16 being operated out there would be reflected under
17 repairs and maintenance for business activities.

18 MS. BRENNER: Okay.

19 WITNESS ELDER: Which was included on one
20 of my slides, if you'd like to refer back to
21 that.

22 MS. BRENNER: O and M for diesel
23 generator?

24 WITNESS ELDER: Repairs and maintenance
25 would typically be included for any equipment

1 that's related to business operations. So that
2 would include a diesel generator that may be used
3 to supply power or utility for business
4 operations --

5 MS. BRENNER: Do you consider repairs the
6 same as operation and maintenance?

7 WITNESS ELDER: It's reflected on the tax
8 returns as repairs and maintenance.

9 MS. BRENNER: Okay. Did you consider the
10 cost, the varying cost of diesel when you were
11 looking at -- when you were preparing your memo?

12 WITNESS ELDER: For historical years?
13 No.

14 MS. BRENNER: No. Any -- in any sense.

15 WITNESS ELDER: In any sense I did not
16 look at diesel fuel costs for the four years of
17 tax returns that I was provided, no.

18 MS. BRENNER: Okay. Do you have any idea
19 how the 2000 -- the cost of diesel in 2016
20 compared to other years?

21 WITNESS ELDER: Only from a personal
22 sense, but, you know, over the last year --
23 several years, from 2008 to present, obviously
24 the price of fuels has been significantly lower
25 than in previous years.

1 MS. BRENNER: Okay. Has diesel fuel gone
2 up this year?

3 WITNESS ELDER: As far as I know, it has.
4 I drive a diesel, so I can attest to that from a
5 personal side. And it's expected to continue to
6 rise.

7 MS. BRENNER: Yeah. Would that rise in
8 the cost of diesel, such as the 26 new tax that
9 we get to pay, and I'm not suggesting that that
10 tax applies to the type of diesel that he
11 purchases, I'm not sure if it does or not. But
12 let's just -- you know, does a ten-cents, 20-
13 cents increase in diesel, and it does fluctuate
14 quite a bit, have a significant impact on the
15 annual fees associated with that diesel cost?

16 WITNESS ELDER: It would.

17 MS. BRENNER: Okay.

18 WITNESS ELDER: Correct.

19 I'm sorry, though, did you say a
20 significant impact?

21 MS. BRENNER: It could have a significant
22 -- it could reflect in a significant increase in
23 that -- in the utility cost.

24 WITNESS ELDER: Depending on the increase
25 that that diesel --

1 MS. BRENNER: Right.

2 WITNESS ELDER: -- price goes up,
3 correct.

4 MS. BRENNER: Yeah. It could go up by a
5 dollar, couldn't it, a dollar a gallon?

6 WITNESS ELDER: I can't speculate to
7 that.

8 MS. BRENNER: Okay.

9 MR. PETRUZZELLI: I'm going to object to
10 that as a hypothetical.

11 HEARING OFFICER MOORE: Sustained.

12 MS. BRENNER: And when you were opining
13 that Mr. Cole could afford to install the half a
14 million solar system, were you also considering -
15 - were you considering additional expenses that
16 need to be incurred for, let's say, lining the
17 ditch?

18 WITNESS ELDER: That -- I did not
19 consider those costs. Again, they were not
20 provided to me.

21 MS. BRENNER: Okay. And I -- and I think
22 I asked you, but I just want to make sure that --
23 confirm that a tax return does not present a full
24 picture of all liabilities and expenses?

25 WITNESS ELDER: That's correct.

1 MS. BRENNER: Okay. I have nothing
2 further.

3 HEARING OFFICER MOORE: Thank you, Ms.
4 Brenner.

5 Next for cross rebuttal, National Marine
6 Fishery Service. I think he left.

7 Department of Fish and Wildlife. Okay,
8 please approach. Mr. Voegeli. Voegeli, Mr.
9 Voegeli.

10 MR. VOEGELI: Voegeli's correct.

11 HEARING OFFICER MOORE: Voegeli, okay.

12 MR. VOEGELI: You had it right the first
13 time.

14 HEARING OFFICER MOORE: I was right, he
15 was wrong -- or she. Sorry.

16 MR. VOEGELI: Most of my questions, I
17 believe, are directed to Mr. Anderson, but if
18 somebody else would be better positioned, please
19 let me know as I go through these.

20 Mr. Anderson, how are you familiar with
21 the operation of the diversion facility and
22 conveyance system?

23 WITNESS ANDERSON: I'm familiar with
24 operation of the diversion and conveyance system
25 from being toured -- or provided a tour of the

1 ranch from Mr. Cole. Also reading the extensive
2 application history, in which numerous Division
3 Staff have inspected the property and reading
4 their understanding of how the operation of the
5 ditch in point of diversion Pelton wheel, the
6 whole system works.

7 MR. VOEGELI: Are you generally familiar
8 with the layout of the system then?

9 WITNESS ANDERSON: Definitely, yes.

10 MR. VOEGELI: Based on your experience of
11 the system, what would you estimate the ditch
12 capacity to be?

13 WITNESS ANDERSON: As stated in my
14 testimony at paragraph 24, I estimated the ditch
15 capacity to be three to four CFS. I'd also like
16 to quote, if I could, Water Right Exhibit 82,
17 which is the Cascade Streams Solutions Report, on
18 page seven. "Doug Cole states the ditch conveys
19 a maximum of about four to five CFS when the
20 ditch is in good condition."

21 MR. VOEGELI: Based on your experience
22 with the system, would more than three CFS be
23 able to enter the ditch at the point of
24 diversion?

25 WITNESS ANDERSON: Yes.

1 MR. VOEGELI: Where in the system is the
2 culvert that is used to measure flow?

3 And it may be helpful for the Board, the
4 Board's Exhibit 1, I think, is the map, if that's
5 helpful for the Board to see, we can reference
6 that too.

7 WITNESS ANDERSON: Or I have a
8 suggestion. The exhibit that you guys had, the
9 demonstrative one that showed the layout, I could
10 add, you know, an X or whatever you would like to
11 indicate where that is in approximation of where
12 I took my flow measurements.

13 MS. WEAVER: Do we have that exhibit on
14 the web to pull up? So we don't have it handy, I
15 think we would have to have you mark a new map.

16 WITNESS ANDERSON: Okay.

17 MR. VOEGELI: Open it up --

18 MS. WEAVER: We're checking.

19 HEARING OFFICER MOORE: I think -- I
20 think if you have a distance downstream to divert
21 it --

22 WITNESS ANDERSON: Yeah, I can -- I can
23 describe it.

24 HEARING OFFICER MOORE: I -- okay.

25 MR. VOEGELI: I mean if you'd rather

1 have...

2 HEARING OFFICER MOORE: And distance
3 downstream --

4 MR. VOEGELI: Would it -- would it help
5 for me to repeat the question?

6 HEARING OFFICER MOORE: Yes, go ahead.

7 MR. VOEGELI: Approximately where in the
8 system is the culvert that is used to measure
9 flow?

10 WITNESS ANDERSON: It's approximately
11 located between the input for domestic water
12 supply and the penstock.

13 MR. VOEGELI: About how far down through
14 the ditch system and the conveyance system is
15 that?

16 WITNESS ANDERSON: The conveyance system
17 is roughly a half mile from the POD to the
18 penstock. I would say it's probably about 2,000
19 feet, so it's pretty close. The -- the domestic
20 intake is within a short distance from the
21 penstock. And the measuring culvert is between
22 the intake for the domestic supply and the
23 penstock.

24 MR. VOEGELI: So the culvert's after the
25 domestic supply?

1 WITNESS ANDERSON: Yes.

2 MR. VOEGELI: Where in the system are the
3 weirs or outfalls located that are used to
4 regulate the flows?

5 WITNESS ANDERSON: The first outfall is
6 located approximately 50 feet downstream of the
7 point of diversion in the Marble Mountain
8 Diversion Ditch. The second outfall is located
9 approximately 300 feet and down -- downditch, I
10 guess, in the Marble Mountain Diversion Ditch.

11 MR. VOEGELI: Was the first outflow in
12 one of the pictures you had, and I believe it's
13 now what our WR197 exhibit, rebuttal exhibit, the
14 PowerPoint that you presented?

15 WITNESS ANDERSON: Yes. Yeah, -- oh,
16 yeah. The -- the -- I believe it was like the
17 tenth slide that showed the first outfall
18 structure being used to discharge the majority of
19 the flow back to the creek in high flows, as has
20 been described throughout this hearing.

21 MR. VOEGELI: Would we be able to pull up
22 that slide?

23 WITNESS ANDERSON: Oh, I'm -- keep going.
24 It's going to be towards the end. Right there,
25 Slide 14. And I apologize.

1 And then there's another angle on Slide
2 15 that I think shows a better angle. There you
3 go.

4 MR. VOEGELI: So does this depict the out
5 -- the outfall or weir relative to the point of
6 diversion?

7 WITNESS ANDERSON: The first outfall,
8 yes, it does.

9 MR. VOEGELI: And you say that's about a
10 hundred feet down from the point of diversion?

11 WITNESS ELDER: No, 50 feet.

12 MR. VOEGELI: Fifty feet, okay. So do
13 these weirs discharge water from the system
14 that's already been diverted at the point of
15 diversion?

16 WITNESS ANDERSON: Yes.

17 MR. VOEGELI: Would it be accurate to say
18 that the weirs regulate the level of water in the
19 ditch, and not necessarily the amount of water
20 being diverted at the Rock Dam Point of
21 Diversion?

22 WITNESS ANDERSON: Yes, that's accurate.

23 MR. VOEGELI: To your knowledge, is there
24 any way to regulate the amount of water entering
25 the ditch at the point of diversion, other than

1 manually arranging the handstacked rock dam?

2 WITNESS ANDERSON: No, there is not.

3 MR. VOEGELI: Approximately how far does
4 water discharge from each of the weirs have to
5 travel to reach the wetted channel of Stanshaw
6 Creek?

7 WITNESS ANDERSON: Wait. Repeat the
8 question.

9 MR. VOEGELI: Approximately how far does
10 the water discharge from each of the weirs have
11 to travel to reach the wetted channel of Stanshaw
12 Creek?

13 WITNESS ANDERSON: So as you can see in
14 the slide that's currently up, the distance
15 between the Marble Mountain Diversion Ditch and
16 Stanshaw Creek is quite small. You know, I'd
17 say, five, three to five feet, depends on the
18 levels in Stanshaw Creek.

19 The second POD was -- or, excuse me --
20 the second outfall structure was demonstrated
21 well in Stormer Feiler's report. And, as you
22 could see, the water actually fell on a hillside.
23 And then, as I stated in my testimony, during the
24 February 12, 2015 inspection, we saw the water
25 carrying what appeared to -- or what I would

1 describe as storm water. It was very turbid --
2 turbid water into Stanshaw Creek. So the water
3 would have to travel -- I'd have to approximate -
4 - and, again, it's dependent on the level, the
5 flow in Stanshaw, but anywhere between 100 to 120
6 feet.

7 MR. VOEGELI: Okay. Did you -- were you
8 here for Mr. Cole's testimony where he talked
9 about the use of Stanshaw units on the culvert?

10 WITNESS ANDERSON: I was.

11 MR. VOEGELI: To your knowledge, does
12 Stanshaw units correlate to commonly-used flow
13 units, such as CFS?

14 WITNESS ANDERSON: They do not. And I'd
15 also like to quote Water Right Exhibit 82, page
16 eight, the footnote at the bottom of the page.
17 And this is the Marble Mountain Water Right
18 Investigation by the Cascade Stream Solutions,
19 "This unit of measurement is unique and has not
20 been correlated to a commonly-used unit of
21 measurement, e.g., cubic feet per second."

22 MR. VOEGELI: Do you know if Stanshaw
23 units correlate to other units that might be
24 acceptable under the California Code of
25 Regulations Title 23, Chapter 2.8, that are

1 related to diversion measurements and monitoring?

2 WITNESS ANDERSON: No, they do not.

3 MR. VOEGELI: No additional questions.

4 HEARING OFFICER MOORE: Thank you.

5 Next, Karuk Tribe, any questions for the

6 -- okay, no question.

7 And Old Man River Trust? No questions.

8 Klamath River Keeper?

9 CSPA?

10 MR. SHUTES: No, thank you.

11 HEARING OFFICER MOORE: No questions.

12 Okay, and PCFFA.

13 So at this time I would request that the

14 prosecution -- or unless Staff has questions?

15 MS. WEAVER: Real quick. Did -- you read

16 a quote from a document in the answer to that

17 last question. Did you give an exhibit number?

18 WITNESS ANDERSON: Yes. It was Water

19 Right Exhibit 82, page eight, and it's Footnote

20 1.

21 MS. WEAVER: Okay. Thank you for

22 confirming that.

23 HEARING OFFICER MOORE: Anything else?

24 Thank you. Now I'd like to request if

25 the prosecution team would offer any additional

1 rebuttal exhibits into evidence.

2 MR. PETRUZZELLI: Only those that have
3 already been offered and marked.

4 HEARING OFFICER MOORE: Very good.

5 Does any party have objections? Thank
6 you.

7 So these exhibits are now entered into
8 the record. And we'll now hear Douglas and Heidi
9 Cole, Marble Mountain Ranch's rebuttal testimony,
10 followed by any cross-examination in the order I
11 previously identified.

12 (Prosecution Team rebuttal exhibits are
13 received.)

14 HEARING OFFICER MOORE: And, as you're
15 approaching, are there any new witnesses that
16 need to take the oath? No. Thank you.

17 Okay. Welcome back, Mr. Cole. Thank
18 you.

19 (Witness previously sworn.)

20 WITNESS COLE: Thanks.

21 HEARING OFFICER MOORE: Ms. Brenner.

22 REBUTTAL DIRECT EXAMINATION BY

23 MS. BRENNER: Just quickly go back to the
24 last question. Have you ever claimed that your
25 Stanshaw units correlate directly to CFS?

1 WITNESS COLE: No. They're -- they're
2 similar in effect to a stadia sticker on the
3 other stream side, a gage stick that's measuring
4 flow position and feet, which requires an
5 accompanying conversion table. And so for my
6 purposes, the Stanshaw units are an internal
7 housekeeping use so that I can do a quick look
8 and assess what the flows are and as needed, then
9 I can do a conversion. And I might add that that
10 conversion changes annually based on evolutions
11 in the sediment level in front of that, so you
12 have to keep an eye on how -- what those numbers
13 really mean. They're primarily used for internal
14 management, best management practices, so I can
15 get a quick evaluation on what level the ditch is
16 at and how much water we're conveying.

17 MS. BRENNER: And -- okay. I'll just
18 leave it at that.

19 And let's just go back to the 25 people
20 question. Do you recall that series of questions
21 about --

22 WITNESS COLE: I do.

23 MS. BRENNER: -- the Department of Health
24 Services?

25 WITNESS COLE: Yes, I do.

1 MS. BRENNER: Okay. Division of -- what
2 is it now -- Drinking Water. Sorry, I'm stuck in
3 the old days. Do you serve more than 25 people
4 for 60 days out of the year?

5 WITNESS COLE: No.

6 MS. BRENNER: Can you explain how you
7 calculate that and how you -- how you respond to
8 the Health Department's --

9 WITNESS COLE: Sure.

10 MS. BRENNER: -- warn...

11 WITNESS COLE: So I have a very seasonal
12 business and we publish that our prime season is
13 typically June, July, and August. That doesn't
14 mean that we are at full capacity all of June,
15 July, and August. We have fluctuations in
16 occupancy based on our success in marketing or
17 lack of success and in other conditions that
18 determining -- that determine travel trends. So
19 although my prime season is stated as June, July,
20 and August, I have not ever had 60 days in a year
21 with more than 25 guests in occupancy.

22 Families, our target audience is
23 families. Families get out of school typically
24 early to mid-June and return to school sometime
25 mid-August and start stopping traveling early in

1 August because they need to get their kids
2 prepared for school. So if you can imagine a
3 bell curve with a long lead and tail, the peak
4 season at the top of a bell curve and a lead-out
5 tail at the end of the bell curve, that would be
6 representative of our season occupancy.

7 The lead-in tail, the long tail leading
8 into that prime season in the middle of the bell
9 curve, is well under 25 people. Twenty-five
10 people is hit in the middle of the bell curve and
11 it is also hit only for portions of the week. We
12 do not have occupancy during the portion of a
13 week when we turn the ranch over, so we'll have a
14 partial week the second half of June, all of July
15 if we're successful, and the first half of
16 August.

17 I have never and don't expect to
18 immediately in the near future ever get close at
19 60 people out of the year, exceeding our
20 capacity, based on drinking water regulations of
21 25 people in -- in service of the water.

22 MS. BRENNER: Does the County Health
23 Department check your water system?

24 WITNESS COLE: They do.

25 MS. BRENNER: And how often?

1 WITNESS COLE: At a minimum, quarterly,
2 and actually more frequent than that. Sometimes
3 it's based on, because we're so remote, when the
4 inspector has to come down for any other purpose,
5 and he stops and takes a water sample, evaluates
6 the system with me, examines it with me. And if
7 I'm not there, he just does a sample on his own
8 and sends it into a lab in Redding for analysis.

9 MS. BRENNER: And that's your drinking
10 water system?

11 WITNESS COLE: That's correct, my
12 drinking water.

13 MS. BRENNER: Okay. Did Joey Howard tell
14 you that once you installed or had the
15 installation of the six-inch pipe in the ditch,
16 you would not be able to add another pipe to the
17 diversion ditch or divert any additional water to
18 the ranch for hydropower use?

19 WITNESS COLE: He did.

20 MS. BRENNER: So that was your only
21 option?

22 WITNESS COLE: My only option was --

23 MS. BRENNER: For the use of the grant
24 money.

25 WITNESS COLE: Correct. I either had to

1 accept the installation of the pipe and abandon
2 any future hydroplant use or not accept that
3 grant money.

4 MS. BRENNER: Okay. And that six-inch
5 pipe was for just consumptive use?

6 WITNESS COLE: That's correct.

7 MS. BRENNER: Have you made a number of
8 improvements to the ranch since you purchased it
9 from the Youngs in 1994?

10 WITNESS COLE: Yes.

11 MS. BRENNER: Can you tell me briefly you
12 -- let me strike that.

13 Did you replace the old water wheel and
14 related improvements to your hydro facility?

15 WITNESS COLE: I did.

16 MS. BRENNER: Can you tell me the cost of
17 that improvement?

18 WITNESS COLE: Forty-eight thousand.

19 MS. BRENNER: Did you also rewire the
20 buildings at the ranch?

21 WITNESS COLE: I did.

22 MS. BRENNER: And an approximate cost for
23 that improvement?

24 WITNESS COLE: Oh, dear. That happened
25 over many years. Per building, if I attach a

1 number of \$20,000, and there might be another
2 \$100,000 plus.

3 MS. BRENNER: Over the years?

4 WITNESS COLE: Over the years, yes.

5 MS. BRENNER: Does that improve the
6 efficiency of the energy?

7 WITNESS COLE: It does.

8 MS. BRENNER: Have you spent -- have you
9 also strengthened the ditch berm for improved
10 water conveyance?

11 WITNESS COLE: I have.

12 MS. BRENNER: And do you have an
13 approximate cost of that?

14 WITNESS COLE: Thirty-nine thousand.

15 MS. BRENNER: And you indicated you
16 purchased and installed diesel generators,
17 improving that system as well?

18 WITNESS COLE: I did.

19 MS. BRENNER: Do you have a cost estimate
20 for that?

21 WITNESS COLE: Over 28,000 thousand.

22 MS. BRENNER: And do you recall the
23 testimony earlier regarding your diesel costs in
24 2016?

25 WITNESS COLE: I do.

1 MS. BRENNER: And that those were low in
2 comparison to other utilities?

3 WITNESS COLE: I do.

4 MS. BRENNER: Do you remember that -- the
5 price of diesel in 2016?

6 WITNESS COLE: I can't say that I do. I
7 just write the checks.

8 MS. BRENNER: Do you recall if it was
9 lower than what you've seen in other years?

10 WITNESS COLE: It's been low relative to
11 previous years, yes.

12 MS. BRENNER: And in 2017 is the cost of
13 diesel increasing?

14 WITNESS COLE: Dramatically.

15 MS. BRENNER: And from -- through August
16 31st, do you recall how much you have spent on
17 diesel alone?

18 WITNESS COLE: Yes, \$14,000.

19 MS. BRENNER: Are you sure that's the
20 cost that's been incurred through August 31st?

21 WITNESS COLE: Oh, I'm sorry, 24,363.

22 MS. BRENNER: And do you have any
23 estimate of how much for additional costs for the
24 rest of 2017?

25 WITNESS COLE: Yes, I'm sorry. That was

1 the 14,000.

2 MS. BRENNER: And so 2017, you're --
3 you're already seeing an increase from 2016?

4 WITNESS COLE: Correct.

5 MS. BRENNER: And -- and do you recall
6 how much you have spent on your water filtration
7 and storage tanks?

8 WITNESS COLE: I do.

9 MS. BRENNER: And what was that?

10 WITNESS COLE: For this it's over 35,000.

11 MS. BRENNER: And on legal and
12 professional services, including permitting
13 costs?

14 WITNESS COLE: Two hundred and nineteen
15 thousand dollars.

16 MS. BRENNER: And how much time -- how
17 much money have you spent on employee time for
18 ditch maintenance and repair?

19 WITNESS COLE: I have \$321,000.

20 MS. BRENNER: How many hours of your
21 employee time is included in that number?

22 WITNESS COLE: Seventeen thousand eight
23 hundred and fifty.

24 MS. BRENNER: How much time -- do you
25 have an estimate of how much time you and your

1 family have spent on administrative matters and
2 meetings relating to these regulatory activities?

3 WITNESS COLE: Three thousand seven
4 hundred and fifty.

5 MS. BRENNER: Hours?

6 WITNESS COLE: That's hours.

7 MS. BRENNER: If you had to pay for that
8 time, if you use a rate of \$20 an hour, did we
9 determine a figure for that cost?

10 WITNESS COLE: Quick math. Let's see, if
11 that was 4,000 times 20, it would be 80,000 -- no
12 800,000.

13 MS. BRENNER: I think you're one number
14 off.

15 WITNESS COLE: Okay. I can't do head
16 math in this -- in this setting.

17 MS. BRENNER: It's about 80,000.

18 WITNESS COLE: Okay, 80,000.

19 MS. BRENNER: If you totaled those costs,
20 do you have an approximation on what that is?

21 WITNESS COLE: A total of which costs?

22 MS. BRENNER: All the costs that --
23 incurred since purchasing the ranch to improve
24 the energy and water efficiencies.

25 WITNESS COLE: It's in the millions, I

1 don't know what the total is.

2 MS. BRENNER: About a million?

3 WITNESS COLE: Right.

4 MS. BRENNER: Did you recently sell your
5 speedboat in order to help offset these costs?

6 WITNESS COLE: I did.

7 MS. BRENNER: Were you using that
8 speedboat to increase your revenue at the ranch?

9 WITNESS COLE: I was.

10 MS. BRENNER: And you no longer have that
11 source of revenue?

12 WITNESS COLE: That's correct.

13 MS. BRENNER: Have you explored any other
14 avenues for providing water at the ranch?

15 WITNESS COLE: I have.

16 MS. BRENNER: And what are those?

17 WITNESS COLE: In the first years on the
18 ranch, we explored drilling wells so that we
19 could have potable water without having to have
20 some filtration system. All the money spent on
21 exploration with the well-drilling company, those
22 efforts failed. There was not a successful
23 location found that had enough flow to service
24 the ranch.

25 MS. BRENNER: Do you remember the

1 approximate cost of that exploration?

2 WITNESS COLE: Oh, it was a long time
3 ago, I'm going to approximate 10,000.

4 MS. BRENNER: Okay. Did you pay for the
5 covered horseback-riding arena the prosecution
6 team included in its pictures from their opening
7 statement?

8 WITNESS COLE: I did not.

9 MS. BRENNER: How was that paid for?

10 WITNESS COLE: That was paid for as an
11 advance on an inheritance fund from my father in
12 response to some illnesses with my wife.

13 MS. BRENNER: Is it your understanding
14 the Blue Heron continued to use the water from
15 discharge into Irving Creek from your hydro, all
16 the way until you quit discharging that water
17 into Irving Creek?

18 WITNESS COLE: That's correct.

19 MS. BRENNER: And is it your
20 understanding that was done under appropriative
21 right?

22 WITNESS COLE: It is.

23 MS. BRENNER: That was what you were
24 told?

25 WITNESS COLE: Correct.

1 MS. BRENNER: Okay. Can we go to Exhibit
2 197, our new photos from this summer -- or this
3 winter storm? Can you just briefly, you know,
4 explain what type of storm season you had this
5 last winter, 2016-2017 winter?

6 WITNESS COLE: Sure. This is a highly
7 unusual water year and it was especially damaging
8 to us in the level of snow that we received on
9 the ranch. You will see snow in this picture
10 right here. It was unusual, to the point that we
11 had thousands of trees tipped over, all to the
12 Stanshaw drainage and on the ranch proper. This
13 is reflecting some of the -- you will see on the
14 left the highly -- the high volume of flow in the
15 main Stanshaw Creek and you will see the first
16 point of diversion to turn out water from the
17 point of diversion.

18 I might also point out that prior to
19 storms of this type, we go up to the point of
20 diversion and move rocks out of the way, also.

21 The ditch is pretty simple and it is
22 effective in large measure on its own in self-
23 regulating and high pulses because it moves the
24 rocks out of the way. It's got enough force that
25 it pushes rocks out of the way, but it is not

1 sufficient enough to keep all of the water out of
2 the ditch and keep the ditch safe. To that end,
3 we shut the ditch off. You will see that at the
4 first diversion there we put bricks in the way
5 and removed the flashing, flash boards so that
6 the water was cut off at the first -- I'll call
7 that the first upper weir.

8 MS. BRENNER: Okay. And -- no mouse
9 today?

10 MS. [SPEAKER]: Oh, I think the mouse is
11 still down there, right.

12 MS. BRENNER: Do you see several
13 mudslides along this Marble Mountain, in this
14 area of Marble Mountain that --

15 WITNESS COLE: Correct.

16 MS. BRENNER: -- deposited soil material,
17 sediment into Stanshaw Creek during these various
18 storm events?

19 WITNESS COLE: Yes. You can't see from
20 this picture because of the white water effect,
21 but the water itself in Stanshaw is opaque,
22 muddy, and filled with sediment. And if you had
23 a perspective to look directly across from this
24 point of diversion to the opposite of the creek,
25 you would have seen a large mudslide as well.

1 Down slope or downstream from our
2 diversion and totally unrelated to our diversion,
3 so slides happened in this last winter all over
4 the Stanshaw drainage and the nearby Klamath
5 River Corridor. The highway department spent the
6 entire winter trying to correct that, as did we
7 try to, you know, deal with the effects of mother
8 nature.

9 MS. BRENNER: And what were some of the
10 measures that you took in order to deal with
11 mother nature this last winter?

12 WITNESS COLE: Well, proactively, we
13 removed the flow from the ditch and, proactively,
14 we had strengthened the out berm and increased
15 the freeboard, and selectively lined sections of
16 the ditch with half culverts and full culverts,
17 so that in the event of a large event we wouldn't
18 have a ditch berm failure.

19 We had probably a month of effort to
20 remove the trees that had fallen onto the ditch
21 and rootballs falling into the ditch, rootballs
22 falling out the out-berm of the ditch, and all
23 areas of the ditch that the forest basically fell
24 over. And so we -- we didn't know that we were
25 going to be open this year because of the damage

1 from the storm and the effects on our
2 infrastructure. So we -- we removed -- I hired
3 staff and removed the overlaying trees from the
4 ditch. We removed material that had sloughed
5 into the ditch from above the ditch line and
6 basically reestablished the ditch prior to
7 turning it back in so that we could refill our
8 storage tanks.

9 MS. BRENNER: And now that you've had
10 a -- two major fires along this area, including
11 in -- devastating the forest in the area
12 reflected in the photo on the screen, what can
13 you expect coming this winter with regard to
14 mudslides into the Stanshaw Creek?

15 WITNESS COLE: I would predict that the
16 refugial pool at Old Man River Lodge is going to
17 need to be excavated again because there is no
18 cover to retain soil on -- on the mountain. The
19 entire Stanshaw drainage is nuclearized, it's
20 like a bomb went off. There is hardly any living
21 thing along the main corridor of the creek, so
22 the cover is gone, the understory cover as well
23 as a good portion of the overstory cover, which
24 all the trees were killed. Without that
25 retaining erosion control that's naturally there,

1 we should expect to see that this coming winter
2 is going to be fraught with sediment carrying
3 down the creek, additional slides, and a very
4 unstable setting all in the course of natural
5 events.

6 MS. BRENNER: Can we -- we're going to
7 look for the one slide that -- or the one
8 hillslide that the prosecution team pointed out.

9 Is that...

10 MS. [SPEAKER]: I think the ditch is
11 here.

12 MS. BRENNER: I have no idea.

13 Do you recognize that slide in this
14 photo, Mr. Cole?

15 WITNESS COLE: I recognize it on the
16 ditch. I'm trying to place where on the ditch
17 that is.

18 MS. WEAVER: I'll note for the record
19 this is Slide Nine in Water Rights 197.

20 MS. BRENNER: Correct.

21 Is that -- is that typical of what you
22 saw throughout this Marble Mountain drainage area
23 last winter?

24 WITNESS COLE: Well, there were spots
25 similar to that due to the heavy atypical storm

1 event.

2 MS. BRENNER: Did you see slides larger
3 than that?

4 WITNESS COLE: Yes.

5 MS. BRENNER: Did you see slides as large
6 as what Mr. Fisher testified to earlier today
7 this last winter?

8 WITNESS COLE: A seven-story-high slide?

9 MS. BRENNER: That's what he testified
10 to, if I recall.

11 WITNESS COLE: I didn't see anything
12 quite like that, I'm sorry.

13 MS. BRENNER: Have you ever seen anything
14 like that?

15 WITNESS COLE: No.

16 MS. BRENNER: And you -- did you have any
17 overtopping of your ditch this last winter?

18 WITNESS COLE: No. We shut the ditch off
19 prior to the storms.

20 MS. BRENNER: So you said you shut off
21 the ditch. So -- and this is Slide Five in Water
22 Rights 197. So why do we see water in the ditch?

23 WITNESS COLE: Take note of the snow
24 upstream of the ditch being entrained by the
25 ditch, not traveling down the ditch, so it will

1 pool up in the ditch.

2 MS. BRENNER: Okay.

3 WITNESS COLE: There's no conveyed water,
4 but it will catch naturally-flowing water into
5 the ditch.

6 MS. BRENNER: Okay. I'm going to just
7 take a quick -- a quick note look, but I'm pretty
8 sure I'm done.

9 I just have one other question. With a
10 solar system in the winter or in the summer, for
11 that matter, will you still need to incur diesel
12 costs?

13 WITNESS COLE: A solar system won't
14 completely eliminate diesel costs because of long
15 periods of overcover, fog, long rain period,
16 events like this.

17 MS. BRENNER: So in the scenario posited
18 by the prosecution team where you would lease or
19 purchase the solar system, you would also either
20 have to continue to use hydro in the winter or
21 you would incur diesel cost pretty much
22 throughout the winter and as well as some in the
23 summer?

24 WITNESS COLE: That's correct.

25 MS. BRENNER: As well as O and M and

1 repair, so that diesel generator system --

2 WITNESS COLE: Yes.

3 MS. BRENNER: Is it common to run a
4 diesel generator 24/7?

5 WITNESS COLE: Not for extended periods.
6 We're putting a heavy load on the equipment we
7 have.

8 MS. BRENNER: Okay. I have nothing
9 further.

10 HEARING OFFICER MOORE: Thank you.

11 At this time we will perform cross
12 rebuttal. First invite the prosecution team,
13 Division of Water Rights.

14 Do you have any questions for Mr. Cole?

15 MR. PETRUZZELLI: Yes.

16 CROSS REBUTTAL OF DOUGLAS TAYLOR COLE BY

17 MR. PETRUZZELLI: So, Mr. Cole, the first
18 thing I'd like to ask you about is -- it relates
19 to Exhibit WR-157, page five, item number six.
20 And is it correct that this was information
21 provided in response to a request from the State
22 Water Board?

23 WITNESS COLE: Yes.

24 MR. PETRUZZELLI: And what is item number
25 six requesting?

1 WITNESS COLE: How -- excuse me. "How
2 many nonfire crew guests have the Coles had each
3 month since July 1st, 1995."

4 MR. PETRUZZELLI: And can you read this
5 paragraph that I've highlighted?

6 WITNESS COLE: "The Coles do not maintain
7 guest records for the period requested. Instead,
8 attached as Exhibit D, are annual reports
9 submitted to the United States Forest Service,
10 USFS, as a condition of the Coles' special use
11 permit for use of that USFS land. The records
12 are a non-comprehensive review of the nonfire
13 guests who have visited Marble Mountain Ranch in
14 2015 and '16. The records do not include any
15 records of lodging, meal services, recreational
16 activities, or other services that are provided
17 on Marble Mountain Ranch privately-held land."

18 MR. PETRUZZELLI: So you don't maintain
19 records of the number of guests that you host at
20 the ranch?

21 WITNESS COLE: Well, I have --

22 MR. PETRUZZELLI: According to this?

23 WITNESS COLE: Yes.

24 MR. PETRUZZELLI: Okay. And then I will
25 continue to page 17. Is this a record of trail

1 use?

2 WITNESS COLE: It is.

3 MR. PETRUZZELLI: And do you report this
4 to the U.S. Forest Service?

5 WITNESS COLE: I do.

6 MR. PETRUZZELLI: Let's see. One, two,
7 three, four, five, six, seven, eight, nine, ten,
8 11, 12, 13, 14, 15, 16, 17, I think I'm 18, 19,
9 20, 21, 22, 23, -- is this 24? It's kind of
10 difficult -- 25, 26, 27, 28. Continue. And that
11 was 2015. Okay, so I counted 28 days with more
12 than 25. And I believe you previously testified
13 that you have six permanent residents and eight
14 staff, roughly, at the ranch during the busy
15 season?

16 WITNESS COLE: Yes.

17 MR. PETRUZZELLI: Okay. So if you have
18 six people and eight staff, that adds up to 14,
19 right?

20 WITNESS COLE: Right.

21 MR. PETRUZZELLI: Okay. And if we
22 subtract 14 from 25, that's 11; is that correct?

23 WITNESS COLE: Okay.

24 MR. PETRUZZELLI: All right. I'm asking
25 you if it's correct.

1 WITNESS COLE: Yes.

2 MR. PETRUZZELLI: Okay. So is it your
3 testimony today that on no more than 59 days out
4 of the year you have no more than 11 guests?

5 WITNESS COLE: Yeah, that's what this
6 document supports.

7 MR. PETRUZZELLI: Actually that's not
8 what you indicate in your explanation that this
9 document supports, because on page five -- I'll
10 go back to page five -- can you read this again?

11 WITNESS COLE: "The Coles do not maintain
12 guest records for the period requested. Instead
13 attached as Exhibit D are annual reports
14 submitted to the United States Forest Service, as
15 a condition of the Coles' special use permit for
16 use of USFS lands. The records are a
17 noncomprehensive review of the nonfire guests who
18 have visited Marble Mountain Ranch in 2015 and
19 '16. The records do not include any records of
20 lodging, meal services, recreational activities,
21 other services that are provided on Marble
22 Mountain Ranch privately-held land."

23 MR. PETRUZZELLI: Thank you. And in your
24 written testimony, did you describe your busy
25 season as running approximately from April 1

1 through December 1?

2 WITNESS COLE: That's the period that
3 we're in business.

4 MR. PETRUZZELLI: Oh, I'm asking what was
5 in your written testimony.

6 WITNESS COLE: I would have to look it
7 up. I can tell you that the prime season we have
8 in business is just -- as I just testified,
9 although we're in business from April --

10 MR. PETRUZZELLI: I'm asking if it was in
11 your written testimony, and I think it's in
12 paragraph one. If you would like to look at it
13 to refresh your memory --

14 WITNESS COLE: Okay.

15 MR. PETRUZZELLI: -- and recollection, I
16 will allow you to do that.

17 WITNESS COLE: If it's there it's
18 incorrect, but I'm happy to look at it with you.

19 MR. PETRUZZELLI: Okay. So you're
20 indicating that the season that you describe in
21 your written testimony is incorrect?

22 WITNESS COLE: If I stated that I had
23 full capacity of business from April through when
24 we close, that is incorrect.

25 MR. PETRUZZELLI: So it is not April 1

1 through December 1?

2 WITNESS COLE: That's the period that I'm
3 open for business. That's not the period that I
4 have maximum capacity and exceed 25 people guest
5 occupancy.

6 MR. PETRUZZELLI: Okay. Well, actually
7 we're asking if you have 11 guests over that
8 period. And did you previously testify that that
9 is eight months?

10 WITNESS COLE: I presume so.

11 MR. PETRUZZELLI: Okay. And if we
12 estimate, say, 30 days times eight months, that
13 comes out to 240; is that correct?

14 WITNESS COLE: Can I backtrack a bit --

15 MR. PETRUZZELLI: On --

16 WITNESS COLE: -- on your previous
17 statement?

18 MR. PETRUZZELLI: No, because I asked you
19 a question.

20 WITNESS COLE: Okay. Respond --

21 MR. PETRUZZELLI: Okay. Is that 240?

22 WITNESS COLE: What was the question
23 again?

24 MR. PETRUZZELLI: Is 30 times -- 30 days
25 times eight months, is that 240?

1 WITNESS COLE: Yes.

2 MR. PETRUZZELLI: Okay. So out of
3 roughly 240 days you have -- in your written
4 testimony you describe as your season, --

5 WITNESS COLE: Um-hum.

6 MR. PETRUZZELLI: -- you have no more
7 than 25 people out of, say, 60 days?

8 WITNESS COLE: Can you repeat the
9 question one more time, please?

10 MR. PETRUZZELLI: Strike that.

11 And was it previously your testimony that
12 you have roughly 35 to 50 people on most days of
13 the season?

14 WITNESS COLE: Testimony where?

15 MR. PETRUZZELLI: Your -- your testimony
16 on I think it was Tuesday through yesterday
17 morning. Do you recall that?

18 WITNESS COLE: That I said what again,
19 please?

20 MR. PETRUZZELLI: That you described
21 supporting 35 to 50 people on most days of the
22 season.

23 WITNESS COLE: On most days of our prime
24 season, yes, which would be the middle of June
25 through the middle of August.

1 I might also add that we don't have 11,
2 this number of 11 is inaccurate because we don't
3 receive our staffing until right prior to our
4 busy season. We don't have those people residing
5 here April, May, and first half of June. So the
6 reality is that we have six people in residence
7 on the ranch in April, when we might get a
8 trickle in of business.

9 MR. PETRUZZELLI: So if you have --

10 WITNESS COLE: The same is true for May,
11 the same is true for early June. So our staff
12 arrives, in order to be fiscally responsible,
13 right before we start into the season when we
14 need them.

15 Is that understood?

16 MR. PETRUZZELLI: I asked what your
17 testimony previously was, and that's in the
18 record.

19 WITNESS COLE: Okay.

20 MR. PETRUZZELLI: And I'll take that
21 answer because we have a record and I'll leave it
22 at that.

23 WITNESS COLE: Thank you.

24 MS. WEAVER: Before you depart, I forget
25 whether you said the number for this exact --

1 this last exhibit from which you had Mr. Cole
2 read?

3 MR. PETRUZZELLI: This is Exhibit WR-157.

4 MS. WEAVER: Thank you.

5 HEARING OFFICER MOORE: Thank you, Mr.
6 Petruzzelli.

7 And next for cross rebuttal, National
8 Marine Fishery Service -- not present.
9 California Department of Fish and Wildlife.

10 MR. VOEGELI: We have none.

11 HEARING OFFICER MOORE: No questions.

12 Karuk Tribe? No questions.

13 Old Man River Trust? Mr. Fisher.

14 CROSS-EXAMINATION OF DOUGLAS TAYLOR COLE BY

15 MR. FISHER: Mr. Cole, were the
16 organizations and agencies that sought public
17 funds on your behalf unwilling to seek funds for
18 you to have a solar power system or a hydropower
19 system with an alternative point of diversion?

20 WITNESS COLE: I don't know if they were
21 unwilling. I had grant proposals on the table
22 for piping a section of the ditch and for
23 rerouting water.

24 MR. FISHER: Okay. You --

25 WITNESS COLE: I don't have any other

1 grant proposals and never have had --

2 MR. FISHER: I see.

3 WITNESS COLE: -- for solar generation.

4 MR. FISHER: Okay. So you testified that
5 it was essentially, I believe, the funding
6 agencies that limited the scope of what you could
7 do to remedy your situation.

8 WITNESS COLE: I'm not able to say who's
9 -- what the critical path is there. I just -- I
10 was following the lead of MKWC and other
11 stockholders --

12 MR. FISHER: Okay.

13 WITNESS COLE: -- the stock players --
14 and stakeholders, --

15 MR. FISHER: Yeah, okay.

16 WITNESS COLE: -- excuse me --

17 MR. FISHER: Okay.

18 WITNESS COLE: -- in trying to find
19 pragmatic solutions, so I don't know how to
20 answer that.

21 MR. FISHER: Okay. Thank you.

22 HEARING OFFICER MOORE: Thank you.

23 And Klamath River Keeper, CSPA, any cross
24 rebuttal questions? No.

25 MR. [SPEAKER]: No thanks.

1 HEARING OFFICER MOORE: PCFFA.

2 Okay, so at this point in the proceeding
3 I request that Marble Mountain Ranch offer any
4 additional rebuttal evidence -- exhibits into
5 evidence, but --

6 MS. BRENNER: Yes. We are going to
7 request that an additional exhibit be submitted
8 in. It would be the written testimony that he
9 summarized during oral as well as documentation
10 receipts supporting the numbers that he testified
11 to.

12 HEARING OFFICER MOORE: Okay. Well, I
13 have -- okay. Okay, all right, so you are
14 submitting a document?

15 MS. BRENNER: Yeah. They are -- it's a
16 large set of documents. It's actually the
17 written -- written testimony that captures his
18 summary of that testimony as well as
19 documentation receipts, the actual receipts that
20 support the numbers --

21 HEARING OFFICER MOORE: Okay.

22 MS. BRENNER: -- that he testified to.

23 HEARING OFFICER MOORE: Okay. I -- I'm
24 getting it now.

25 MS. WEAVER: So for his written

1 testimony, is that -- is it typed, are they
2 notes?

3 MS. BRENNER: It's just typed testimony.
4 It's just --

5 MS. WEAVER: Okay. If he can just review
6 it and -- while he's still under oath and just
7 confirm that it's his written testimony, that
8 would -- just to be fair --

9 MS. BRENNER: Sure.

10 MS. WEAVER: Thank you.

11 MR. HUNT: Hi. This is Mr. Hunt with the
12 Karuk Tribe. I'm just curious, I don't totally
13 understand. We have a written record of what he
14 testified to. I don't understand why we need a
15 written summary of it.

16 MR. [SPEAKER]: For the record.

17 MR. HUNT: Just -- just for clar- -- I
18 mean the stenographer's doing a great job keeping
19 a clear record. I don't understand what clearer
20 record we're going to get with this.

21 MS. WEAVER: So their ability to
22 introduce rebuttal exhibits is described in the -
23 - the Hearing Notice under Regulations. As I
24 understand it, their proposal is to introduce
25 additional written testimony that -- sounds like

1 his oral remarks today were based on that?

2 MS. BRENNER: Right.

3 MS. WEAVER: Okay.

4 MS. BRENNER: It summarized that written
5 testimony as well as the receipts that document
6 those expenditures, at least in part.

7 HEARING OFFICER MOORE: Yes. It -- that
8 makes logical sense to me. That was the line of
9 questioning. He answered with specific --

10 MR. HUNT: Okay.

11 HEARING OFFICER MOORE: -- numbers and
12 this is the documentation that --

13 MR. HUNT: I understand.

14 HEARING OFFICER MOORE: -- corroborates
15 that.

16 MR. HUNT: And is it -- is it the usual
17 process that that would be provided before or
18 after the testimony is provided?

19 MS. BRENNER: I don't believe it
20 specifies as timing.

21 MS. WEAVER: So I'd refer to Section
22 648.4 of Title 23 of the California Code of
23 Regulations. It's subdivision (f), "Rebuttal
24 testimony generally will not be required to be
25 submitted in writing, nor will rebuttal testimony

1 and exhibits be required to be submitted prior to
2 the start of a hearing."

3 Can we see the hearing notice?

4 MR. HUNT: Just to be clear, that says
5 prior to the start of the hearing or prior to the
6 start of the rebuttal testimony?

7 MS. BRENNER: It says not required prior
8 to the start of the hearing.

9 MR. HUNT: I'm just -- I just want to
10 understand completely just so I can understand
11 what the basis would be.

12 MS. WEAVER: So I've now marked where in
13 my book what the regulation is, but -- so the
14 regs say how our procedures generally work. And
15 then within that, the hearing officer has
16 discretion to specify things in the hearing
17 notice. So, as a general matter, they don't have
18 to submit rebuttal testimony in writing, but they
19 can. They don't have to submit rebuttal exhibits
20 prior to the start of the hearing, but they can.

21 And then in the Hearing Notice we explain
22 what rebuttal evidence -- evidence is. So it's
23 new evidence that's used to rebut evidence
24 presented by another party. And, you know,
25 beyond that it's pretty broad what's allowed, so

1 I think if he is submitting -- if he is
2 submitting documents and he is submitting a
3 written -- you know, something in writing that he
4 worked from when he testified, that Mr. Cole, I -
5 - you know, I -- I guess I would encourage you to
6 review the documents once they're posted and file
7 a motion you believe is appropriate if you have
8 concerns.

9 MR. HUNT: Okay. Thank you.

10 HEARING OFFICER MOORE: Thank you.

11 The key point there was it's fairly broad
12 and so there is a logical outgrowth of a
13 proceeding, he's responding in, you know,
14 rebuttal format. You can't have perfect
15 foresight to know exactly what kind of testimony
16 you're going to go before the hearing that's
17 going to be rebuttal. I mean this is a logical,
18 common sense thing.

19 MR. SHUTES: Hi. Chris Shutes with CSPA.
20 I think the issue is that, you know, in the -- in
21 the direct testimony we had a summary of written
22 testimony that was provided to folks in advance
23 so we could look at that. The question now is we
24 have basically a summary, but we don't have the
25 testimony and we therefore don't have the

1 opportunity to cross-examine based on the written
2 testimony.

3 MS. WEAVER: So under our rules as
4 described in the Code of Regulations and the
5 Hearing Notice, there is no requirement that they
6 submit any exhibits for rebuttal, there is no
7 requirement that they submit written testimony
8 for rebuttal. They are allowed -- he -- if that
9 was Marble Mountain Ranch's preference, Mr. Cole
10 or any witness could have simply testified and
11 left it at that. My understanding is that Marble
12 Mountain Ranch is proposing to introduce
13 exhibits, it sounds like documents that Mr. Cole
14 described and it sounds like his written notes.
15 I -- I am not aware of any requirement under
16 applicable law that would obligate them to have
17 given these to you for cross-examine prior to
18 rebuttal or during rebuttal or prior to
19 introduction. They are simply: He testified;
20 you had your opportunity to cross-examine him
21 based on his testimony, you did not cross-examine
22 him, and the record reflects that; and then
23 they're introducing some additional materials
24 that corroborate his testimony, it sounds like.

25 So what I would encourage you to do is to

1 -- you know, we'll -- once we have posted the
2 materials we'll review them. If you have
3 concerns, you have the right to file what you
4 believe is an appropriate motion. I encourage
5 you to cite applicable law in your motion and we
6 can take it from there.

7 MR. SHUTES: Thank you, Ms. Weaver. The
8 distinction I think is that I understand the
9 issue about exhibits. I think what -- what I
10 understand and maybe I'm not understanding it
11 correctly, but what I understand is that he is
12 actually presenting additional testimony and not
13 simply supporting exhibits. And that --

14 MS. BRENNER: If this is such -- such a
15 large concern, I don't need to mark his
16 testimony. It is simply, you know, a better
17 explanation of the efforts that were made. They
18 were summarized in his oral testimony. There's
19 nothing new there. There's no new issues there.
20 It's simply his oral testimony in a written
21 format.

22 MR. SHUTES: Very well. If there is an
23 issue we'll take it up on motion. Thank you.

24 MS. BRENNER: I would suggest the
25 PowerPoint that the Prosecution Team and the memo

1 that the Prosecution Team submitted is the same
2 thing.

3 MS. WEAVER: I -- I -- based on what we
4 have just heard -- I mean you're in charge here,
5 Hearing Officer Moore, but I don't have any
6 concerns with at least accepting the written
7 testimony and letting folks review it and raise
8 any concerns if they have them. I think that,
9 you know, to the extent that there's something in
10 the written testimony that wouldn't be covered
11 that would go to weight of the evidence it would
12 be -- you know, we'd evaluate it under the
13 hearsay standard and Government Code 11513, which
14 I've talked about previously.

15 MS. BRENNER: Right. And the supporting
16 copies of the checks, receipts, etc. that support
17 those numbers? Those were also -- we're also
18 suggesting we submit those.

19 HEARING OFFICER MOORE: Yes, I
20 understand.

21 So, you know, at this point we want to
22 know if any of the parties have objections. I'm
23 taking this discussion, those questions -- they
24 feel like objections. Are you objecting to the
25 entering of this additional evidence into the

1 record?

2 MR. HUNT: I think that Ms. Weaver has
3 indicated that we could address any issues we
4 have with an appropriate motion or --

5 HEARING OFFICER MOORE: Okay, so you're
6 not objecting?

7 MR. HUNT: Not at this time.

8 HEARING OFFICER MOORE: Okay. You just
9 had some good questions, okay.

10 MR. HUNT: I was just clarifying whether
11 the written testimony was appropriate considering
12 that we have the stenographer here to take care
13 of that, but thank you.

14 HEARING OFFICER MOORE: Okay. All right,
15 well, so they're not formal objections, so I'm
16 going to accept that testimony -- written
17 testimony and other items into the record as
18 exhibits and they are entered. Okay.

19 MS. BRENNER: Thank you.

20 MS. WEAVER: So -- so we can number them
21 next in order. I think we would do the written
22 as one and the stack of documents as one?

23 MS. BRENNER: Right.

24 MS. WEAVER: Does that work for your
25 client --

1 MS. BRENNER: Yes.

2 (MMR rebuttal exhibits are received.)

3 HEARING OFFICER MOORE: Okay. So we're
4 probably pretty close, if y'all would let me
5 continue the proceeding. May I continue?

6 Okay. Now according to procedure next
7 would be rebuttal testimony from other parties of
8 the hearing. So first I would ask the National
9 Marine Fishery Service. They're not present, so
10 does Department of Fish and Wildlife have any
11 rebuttal testimony?

12 MR. VOEGELI: No. Thank you.

13 HEARING OFFICER MOORE: Thank you.

14 The Karuk Tribe, any rebuttal testimony?
15 Okay.

16 Old Man River Trust, no.

17 Klamath River Keeper. California
18 Sportsfishing Protection Alliance, rebuttal
19 testimony?

20 PCFFA.

21 And at this point in the proceeding I
22 will discuss the briefing schedule for these
23 proceedings. Closing briefs are due 30 days
24 following the date the transcripts are released
25 and are limited to a maximum of 15 pages, 15, 1-

1 5, of double-spaced 12-point Arial font.

2 So the court reporter, I hear, estimates
3 that the transcripts will be available 11 to 15
4 working days after the close of the hearing.
5 Hopefully that's -- okay, good. This is
6 secondhand information I'm working from.

7 The Board will take this matter under
8 submission. Board Staff will prepare a proposed
9 order for consideration by the Board. The
10 participants in this hearing will be sent notice
11 of the Board's proposed order in this matter and
12 the date of the Board meeting at which the
13 proposed order will be considered.

14 After the Board adopts an order, any
15 interested person has 30 days within which to
16 submit a written petition for reconsideration by
17 the Board.

18 And with that, thank you for all your
19 interest, cooperation, and participation in this
20 hearing. I determine that this hearing is
21 adjourned, and safe travels.

22 (The hearing was adjourned at 4:51 P.M.)

23

24

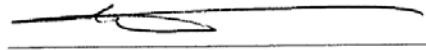
25

REPORTER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th day of January, 2018.



PETER PETTY
CER**D-493
Notary Public

CERTIFICATE OF TRANSCRIBER

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were transcribed by me, a certified transcriber and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.



January 31, 2018

MARTHA L. NELSON, CERT**367