



DEPARTMENT OF FISH AND GAME

JOHN McCAMMAN, Director

Central Region
1234 East Shaw Avenue
Fresno, California 93710
(559) 243-4005
http://www.dfg.ca.gov



STATE WATER RESOURCES
CONTROL BOARD

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DIV. OF WATER RIGHTS
SACRAMENTO

PGM
A030166

July 23, 2010

Victoria Whitney
State Water Resources Control Board
Division of Water Rights
1001 "I" Street
Post Office Box 2000
Sacramento, California 95812

Subject: Proposed Draft Protest Dismissal Terms, El Sur Ranch Water Right Permit Application No. 30166, Big Sur River, Monterey County

Dear Ms. Whitney:

On June 9, 2010, the Department of Fish and Game (Department) provided a status update regarding protest resolution of the El Sur Ranch (ESR) Water Application (WA) No. 30166. The Department began dialogue with ESR with the goal of protest resolution. After holding several meetings and discussions with ESR attorneys and consultants, the Department would like to take this opportunity to report on the current status of settlement negotiations.

The Department and ESR held an initial informational needs meeting on June 16, 2010, to discuss what information relevant to the WA and protest resolution is in existence, and what additional information was needed from ESR for the Department to be able to formulate specific protest dismissal terms. A follow-up meeting was held on June 29, 2010, during which time the Department presented its proposed protest dismissal terms (attached). The terms have since been edited at ESR's request to better describe erosion control methods and pumping restrictions in the event of inoperable meters and/or monitoring devices.

Proposed protest dismissal terms 1 through 3 recommend a water duty and maximum annual diversion, based on the acreage subject to an appropriative right, and water duty as prescribed in Water Code section 697(1). Term 4 identifies thresholds which, when met, would limit diversions to ensure adequate water quantity and quality. Terms 4(a) and 4(b) would have the applicant cease diverting when the current United States Geological Survey gauge registers 40 cubic feet per second (cfs), June to November, and 132 cfs, December to May; and 4(c) when specific water quality thresholds are exceeded. The bypass thresholds recommended in 4(a) and 4(b) were calculated utilizing the methodology developed in the December 2007 Draft State Water Resources Control Board's (SWRCB) *Policy for Maintaining Instream Flows in Northern California Coastal Streams*, updated March 14, 2008 (2007 SWRCB Instream Flow Policy), with data collected by the applicant. It is of note that the recommended thresholds which would trigger cessation of diversions are based on the applicant's requested duty of 5.84 cfs, not the Department's recommended duty of 2.79 cfs; should the SWRCB approve a duty other than 5.84 cfs, the thresholds to ensure adequate bypass flows would need to be modified. Additionally, as term 5 would require, the thresholds for cessation of diversion

could be modified by the SWRCB as other information becomes available. The remainder of the recommended terms are included to address issues such as erosion control, tailwater pond management, monitoring, reporting, and access, etc.

At a third meeting held on July 9, 2010, ESR provided general feedback on the Department's proposal and conceptual alternative proposals that may lead to the development of final protest dismissal terms acceptable to both ESR and the Department. The Department is presently waiting for alternative studies and analyses to be submitted by ESR consultants. The Department has committed to ESR that it will continue to negotiate a settlement in good faith by reviewing the information carefully and modifying proposed terms where appropriate.

With ESR proposing to divert a maximum of 1,615 acre feet (af) annually at a maximum instantaneous rate of diversion of 5.84 cfs from the Big Sur River, the Department's main concern remains the protection of public trust resources, including adequate instream flows for steelhead (*Oncorhynchus mykiss*). Steelhead are listed as threatened under the federal Endangered Species Act (ESA), and the Big Sur River is designated as critical habitat under the ESA. Adequate instream flows are vital to provide suitable habitat for all life stages, and to ensure proper temperature and salinity of water in the river for steelhead. The Department believes that other resources of concern would also benefit if the recommended measures are put in place to address steelhead. Given the Department's responsibilities pursuant to the Public Trust Doctrine, and Fish and Game Code section 1802, which states: "the Department has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species," the Department will dismiss its protest only when it is assured that critical habitat is protected, steelhead population viability is maintained with all life stages addressed, and other fish and wildlife potentially present are adequately protected.

Additionally, the issuance of any subsequent permits by the Department, e.g., a Lake and Streambed Alteration Agreement, is considered a "project" under the California Environmental Quality Act (CEQA). A responsible agency "complies with CEQA by considering the EIR ... prepared by the lead agency and by reaching its own conclusions on whether and how to approve the project involved." Cal. Code Regs., tit. 14, § 15096. Ideally, the Department will rely on the Environmental Impact Report (EIR) prepared by the SWRCB to support its permit issuance. As a responsible agency, the Department is required, pursuant to California Code of Regulations, title 14, section 15096 (b), to provide input to the lead agency via pre-consultation, respond to the Notice of Determination, and/or provide comments on the environmental document, all of which the Department has provided for this Project.

The Department will evaluate the sufficiency of the final environmental document for its needs. If it is inadequate to support permit issuance, the Department will need to formulate a feasible alternative and/or feasible mitigation measures which will lessen or avoid any significant effects the Project will have on the environment, with respect to any subsequent approvals provided by the Department. At that time, the Department will make a determination as to whether a revision and recirculation of the environmental document is necessary. The Department remains committed to working with the SWRCB to finalize an environmental document which

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will meet the needs of both agencies. To that end, the Department believes that inclusion and analysis of some or all of the proposed protest dismissal terms in the alternatives analysis of the CEQA document is appropriate, as the terms are feasible measures that will lessen the significant effects of the Project while attaining most of the Project proponent's objectives.

If you have any questions regarding the above discussion, please contact Brian Erlandsen, Staff Environmental Scientist, of the Water Rights Program at (559) 243-4014, or by writing to the Department at the address listed above.

Sincerely,

Dean Mauston for

Jeffrey R. Single, Ph.D.
Regional Manager

Attachment

cc: Joyce Ambrosius, Central Coast Supervisor
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404-6528

✓ Paul Murphey
State Water Resources Control Board
Division of Water Rights
Post Office Box 2000
Sacramento, California 95812

Thomas Berliner
Duane Morris LLP
One Market, Spear Tower, Suite 2200
San Francisco, California 94105-1127

Janet Goldsmith
Kronick, Moskovitz, Tiedemann and Girard
400 Capitol Mall, 27th Floor
Sacramento, California 95814

Darlene Ruiz
Hunter/Ruiz
1017 L Street, #599
Sacramento, California 95814

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cc: Mark Blum
Horan, Lloyd Law Offices
499 Van Buren Street
Monterey, California 93942.

James J. Hill
El Sur Ranch
Post Office Box 1588
Monterey, California 93940

ec: Department of Fish and Game
Chandra Ferrari, Office of the General Counsel
Robert Holmes, Water Branch
Rob Titus, Fisheries Branch
Kit Custis, Fisheries Engineering Branch
Julie Vance, Central Region
Julie Means, Central Region
Patricia Anderson, Region
Brian Erlandsen, Region
Deborah Hillyard, Region