

Paul Murphy
Division of Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, CA 95812

December 11, 2009

**RE: El Sur Ranch Water Right Application No. 30166
Draft Environmental Impact Report**

Dear Mr. Murphy:

The Carmel River Steelhead Association (CRSA) has serious concerns in regards to the Draft Environmental Impact Report (DEIR) for the El Sur Ranch (Ranch) Water Right Application Number 30166. CRSA finds the DEIR critically flawed, inaccurate, biased and not in conformance with CEQA guidelines.

CRSA feels it is astounding that the Ranch has been allowed to continue pumping water after the determination in 1992 that the Ranch had only rights to riparian water for 25 acres. If the State Water Resources Control Board (SWRCB) knowingly allowed the Ranch to pump an average of 857 AF of water for the last 17 years, the SWRCB in fact gave the Ranch a water right without permit process, without public comment, and without regard to the environmental consequences and would be liable, along with the Ranch, in a suit based on the Endangered Species Act, illegal take provisions. CRSA insists that the SWRCB immediately issue a Cease and Desist notice to the Ranch and hold hearings.

CRSA believes that because this DEIR is critically flawed, inaccurate, biased and lacking CEQA elements, this DEIR should be set aside and a new DEIR issued by a company competent in dealing with CEQA requirements. The following is a list of flaws in the DEIR.

1: *The DEIR is flawed in using a historic use of 857 AFA as the basis for evaluating the DEIR.*

In 1992 the SWRCB determined that the Ranch only had riparian rights to 25 acres of land. At that time the SWRCB could have and should have issued a Cease and Desist Order to the Ranch. It does not appear that the Ranch was issued orders to stop illegal pumping so they continued with what was best for the Ranch. To use non-permitted pumping as a base for “historical pumping rates” and then use that illegal rate as a base to evaluate the impacts of the water right application is illogical if not illegal.

The Ranch is not requesting an average of 375 AF per year, it is requesting an average of 1,200 AF per year and the impacts must be evaluated based on the total request not the increase from water that was not permitted. If the SWRCB uses 857 AF as the baseline then the SWRCB is in fact giving the Ranch a permit for water without CEQA review, public comment, or regards for the environment.

2: *The DEIR (page 2-18) is flawed and inaccurate in stating the steelhead population is large and healthy.*

The preparers of the DEIR only offer surveys from the two years of 2004 and 2007 for this statement (Table 4.3-5). One cannot state the health of a run of fish from two very recent years. An accurate statement would require a comparison from before the Ranch started pumping to a recent year and this was not done. It is hard to ignore the bias of the report when the DEIR fails to recognize the listing of steelhead as a threatened species by the federal government during the time of illegal pumping. By the admission of the DEIR, the Ranch has pumped the river far below what is necessary for fish passage and therefore undoubtedly contributed to the listing, and makes the Ranch subject to an Endangered Species Act (ESA) lawsuit for illegal "take." Illegal "take" can result from habitat alteration.

3: *The DEIR is flawed and misleading on page 2-18.1 when it says the flow below the POD is greater than the flow above the POD.*

Most rivers gain flow in the lower reaches as the river cuts lower into the valley floor and therefore lower into the groundwater basin. As the groundwater basin is exposed, water from the subterranean flow joins the river. The statement is further misleading in that major impacts to fish are occurring at the POD as well as above and below.

4: *The DEIR is flawed in the amount of water needed to irrigate the pasture land.*

The DEIR is requesting a water right to irrigate pasture land and using theoretical needs based on efficiency tables and crop needs rather than historic use.

The DEIR (page 2-20 table 2-2) states that the Ranch is 65% efficient compared to an optimal efficiency of 80%, yet the DEIR makes no attempt to increase efficiency by better monitoring of soil moisture, properly setting borders, further leveling the land, or better monitoring of irrigation. The Ranch must maximize their efficiency or the water will not be "put to beneficial use."

The DEIR (page 2-21) states that in past years the Ranch applied less water than was needed for optimal crop production. Yet the DEIR makes no mention of increasing

Ranch labor to better monitor proper amounts of water. It is implied that the Ranch will now use enough water to make sure it has optimal crop production even if it wastes water.

The DEIR (page 2-22) talks about the amount of leaching required because of salinity, noting that the salinity comes mainly from the "Old Well" which is closer to the ocean and affected by the tides. The Ranch can reduce water needs by better monitoring of the "Old Well" or by drilling another well above the tidal influence and then abandoning the "Old Well."

The DEIR further states (page 2-20 table 2-2) that controls are limited to available labor. It appears that the Ranch is asking for the maximum amount of water because the Ranch is not willing to hire additional or professional help.

The DEIR (page 2-14) states that when the SWRCB determined that the Ranch only had riparian rights and not groundwater rights, the SWRCB decided that 3 AF of water is what is needed to irrigate an acre of water. As there are 262 acres of land to be irrigated, then 786 AF of water is all that should be used, yet the DEIR is requesting an average of 1,200 AF or approximately an increase of 35% over what the SWRCB said was reasonable.

5: *The DEIR is flawed by not noting the requirements of minimum low flow as set by the California Department of Fish and Game.*

The DEIR on page 4.2-38 states that the California Department of Fish and Game (DFG) is to list rivers where a minimum flow level needs to be established in order to assure the continued viability of stream-related wildlife resources. While the DEIR makes this point it does not mention the requirement in the DFG fishing regulations on page 61 which states that the Big Sur River will be closed to fishing when flows are inadequate to provide safe fish passage. The regulations then set the flow limit on the Big Sur River as 40 cfs measured at the U.S.G.S. gauging station. While not specifically addressing this DEIR, DFG has already set the low flow limits at 40 cfs. Therefore, any diversions below that level would be in violation of DFG regulations.

6: *The DEIR is flawed and inadequate in that there was not an adequate survey made for sensitive plants or plant communities.*

The DEIR (page 4.3-3) states that the preparers of the DEIR only visited the site once on July 21, 2006 and documented plant 68 species. The DEIR then indicates that it relied on another report (Miriam Green and Associates) for the complete list of plants. The Miriam Green report stated it was made in May and June. Later on page 4.3-12 the DEIR states that it used the California Natural Diversity Data Base (CNDDDB) and the California Native Plant Society (CNPS) databases to determine if any CNPS list 1B or list 2 plants could be present in the area.

The DFG Protocols for Surveying and Evaluating Special Status Native Plant Populations and Natural Communities, states that plants requiring surveys include CNPS

List 1A, 1B, and 2, plants considered a locally significant species, or special status natural communities. Most types of wetlands and riparian communities are considered special status natural communities.

The DEIR does not explain the nature of the Miriam Green report, what the expertise of the botanist who made the survey is, or what the reported study area was. The DEIR does state that all visits were made between March and June. The DFG protocols state that surveys must be made as necessary to accurately determine what plants exist on the site. Without a copy of the Miriam Green report, one cannot comment on the validity of the report or if it fits the other criteria of the DFG protocols. One can state that surveys that do not include visits from July to the following March do not capture the total plant community. Using the CNDDDB and CNPS sites (as done by PBS&J) does not substitute for field visits, in fact the DFG protocols state that “‘Focused Surveys’ that are limited to habitats known to support special status species or are restricted to lists of likely potential species are not considered floristic in nature and are not adequate to identify all plant taxa on site to the level necessary to determine rarity and listing status.”

Because of no adequate description of the site visits, because of inadequately timed visits, and because of the nonfloristic nature of the report, the surveys for special status plants are unacceptable.

7: *The DEIR is flawed in Impact 4.2-1 ground water to surface water gradient, by not evaluating conditions of the no pumping alternative.*

The DEIR allows pumping in Critically Dry years to continue at the “baseline” rate. There is no permit for the 857 AF of water included in the baseline rate and therefore the analysis is not valid. To evaluate the effects of this DEIR, comparisons only to legal diversions can be used.

8: *The DEIR is flawed in Impact 4.3-1 (adult fish passage) by allowing “baseline” pumping to continue below legal depths for adult fish passage and by not using DFG regulations.*

The DEIR lists this impact as Potentially Significant. Blocking fish passage for a federally threatened species is a Significant Impact not a Potentially Significant Impact and should be listed as such for evaluation.

The basic premise of the DEIR is that pumping will be reduced to “baseline rates” during periods of dry or critically dry conditions. As there is no legal right to these “baseline” diversions, using this as mitigation measure will not reduce a Significant Impact to a Less than Significant Impact. The impact is still there, the DEIR just ignores impacts resulting from “baseline” rates as well as rules by Monterey County and DFG.

There must always be enough flow in the river to allow adult steelhead to migrate any time they are in the river. The problem is what is enough water?

Monterey County has adopted a "Big Sur River Protection Waterway Management Plan." This plan states that for adult fish to migrate, water must be 0.6 feet in depth with 25% of the total stream width, 10% of which is contiguous. Page 61 of the California Sport Fishing Regulations states that the Big Sur River shall be closed to fishing when flows are inadequate to provide safe fish passage. The regulations then set the flow requirement at 40 cfs measured at the U.S.G.S. gauging station.

The County Management Plan, while giving actual measurements that can be taken on riffles, is unworkable in that every time there is a high water event, sediment moves down the river and changes the profile of the riffle. To use this measurement of flow needs would require someone other than Ranch employees to constantly monitor riffle profiles which is unworkable. The only adequate measurement is the DFG requirements of 40 cfs.

Regardless of listed "baseline rates," the river cannot be lowered to a level that would not allow adult steelhead to migrate. On pages 4.3-36 and 4.3-37 the DEIR states that at 12 cfs several transects did not meet the depth for adult fish passage, yet the "baseline" rates could still be used. The DEIR further states that on two dates in Oct. of 2006 flow rates of 21 cfs and 24 cfs did not meet the criteria, yet the "baseline" rates could still be used. Therefore, the only way to insure safe fish passage is to set the standard for diversions at 40cfs, before any diversions could be used including "baseline" diversions, and then diversions could not lower the river to below 40 cfs.

The DEIR is further flawed by using the date of December 1 as the starting point for adult fish migration. PBS&J made two visits to the site in October of 2004 and 2007. In one of those visits they observed an adult fish in the river. When 50% of visits show adult fish present in October, it is impossible to state the migration begins in December.

9: *The DEIR is flawed in Impact 4.3-2 (juvenile fish passage) by allowing baseline pumping to continue below legal depths for juvenile fish passage and inaccurately listing the depth of water needed for juvenile passage.*

The DEIR once again uses the Monterey County Big Sur River Protection Waterway Management Plan as a basis for measuring flow requirements. The County Plan lists a depth required for juvenile fish passage as 0.5 feet, yet the DEIR on page 4.3-40 lists a depth of 0.3 feet as the base. While this is inaccurate and requires the analysis to be done over, it is worthwhile to note that even with a depth of 0.3 feet the DEIR admits on page 4.3-40 "When both pumps were operating on September 5, both thresholds were violated (the 10 percent contiguous width deeper than 0.3 feet and 25 percent of the total stream width over 0.3 feet.)"

The DEIR in fact notes many times when pumping resulted in illegal water depth as well as depth being below legal limits without any pumping. "Depth at passage transect 11 were in violation of the criteria on all sample dates in 2007 regardless of flow and pumping operations" (Page 4.3-40). Even noting the illegal water depth, the DEIR allows for pumping at the "baseline rates" further complicating an unacceptable event.

In fact, page 6-7 notes that “Baseline pumping at a maximum 30-day average diversion rate of 5.7 cfs has been measured to reduce water elevations within the Big Sur River by .017 feet; about 2 inches.” Lowering the water depth by 2” when it is already below both DFG and County standards is criminal.

As noted above, the County Plan of measuring water depth is unworkable and one must use another measurement. If the passage of 0.6 feet is required for adult passage and 0.5 feet the requirement for juvenile passage, that is a 20 percent reduction. If one uses this same ratio with the 40 cfs required by DFG for adult passage, then 32 cfs must be required for juvenile fish passage.

One cannot prevent juvenile fish from passage without being in violation of DFG codes, County ordinances, and the Endangered Species Act. I must further point out that “baseline” diversion rates caused the river to go dry in 1990 bringing on the situation that has been allowed to continue.

10: *The DEIR is flawed in Impact 4.3-4 (dissolved oxygen levels) in that the mitigation measures are unacceptable and untested.*

Once again allowing for “baseline” diversion rates is not mitigation when the river is below or near legal levels. Pumping at those times would further increase an unacceptable condition. Allowing unpermitted pumping to continue will increase the severity of the problem by lowering flows below legal levels and is unacceptable.

The second mitigation measure of using an air pump and pipe to increase oxygen levels has not been proven and probably will not work. The responsibility for beginning and maintaining this measure would be left to the Ranch labor. The DEIR already (page 2-20) stated that controls are limited to available labor. Preventing the extinction of a species cannot be left to available labor or untested theories.

11: *The DEIR is flawed in Impact 4.3-11 (cumulative impacts of temperature) in that it did not consider the cumulative impact of low flows combined with high temperatures.*

Juvenile steelhead migrate both upstream and downstream. Fish migrate upstream when conditions are unhealthy in their existing habitat. While the DEIR found that the proposed project did not raise water temperatures more than the legal limit, it did not analyze the effect of increased temperatures when the flows were low enough to prevent juvenile fish from migrating back upstream to cooler water. This affect must be analyzed.

12: *The DEIR is flawed in Impact 4.3-12 (cumulative impacts of low Dissolved Oxygen) in that it did not consider the cumulative impact of low flows combined with low dissolved oxygen levels.*

Using the same reasoning listed in 11 above, fish must be able to migrate upstream when low dissolved oxygen levels make it unhealthy in their existing habitat. The DEIR did find that the project contributed to low levels of dissolved oxygen, but it

did not analyze the effects of low dissolved oxygen and low flows. This must be analyzed.

13: *The DEIR is flawed in the list of existing and potential water rights, in that Table 5-1 did not list riparian water rights and that omission is deceptive.*

The DEIR uses the combined permitted and unpermitted water rights which includes 1136 AF of Ranch unpermitted water to come to a total of 1,411.8 AF for existing and potential diversions. The table then shows adding the same Ranch proposed project water of 1,615 AF to come up with the total water usage on the Big Sur River of 1,890.8 AF of diversions (adding 1,411.8 and 1,615 totals 3,026.8 not 1,890.8). The table artificially lists a higher existing and potential diversions of water to make it look like this project would only add 479 AF of diversions.

The DEIR also does not list the riparian water rights in the table. To be accurate in determining total water use, the table must combine all the riparian users with the permitted and unpermitted users to come up with total river diversions.

14: *The DEIR is flawed by omitting pertinent information.*

The Ranch was paid \$11 million by the state of California to maintain scenic conservation easement values on the Ranch.

The Ranch entered into a coastal development agreement with the California Coastal Commission that would permit development.

The Ranch has an agreement with DPR that would allow use of water from the "Three Springs" location on the north end of the property. As this source was used by the Molera Ranch to irrigate its pastures prior to becoming a park, and because the "Three Springs" is connected by piping to the POU it would be an alternative source of water.

All of these items must be noted and analyzed for the public to properly evaluate the DEIR.

Even if this DEIR is considered by the SWRCB, CRSA believes the only alternate that would be acceptable under CEQA would be alternate 1: No Project / No Permit Alternative. CRSA believes this because "Significant" and "Potentially Significant Impacts" to Steelhead can not be mitigated to "Less than Significant" as stated in this DEIR. Other reasons will become apparent when a proper DEIR is issued.

CRSA further believes that this DEIR proves the Ranch has pumped illegal water for years further damaging the federally listed Steelhead Trout and that a Cease and Desist Order should be issued and an investigation into ESA violations conducted.

Sincerely,

Brian LeNeve
CRSA Board Member

