
State Water Resources Control Board

NOTICE OF ASSIGNMENT

The State Water Resources Control Board's
Executive Director has assigned to the
Administrative Hearings Office
pending Application 30166 filed by

El Sur Ranch

for a permit to appropriate water from the Big Sur
River in Monterey County.

WATER-RIGHT APPLICATION 30166

On July 27, 1992, James J. Hill III (Applicant) filed water-right Application 30166 on behalf of El Sur Ranch with the State Water Resources Control Board's (State Water Board or Board) Division of Water Rights (Division) for a permit to appropriate water from the Big Sur River to irrigate 246 acres of pasture located along the Pacific Coast in Monterey County.

El Sur Ranch pumps water to irrigate pastureland from two wells located in Andrew Molera State Park, adjacent to the Big Sur River. One of the wells has been in operation since 1949 and the other has been in operation since 1984. In 1992, the Division issued a report in which Division staff concluded that extractions of water from the wells are diversions of from the Big Sur River that required a water-right permit under Division 2 of the Water Code. Mr. Hill filed Application 30166 soon after the Division issued its report.

The Applicant amended Application 30166 in November and December 2005, October 2006, and June 2011. The current application is for diversion of an annual maximum of 1,320 acre-feet, a maximum 20-year rolling average of 1,087 acre-feet per year, a seasonal limit of 676 acre-feet from July through October, and a monthly limit (July through October) of 203 acre-feet at a rate not to exceed 5.84 cubic feet per second (cfs). Several parties, including the California Department of Fish and Wildlife (CDFW), protested the application based on the impact of the diversions on flows in the Big Sur River and habitat for South Central California steelhead and other protected species.

The State Water Board held a public hearing on Application 30166 in June and July 2011.

On September 23, 2016, CDFW issued proposed streamflow requirements for the Big Sur River supported by a flow recommendation report, pursuant to Public Resources Code section 10001 and 10002.

On April 15, 2019, El Sur Ranch and CDFW submitted a draft settlement agreement to the State Water Board that addresses CDFW's protest to the application. The terms of the agreement would require the Applicant to amend Application 30166 to add off-stream reservoir storage and revise the place of use. In a letter to the Board dated June 16, 2020, the Applicant proposed a 30-month schedule to submit an amended application, to assist in the preparation of supplemental environmental documentation under CEQA, and for the State Water Board to conduct additional days of public hearing necessary for the Board to act on the application.

ASSIGNMENT TO THE ADMINISTRATIVE HEARINGS OFFICE

Water Code section 1112, subdivision (c)(2), provides that the Board may assign an adjudicative hearing to the AHO. Water Code section 1114 provides that, after the AHO holds a hearing in an assigned matter, the AHO hearing officer shall prepare a proposed order and transmit it to the Board for the Board's consideration.

On December 9, 2021, Erik Ekdahl, Deputy Director for the Division, recommended to the Board's Executive Director, Eileen Sobeck, that she assign Application 30166 to the AHO for further proceedings. On December 9, 2021, Ms. Sobeck issued a memo to the AHO assigning Application 30166 to the AHO.

HEARING OFFICER AND HEARING TEAM

AHO Hearing Officer Nicole Kuenzi will preside over any hearing in this matter. Other members of the AHO may be present and assist the hearing officer throughout these proceedings. The hearing officer and other AHO staff members may consult with staff of the Board's Division of Water Rights and the Board's Office of Research, Planning, and Performance, attorneys in the Board's Office of Chief Counsel, members of the executive management of the State Water Board, and State Water Board members, to discuss or deliberate on matters relevant to this proceeding.

ADMINISTRATIVE RECORD

The AHO has uploaded copies of documents from the Water Board's files for this matter, as the AHO's initial administrative record in this matter, on the State Water Board's FTP site in the AHO-FTP folder. Instructions regarding how to access the AHO-FTP folder on this FTP site are on the AHO's webpage at:

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/2021-07-09_ftp_sites.pdf.

Some of these documents are also available on the State Water Board's Hearings

Program webpage at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/elsur_ranch/

PROHIBITION ON EX PARTE COMMUNICATIONS

All parties and interested persons are prohibited from having any ex parte communications with any members of the AHO hearing team. (See Wat. Code, § 11110, subd. (c); Gov. Code, §§ 11430.10-11430.80.) The AHO has posted a discussion of ex parte communications on the AHO's webpage:

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/2021-07-06_webpage_faq.pdf (See response to FAQ 16.)

If any party or interested person wants to communicate with the AHO regarding any procedural or substantive issue related to this matter, then that party or interested person shall make such communication to the AHO in writing (by e-mail or letter) and, except as otherwise provided in this notice, shall serve all other parties with copies of the communication and include a proof of service demonstrating such service with the written communication to the AHO. The service list attached to this notice is the AHO's initial service list for this matter. For emails, the verification of service shall be a list of the e-mail addresses of the parties or their representatives in an electronic-mail "cc" (carbon copy) list. For letters, the verification of service shall be a list of the names and mailing addresses of the other parties or their representatives in the cc portion of the letter. The AHO will post copies of all such communications to the AHO-FTP folder described above. Please do not attempt to communicate by telephone or in person with any AHO hearing team member regarding any procedural or substantive issue concerning this hearing, because other parties would not be able to participate in such communications. If oral communications with any members of the AHO hearing team are necessary to discuss any procedural or substantive issue, then the AHO will set up a Zoom conference in which representatives of all parties may participate. Any party or interested person may request such a conference at any time using the written communications protocols described above.

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for internet website accessibility in Government Code section 11546.7, the AHO will post all notices and other documents regarding these proceedings on the AHO's internet webpage at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

Any interested person may sign up to receive all AHO notices at https://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.html.

Date: February 4, 2022

SIGNATURE ON FILE

Nicole L. Kuenzi,
Hearing Officer

Attachments:

- Attachment 1 – December 9, 2021 Memo from E. Ekdahl to E. Sobeck (El Sur Ranch)
- Attachment 2 – December 9, 2021 Memo from E. Sobeck to AHO (El Sur Ranch)
- Attachment 3 – Initial Service List

State Water Resources Control Board

TO: Eileen Sobeck
Executive Director
State Water Resources Control Board

FROM: Erik Ekdahl 
Deputy Director
Division of Water Right

DATE: December 9, 2021

SUBJECT: ASSIGNMENT OF ADJUDICATIVE HEARING ON WATER RIGHT
APPLICATION 30166 TO THE ADMINISTRATIVE HEARINGS OFFICE –
BIG SUR RIVER, MONTEREY COUNTY

The State Water Resources Control Board (State Water Board or Board) Division of Water Rights (Division) recommends assignment of the adjudicative hearing on pending water right Application 30166 to the Administrative Hearings Office (AHO) for further proceedings, including, if necessary, a supplemental adjudicative hearing, pursuant to Water Code section 1112, subdivisions (c)(2) and (c)(3). Given the significant increase in workload for the Division because of drought conditions statewide, the Board's action on this application would be aided by the AHO's role in ensuring water rights matters are resolved in a timely manner.

Water Right Application 30166

El Sur Ranch consists of about 7,000 acres in Monterey County, located approximately 25 miles south of Monterey. The ranch pumps water from two wells located adjacent to the Big Sur River in nearby Andrew Molera State Park, to irrigate pasture for cattle. One of the wells has been in operation since 1949 and the other has been in operation since 1984. In 1992, Division staff issued a report which concluded that the extractions from the wells by El Sur Ranch were diversions from the Big Sur River that require a water right permit under Division 2 of the Water Code.

In July 1992, James J. Hill III (Applicant) filed Application 30166 with the Division for a permit to appropriate water from the Big Sur River for irrigation of pasture on El Sur Ranch. The Applicant amended the application in November and December 2005, in October 2006, and again in June 2011. Several parties, including California Department of Fish and Wildlife (CDFW), protested the application, alleging that diversions of water

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

from the Big Sur River impact South Central California steelhead and other protected species and their habitats.

Hearing and Evidentiary Record

The State Water Board held an evidentiary hearing in June and July 2011. During the hearing process, the parties submitted extensive evidence and arguments, including arguments addressing whether the water sought to be appropriated by the Applicant would be put to reasonable and beneficial use.

On September 23, 2016, CDFW issued a report with proposed minimum streamflow requirements to protect fish and wildlife resources dependent on the Big Sur River, pursuant to Public Resources Code section 10002. Water Code section 1257.5 requires the Board to consider streamflow requirements proposed for fish and wildlife purposes pursuant to section 10002 of the Public Resources Code when the Board acts on applications to appropriate water. Because CDFW issued the report after the close of the evidentiary hearing, the report and the proposed minimum streamflow requirements are not, at this time, part of the evidentiary record that the Board may consider when acting on the application.

Post-Hearing Negotiations and Application Amendment

After CDFW issued its report, the Applicant and CDFW engaged in lengthy settlement negotiations to attempt to resolve CDFW's protest to the application. The Applicant and CDFW reached a settlement agreement dated April 15, 2019 (Agreement). The Agreement allows the Applicant to obtain a water right permit that authorizes diversion of up to 1,320 acre-feet per year (with a maximum of 1,087 acre-feet per year on a 20-year rolling average), with conditions on El Sur Ranch's operation of the wells, including minimum bypass requirements measured at a United States Geological Survey (USGS) gage on the Big Sur River. The Agreement provides that El Sur Ranch will construct an off-stream reservoir to store water for use when the bypass requirements limit pumping. The Agreement settles most but not all of the issues in dispute between CDFW and the Applicant. Implementation of the Agreement would require the Applicant to amend its application to include off-stream storage and to revise the proposed place of use to reflect the construction of a pond and replacement pasture for the pond area.

On April 30, 2019, the State Water Board held a hearing management conference to consider next steps in acting upon the pending application. CDFW confirmed during the conference that they had not considered Water Code section 1004, which they raised in its protest and during the hearing as a limitation on the volume of water that the Board could authorize the Applicant to appropriate in any water right permit, when negotiating the terms of the Agreement.

On April 15, 2020, the hearing officer issued a ruling letter directing the Applicant to submit: 1) a proposed schedule for the Applicant to revise the application to reflect the Applicant's current intent, for the Applicant to complete the proposed required environmental documentation, and for the Board to conduct a supplemental hearing;

and 2) an interim plan and time schedule for the Applicant's diversions while the water right application is pending that will protect public trust resources in the Big Sur River to the extent feasible. The ruling letter also presented the hearing officer's opinion, which was not a final determination or final action by the Board, that Water Code section 1004 applies to the irrigation of pasture as proposed in Application 30166 and would limit the amounts of water that the Board could authorize the Applicant to appropriate in a water right permit.

On June 16, 2020, the Applicant responded by letter to the hearing officer's ruling. The Applicant proposed 18 months (by December 2021) to revise its application to include off-stream storage, 30 months (by December 2022) to complete the proposed required environmental documentation, and 24 months (by June 2022) for the Board to hold a supplemental hearing based on a draft environmental document. The Applicant proposed to continue diversions in accordance with the interim plan of operation in the Agreement until the Board issues a decision on the application.

Several parties objected to the Applicant's proposed interim plan of operation. On December 9, 2020, the hearing officer granted the parties 90 days (until March 9, 2021) to reach an agreement on an interim plan of operations for diversions from the wells. In the ruling letter, the hearing officer stated that if an agreement could not be reached within 90 days, the Board would schedule a hearing to consider whether to issue a cease and desist order to impose appropriate remedies such as limits on diversions by the Applicant while its water right application is pending. On March 9, 2021, the parties requested a time-extension to continue negotiations. The hearing officer extended the deadline for the parties to reach an agreement on an interim plan of operations to April 9, 2021. The parties have not provided an update to the Board since the April 9 deadline.

Recommendation


Because of the Division's current workload and the possible need to re-open the evidentiary record and conduct a supplemental adjudicative hearing, the Division recommends assignment of this matter, including further proceedings on Application 30166 and any adjudicatory hearing to consider a proposed cease and desist order against the Applicant, to the AHO to assist in the efficient resolution of the pending water right application.

If you have any questions regarding this memo, please contact Conny Mitterhofer, Chief of the Hearings and Special Projects Section at 916-341-5720 or by email at conny.mitterhofer@waterboards.ca.gov.

cc: Michael Lauffer, Chief Counsel, Office of Chief Counsel
Diane Riddle, Assistant Deputy Director, Bay Delta and Hearings Branch
Conny Mitterhofer, Hearings and Special Projects Section Chief, Division of Water Rights

State Water Resources Control Board

TO: Alan Lilly
Presiding Hearing Officer
Administrative Hearings Office

FROM: Eileen Sobeck 
Executive Director
State Water Resources Control Board

DATE: December 9, 2021

SUBJECT: ASSIGNMENT OF ADJUDICATIVE HEARING ON WATER RIGHT APPLICATION 30166 TO THE ADMINISTRATIVE HEARINGS OFFICE – BIG SUR RIVER, MONTEREY COUNTY

The Division of Water Rights (Division) has recommended assignment of the adjudicative hearing on pending water right Application 30166 to the Administrative Hearings Office (AHO). Based upon the Division's recommendation, I am assigning Application 30166 to the AHO for further proceedings, including, if necessary, a supplemental adjudicative hearing and any adjudicatory hearing to consider a proposed cease and desist order against the Applicant, pursuant to Water Code section 1112, subdivisions (c)(2) and (c)(3).

If you have any questions regarding this memo, please contact Conny Mitterhofer, Chief of the Hearings and Special Projects Section at 916-341-5720 or by email at conny.mitterhofer@waterboards.ca.gov.

cc: Erik Ekdahl, Deputy Director, Division of Water Rights
Michael Lauffer, Chief Counsel, Office of Chief Counsel
Diane Riddle, Assistant Deputy Director, Bay Delta and Hearings Branch
Conny Mitterhofer, Hearings and Special Projects Section Chief, Division of Water Rights

**ATTACHMENT 3
INITIAL SERVICE LIST**

By e-mail only

Participants:

EL SUR RANCH
Mr. Tom Berliner
Duane Morris LLP
One Market Plaza, Suite 2200
San Francisco, CA 94105
tंबरliner@duanemorris.com

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE
Mr. Chris Shutes
1608 Francisco St.
Berkeley, CA 94703
blancapaloma@msn.com

TROUT UNLIMITED
Mr. Brian Johnson
2239 5th Street
Berkeley, CA 94710
bjohnson@tu.org

CARMEL RIVER STEELHEAD
ASSOCIATION
Mr. Brian LeNeve
P.O. Box 1012
Carmel, CA 93921
bjleneve@att.net

CALIFORNIA DEPARTMENT OF FISH &
WILDLIFE
Mr. Kevin Takei
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
Kevin.Takei@wildlife.ca.gov

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE/CENTER FOR
BIOLOGICAL DIVERSITY &
VENTANA WILDNERNESS ALLIANCE
Mr. John Buse
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
jbuse@biologicaldiversity.org

Persons participating by policy statement only:

CALIFORNIA STATE PARKS
Mr. Stephen Bachman
2211 Garden Road
Monterey, CA 93940
stephen.bachman@parks.ca.gov

CALIFORNIA CATTLEMEN'S
ASSOCIATION
Mr. Justin Oldfield
1221 H Street
Sacramento, CA 95814
Justin@calcattlemen.org

VENTANA WILDERNESS ALLIANCE
Mr. Tom Hopkins
P.O. Box 506
Santa Cruz, CA 95061
tom.hopkins@ventanawild.org

CAL FIRE
Mr. Richard Hutchinson
2221 Garden Road
Monterey, CA 93940
Rick.hutchinson@fire.ca.gov

FRIENDS OF THE RIVER
Mr. Steve Evans
1418 20th Street, Suite 100
Sacramento, CA 95811
sevans@friendsoftheriver.org

MONTEREY COUNTY CATTLEMEN'S
ASSOCIATION
Mr. Aaron Johnson
295 South Main Street, Suite 600
Salinas, CA 93901
Aaron@johnsonmoncrief.com

MONTEREY COASTKEEPER
Mr. Steve Shimek
475 Washington Street, Suite A
Monterey, CA 93940
exec@montereycoastkeeper.org

BIG SUR RIVER INN
Mr. Alan Perlmutter
Highway One at Pheneger Creek
Big Sur, CA 93920
alan@bigsurriverinn.com

NATIONAL MARINE FISHERIES SERVICE
Mr. David Hines & Mr. Devin Best
David.Hines@noaa.gov
Devin.Best@noaa.gov

DEPARTMENT OF ECOLOGY &
EVOLUTIONARY BIOLOGY,
LONG MARINE LAB
UNIVERSITY OF CALIFORNIA SANTA
CRUZ
Dr. Peter Raimondi
Santa Cruz, CA 95060
raimondi@biology.ucsc.edu

CENTRAL COAST LIGHTHOUSE
KEEPERS
Mr. John O'Neil
P.O. Box 223014
Carmel, CA 93922
johnoneil@montereybay.com

Mr. Butch Kronlund
48280 Highway 1
Big Sur, CA 39320
bpkronlund@aol.com