
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

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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.

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