

Farwell Jensen, Jane@Waterboards

From: Sangalang, Michelle M. <MMSangalang@duanemorris.com>
Sent: Thursday, January 31, 2019 12:01 PM
To: Farwell Jensen, Jane@Waterboards
Cc: jgoldsmith@kmtg.com; Takei, Kevin@Wildlife; bjohnson@tu.org; jbuse@biologicaldiversity.org; bjleneve@att.net; Berliner, Thomas M.
Subject: Water Right Application 30166 of El Sur Ranch, Big Sur River in Monterey County
Attachments: 2019-01-31 Hearing Management Plan.pdf

Dear Ms. Dudoc and Ms. Farwell-Jensen,

Please see the attached ESR and CDFW Hearing Management Plan, in regards to the above-referenced matter.

Please do not hesitate to contact our office if you have any questions.

Thank you,

Michelle M. Sangalang

Legal Assistant to
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January 31, 2019

Ms. Tam M. Doduc, Board Member
State Water Resources Control Board
PO Box 100
Sacramento, CA 95812-0100

RE: Water Right Application 30166 of El Sur Ranch, Big Sur River, Monterey County

Dear Ms. Doduc:

The California Department of Fish and Wildlife (“CDFW”) and El Sur Ranch (“ESR”), through their respective attorneys, hereby respond to your letter of December 20, 2018. Your letter requests that we prepare a Hearing Management Plan (“Plan”).

For the past several months, CDFW and ESR (collectively referred to as “parties”) have been proceeding diligently to address and resolve issues concerning the operations of ESR and the protection of fish and wildlife resources in the Big Sur River. The parties have successfully negotiated many issues. Further, the parties have been unable to reach agreement on a few items which will be submitted to the State Water Resources Control Board (“State Water Board”) for assistance with resolution.

The parties understand that the State Water Board is interested in seeing this matter resolved and the parties strongly support that outcome. Although the parties have been engaged in negotiations, the other hearing participants have not been a part of that effort. Therefore, the parties intend to meet and confer with the other participants about the parties’ negotiations. The parties hope that with input from other participants we can further refine any hearing management plan.

The parties recognize that our responses to the enumerated items below may lack the detail the State Water Board sought. The parties also recognize that additional discussions among the hearing participants may not be what the State Water Board envisioned as a response. Accordingly, the parties suggest that they, along with the other hearing participants, provide the State Water Board an update regarding outreach by the parties to the other participants. This update would be provided to the State Water Board no later than 45 days from the date of this letter. The parties have not discussed this with the other participants, but are optimistic they would be interested in discussing the settlement prior to developing a hearing management plan.

In addition to detailing the contents of the settlement agreement, the parties intend to explain to the other participants our two major goals from the outset of negotiations: keeping ESR functioning as an operating cattle ranch and protecting the fish and wildlife resources of the Big Sur River. To that end, the parties have negotiated various issues mentioned in response to #1 below including general terms for the development of an off-stream reservoir in order to meet water use requirements of ESR during times that the bypass flows limit diversions, and development of a relatively small amount of additional pasture to provide replacement pasture

for cattle feed for the pasture lost to the reservoir. The change in place of use and diversion to storage will require an amendment to the application. The parties will meet and confer with the other participants and State Water Board staff to determine how best to process the amended application.

Turning now to your letter, you requested that the Hearing Management Plan address the four factors below. Keeping in mind the parties' outreach in the immediate future to the other participants, the parties respond as follows:

1) Any facts to which ESR and CDFW can stipulate.

Response: The parties are in the process of finalizing their settlement agreement. Issues covered in the settlement agreement are mentioned below. The terms of the settlement are a package. Changing one item changes the balance of burdens and benefits and is grounds for either party to withdraw. There are many facts the parties agree upon, however the parties are hesitant to identify those items here before conferring with the other participants. To help ensure this process continues in a timely manner, the parties suggest that the State Water Board consider input from the other participants to fully assess the parameters of any hearing, including the timing and issues to be heard.

Further, for the past four years, as a measure of good faith, ESR has been implementing best management practices agreed to as part of the settlement. Among these measures is a bypass flow cut off at 10 CFS as well as complete cut off over the long weekends of Memorial Day, July 3-5, and Labor Day. The BMP measures will be part of the settlement and are intended to be included in a State Water Board order to the extent they are within the scope of the State Water Board's jurisdiction. The measures will not be deemed to be part of the baseline.

Topics covered by the settlement agreement and which the parties will seek input from the other participants include:

- a. Bypass flow. The parties tentatively agreed to time dependent flows, the quantity of flows, location of gage, instantaneous maximum pumping rate, 30-day average pumping rate, and maximum annual diversion amount. The parties continue to discuss how some aspects of the bypass would be measured, flows during a critically dry year, and when the bypass would become effective. Issues subject to continued discussion will, after conferring with other participants, either be resolved or a matter submitted to the State Water Board for resolution.
- b. Monitoring. The parties tentatively agreed to the location of monitoring, the type of data that would be recorded, and the quantity of time that data would be held. The parties continue to discuss the interval that data would be recorded and how it would be made available.
- c. Construction of a reservoir at the Pumphouse Field. The parties tentatively agreed to construction of such a reservoir.
- d. Emergency uses of water from the Pumphouse Field reservoir. The parties tentatively agreed to the types of emergency uses for which water could be

withdrawn from the Pumphouse Field reservoir by third parties such as CalFire. The parties continue to discuss the conditions under which that water can be replaced or how it would be measured.

2) The specific areas of fact and law that are in dispute.

The parties were unable to agree on a complete set of terms in the settlement agreement and therefore will be submitting those issues to the State Water Board for resolution. Either party may challenge an issue determined by the State Water Board. One area of known continued disagreement is the impact of pumping on the BSR as to whether there is a one to one impact (per CDFW) or an impact of at most three to one under worst case scenario (per ESR). This disagreement features heavily in the existing hearing record. Similarly to what is mentioned in item #1 above, the parties are hesitant to identify those items in disagreement before conferring with the other participants. Also as mentioned in item #1 above, the parties continue to discuss certain aspects of the settlement agreement and will bring those before the other participants.

3) The disputed factual issues on which ESR and CDFW intend to present evidence in the supplemental hearing.

See response to #2 and #4.

4) The amount of time necessary to conduct the supplemental hearing including the number of expert witnesses CDFW and ESR plan to call and any motions they plan to make in advance of the hearing.

CDFW and ESR do not want to revisit the issues that are detailed in the hearing record. Rather, it is the parties' desire that any hearing focus on any issue not already covered in the hearing record that arises from the settlement agreement; and any amendments to the application. ESR will seek to exclude CDFW's final instream flow recommendation on relevancy and lack of sufficient facts upon which to base a decision grounds. CDFW will assess those efforts by ESR at that time and respond accordingly.

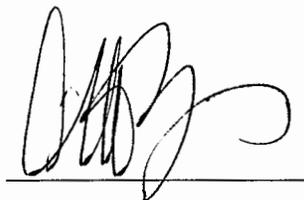
As mentioned above, the parties will reach out to the other hearing participants concerning the parties' negotiations and provide the State Water Board an update as to that effort within 45 days of this letter.

In the meantime, please do not hesitate to contact either of the parties with questions about this letter.

Very truly yours,



Kevin Takei, Counsel for
California Department of
Fish and Wildlife



Thomas M. Berliner, Counsel for
El Sur Ranch

Attachment 1

OPERATIVE CONDITIONS REGARDING WATER USE AND LAND
MANAGEMENT

E.S.R. Ranching and Land Maintenance Best Management Practices

The following conservation measures and best management practices (“BMPs”) are expected to be implemented on a reasonable timetable that recognizes ranch operations, cash flow, overall cost of BMPs and individual BMPs, and opportunistic events.

- A. Adoption of a long-term program to replace the old metal water distribution system pipelines with new materials, which materials are to be determined by E.S.R. (Underway)
- B. In lieu of or in addition to replacing the existing irrigation system, E.S.R. may convert all or a portion of its irrigation system with drip tape or other efficient irrigation methods.
- C. Subsurface drip-tape irrigation (SDI) Pilot Program. E.S.R. is exploring the use of SDI to reduce overall water use and/or rate of diversion from the Big Sur River (“B.S.R.” or “River”). E.S.R. will install SDI on a sample section of pasture to determine whether SDI is compatible with a cattle operation, cost effective and reduces water consumption without adverse impact to crop production. E.S.R. will employ an irrigation expert to monitor the pilot program. The results of the program will be reported to CDFW. The pilot program is expected to last for five years unless demonstrated ineffective or uneconomical prior thereto. If the pilot program is successful, at E.S.R.’s discretion it will install SDI over the following 10 years.
- D. The following ranch-related measures are taken from the 2012 joint efforts of land/ranching experts Dave Feliz and Orrin Sage. These are measures that are being implemented in the near and longer term or are considered for future deployment. If grant funding is available, it may be used for any of these measures. Depending upon what is actually implemented, some measures may no longer be applicable or will require modification. For example, E.S.R. is exploring SDI, which if implemented could render a new tailwater pond unnecessary, or converting the Pumphouse field to a reservoir, which would obviate need to modify irrigation of Pumphouse field, etc.

Only to the extent necessary will any of these be included in the Water Board permit. Otherwise they will be enforceable through agreement between E.S.R. and CDFW

- i. R-1 – Renovate existing main lines and laterals. *Currently being implemented on incremental basis.*
- ii. R-2 – Upgrade new well pumping system. *Upgraded to variable speed drive.*

- iii. R-3 – deleted
- iv. R-4 – Use existing test wells for irrigation and/or streamflow augmentation. *One test well appears to have reasonable output of 500 gpm, is farther from the river, will have no measurable impact on the river, but it is uncertain whether the well is operable or needs rehabilitation.*
- v. R-10 – Expand off-river storage. *E.S.R. is exploring the conversion of the Pumphouse field to a reservoir site. Net change in expansion of place of use shall use less water than used by Pumphouse field. Pumphouse field reservoir would be filled primarily during high flow events on an opportunistic basis.*
- vi. R-11 – Expand tailwater pond. *This may or may not be practical, depending upon the results of the SDI study. If there is excess tailwater after irrigation improvements have been made such that there is a material amount of water to be produced.*
- vii. R-12 – Build new tailwater recovery pond. *See R-11.*
- viii. R-13 – Build small night pond catchment in Swiss Canyon drainage. *CDFW/U.S.F.W.S. will have to determine if this can be permitted. Utility of a night pond will depend upon the authority to fill it on a regular basis.*
- ix. R-15 – Modify Pumphouse field irrigation practices. *This is being explored at this time.*
- x. R-17 – Pre-irrigate. *This will be instituted if a flow regimen is instituted that permits pre-irrigation.*
- xi. R-18 – Install soil moisture gauges. *In process.*
- xii. R-20 – Improve dryland rangeland conditions. *In process.*
- xiii. R-22 – deleted
- xiv. R-23 – Weed abatement. *Ongoing.*
- xv. R-24 – Watershed management. *E.S.R. has been working with Monterey Co. watershed management process. Completed.*
- xvi. R-25 – Prepare water conservation and operational management plan. *Completed. See Orrin Sage (2012).*

II. Adaptive Management Program to Enhance Resource Values of the Big Sur River

A. E.S.R. will monitor water quality data in conjunction with its metering of its water use from its wells. Water quality parameters to be tested on at least a bi monthly basis are salinity, dissolved oxygen and temperature.

B. Meters shall keep a log of all water use.

C. E.S.R. shall employ a fisheries biologist to periodically assess conditions in the B.S.R. within the zone of influence of the E.S.R. wells and of the lagoon. The fisheries biologist, or appropriately supervised personnel working under the direction of the biologist, shall take the following measurements once monthly between May 1 and October 31: (1) deploy water temperature monitoring units at three locations (near the old U.S.G.S. 11143010 gauge site, adjacent to the E.S.R. wells, and in the lagoon) to monitor and record temperature at 10-minute intervals; (2) grab sample measurements of water temperature, dissolved oxygen, and electrical conductivity at a location adjacent to the E.S.R. wells and at two locations in the lagoon (near the head of the lagoon and mid-lagoon); and (3) conduct a visual inspection of the river between the lower U.S.G.S. gauge site and the lagoon to characterize surface water connectivity among habitat units (identify any areas that are dewatered), potential passage barriers or impediments, and areas where potential juvenile stranding may occur as flows decrease. Results of monitoring will be reported to CDFW each year for the first five years of permit implementation.

D. The following biological measures are taken from the 2012 joint efforts of CDFW and E.S.R. If grant funding is available for any of these measures, CDFW will support E.S.R.'s efforts to obtain grant funding to the extent CDFW may do so under applicable laws and policies. These are measures that are being considered for future deployment and may or may not involve E.S.R. To the extent E.S.R. becomes involved with these measures, such involvement will be subject to the same funding parameters as implementation of the ranching and land management BMPs.

i. B-1 - Gorge blockage. *Not successful to date. Likely would be implemented by state and/or federal agencies.*

ii. B-4 – In-channel habitat enhancement. *CDFW has stated in the past that they do not believe any measures are needed at this time in the E.S.R. area.*

iii. B-5 – Instream flow augmentation. *Concept put on the shelf at this time.*

iv. B-10 – Regulate summer dams. *This would be an educational and enforcement effort by CDFW and D.P.R.*

v. B-13 – Financial contributions/Local cost share. *As grants become available, the interested B.S.R. stakeholder community will seek to take advantage. E.S.R. will participate.*

- Participate in the watershed wide management plan process. *Completed.*