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Duane Morris®

FIRM and AFFILIATE OFFICES

THOMAS M. BERLINER
DIRECT DIAL: +1 415 957 3333
PERSONAL FAX: +1 415 520 5835
E-MAIL: TMBerliner@duanemorris.com

www.duanemorris.com

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AND SRI LANKA

June 16, 2020

The Honorable Tam M. Doduc
Hearing Officer
State Water Resources Control Board
Post Office Box 100
Sacramento, CA 95812-0100

Via email to: wr_hearing.unit@waterboards.ca.gov

RE: Response of El Sur Ranch to the April 15th, 2020 *Ruling Letter On The Applicability Of Water Code Section 1004 And Procedural Directive To The Applicant*

Dear Hearing Officer Doduc:

On behalf of El Sur Ranch, the Applicant, we provide this response to the April 15, 2020 *Ruling Letter On The Applicability Of Water Code Section 1004 And Procedural Directive To The Applicant* (Ruling). Thank you for providing El Sur Ranch with the next procedural steps to be accomplished in this proceeding. El Sur Ranch appreciates the opportunity to submit an amended application, thereby ensuring that the totality of this project will be considered in a single application and analyzed *en toto* pursuant to the California Environmental Quality Act (CEQA). El Sur Ranch further appreciates the opportunity to provide the Hearing Officer and the Parties with our estimates of the time needed to address the issues raised by the Ruling, which are addressed below.

Objection to Determination of Applicability of Water Code Section 1004 to the Pasture at El Sur Ranch

DUANE MORRIS LLP

SPEAR TOWER, ONE MARKET PLAZA, SUITE 2200
SAN FRANCISCO, CA 94105-1127

PHONE: +1 415 957 3000 FAX: +1 415 957 3001

It is evident from the Ruling that the Hearing Officer has an appreciation that El Sur Ranch is a “unique property of historical, cultural and aesthetic value.” And while El Sur Ranch does not agree with the Ruling’s interpretation of Water Code Section 1004, we also appreciate that the Hearing Officer’s interpretation of Water Code section 1004 is neither a judgment about the value of the continued operation of El Sur Ranch nor a final determination or action by the Water Board interpreting or applying Section 1004.

El Sur Ranch strongly objects to the applicability of Section 1004 to its operations, which is premised on findings that El Sur Ranch is irrigating “uncultivated areas of land” that are “not devoted to cultivated crops.” A review of the record in this proceeding discloses that based on competent evidence, submitted by the owner and operators of El Sur Ranch and by experts qualified in the areas of agriculture and the rearing of cattle, it is uncontroverted that the pasture was established by the tilling and preparation of ground that had previously been used to grow row crops and that the mixed crop of grasses and other species that comprise the pasture has been tended, maintained, replanted, irrigated, and managed through continued soil disturbance, movement, aeration, husbandry, stewardship, and manipulation of the land and crops.

To reach the conclusion that the irrigated pasture at El Sur Ranch (Pasture) is subject to Section 1004, the Ruling relied upon extrinsic evidence that has not been subject to cross-examination (Ruling, p. 8)¹ and testimony from an unqualified witness, Kit Custis, a geohydrologist with no expertise in agricultural operations.² El Sur Ranch objects to both sources of evidence and it will seek relief from this finding at the appropriate time.

¹ The Ruling acknowledges that the “definition of cultivated and uncultivated lands is inconclusive” and then relies on “other sources [that] may assist in clarifying how the terms may have been understood when section 1004 was adopted in 1914.” The Ruling cites Government publications and decisions in the 1914 era “to support a technical definition under which tillage is a necessary comment of cultivated land.” The interpretation of the use of the term “cultivate” is susceptible to multiple meanings and is appropriately the subject of expert testimony since it’s not a commonly understood concept with a singular meaning. Evidence code sections 451 (f) and 452 (g) and (h). Pursuant to Evidence Code sections 454 and 455, El Sur Ranch is entitled to provide counter argument concerning the propriety of matters for which the hearing officer intends to take judicial notice. Further, the evidence for which the hearing officer intends to take judicial notice, unless subject to cross-examination and the opportunity for submission of counter evidence unduly prejudices El Sur Ranch. Evidence Code section 352.

² The so-called expert testimony of Mr. Custis was demonstrated to not be based on his professional qualifications, background or experience. His testimony was objected to and the hearing officer determined that the testimony would be allowed, the objection noted and that his testimony “will be considered in weighing the evidence.” Nevertheless, it

Responses to Hearing Officer's Scheduling Request

El Sur Ranch recommends the following timeline for the various items as requested by the Hearing Officer. El Sur Ranch requested input from the other Parties to this proceeding in the event that they wanted to advise regarding their views of factors to be taken into account in order to advise the Hearing Officer of an appropriate schedule. None of the other Parties responded to this request. Of course, pursuant to the Ruling they will have 30 days within which to provide their comments.

The estimate below are based upon the experience of experts consulted by counsel for El Sur Ranch, experience dealing with Monterey County and the experience of counsel regarding typical time frames within which applications, environmental review and other matters have been processed by the Water Board and other public entities. We also note that despite estimates, the Water Board has a substantial number of matters currently before it, particularly concerning the Delta. We also recognize that with the ongoing COVID-19 situation, even the most optimistic schedules are unpredictable at best. The timelines below do not take into account delays associated with unanticipated interruptions, increases in workload or constrained working capabilities due to the COVID-19 pandemic.

1. Submission of an amended application reflecting the applicant's currently proposed project, including offstream storage.

The reservoir that will be constructed on what is now pastureland on El Sur Ranch is being designed by engineers at Provost and Prichard. Based on their experience submitting applications to the Water Board, a relatively easy application can take one year. A more complex application may take 1-2 years. Applications go through an internal analysis process that typically involves responding to questions from Water Board staff and, following notice, responding to issues raised by interested parties. As a compromise, El Sur Ranch suggests that 18 months to be allocated for the application process.

2. Completion of environmental documentation under CEQA, including initial study, draft environmental documents, public comment, and final adoptions.

Initial study: Preparation - six months. Discussion/processing - six months.
EIR preparation: Once the environmental consultant is chosen, 12 months.
Public comment, revisions, final adoption, 12 months. Total – 30 months.

was established at Mr. Custis has no qualifications in the agricultural area to determine what is or is not cultivated pasture or cultivated or uncultivated land.

3. Public notice of the amended application and conducting a supplemental hearing to admit the report issued by CDFW, “final in-stream flow regime recommendations, Big Sur River, Monterey County,” and evidence relevant to any revisions to the project.

Public notice of the amended application: 12 months.

Supplemental hearing: 24 months (assuming the draft environmental document is completed within 24 months and it is only a final EIR for the Water Board to approve). In the Hearing Management Plan, El Sur Ranch estimated a timeframe of 18–20 months. Since the Hearing Management Conference, El Sur Ranch has been designing the offstream reservoir in conjunction with its consultant, Provost and Prichard. Despite the previous estimate, it has taken longer to design the reservoir than originally estimated at approximately 120 days. The time estimate of 24 months recognizes that certain elements of the schedule are outside of the control of the Applicant.

4. Submittal of an interim plan and time schedule for diversions while the application for a water right is pending, to protect to the extent feasible public trust resources in the Big Sur River.

El Sur Ranch is currently operating pursuant to an interim plan for diversions while the application for its water right is pending. During the Hearing Management Conference held in March, 2019, El Sur Ranch and the California Department of Fish and Wildlife submitted the proposed Settlement Agreement between the two parties that provides a schedule for the interim plan of operation as follows:

“Until the bypass effective date, ESR may operate pumps and divert until the river flow drops to 10 CFS at which point diversions shall cease. There should be no diversions commencing on Friday night at 5 pm until Monday at 5 pm on Memorial Day and Labor Day weekends and from July 3 at 5 pm until July 5 at 5 am.”

Respectfully submitted,

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Thomas M. Berliner
Duane Morris LLP