

BIG SUR RIVER WATER RIGHTS HEARING
CLOSING BRIEF
OF THE CARMEL RIVER STEELHEAD ASSOCIATION
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The Carmel River Steelhead Association (CRSA) came to the El Sur Ranch hearings with the opinion that CRSA had no objection to some permit for El Sur Ranch provided that the steelhead trout were protected. After the hearings and listening to all arguments by all parties, CRSA believes no permit is legal or warranted.

NO PERMIT SHOULD BE ISSUED.

1: In their case-in-chief, Trout Unlimited provided legal argument and precedent showing why no permit should be issued. While hard to pinpoint where the case-in-chief of Trout Unlimited concisely states its position that no permit should be issued, the transcript of 6-17-11 (page 328 and 329) sums up the position that there was an incorrect baseline used for the permit application, “We have activities that will continue into the future regardless of project approval are part of the base line. Things that will only continue into the future if the project is approved are not part of the base line.” Incorrectly studying the affect of change from the existing unpermitted pumping of 800+ AF of water was pointed out by many of the parties that commented on the DEIR

and has not been satisfied to this point. While the Board does have the right to allow continued pumping during the permit process, the Board does not have the right to allow inaccurate baseline measurements. The Board cannot compare changes to the river using a base line of 800+ AF of pumped water when that amount of water may not be allowed if a permit is denied.

Until studies are made using the baseline of only the riparian water right and comparing change from that baseline, no permit should be granted.

**ANY PERMIT ISSUED MUST HAVE CONDITIONS TO PROTECT THE
PUBLIC TRUST RESOURCES.**

If the board decides that a permit should be issued then that permit must have multiple conditions.

A: EL SUR RANCH CANNOT BE TRUSTED TO MONITOR AND
PROVIDE LIFE SUSTAINING CONDITIONS TO THE RIVER

The statement made by Mr. Hill in the video presented as part of his direct testimony (ESR-13 James Hill video 2:57:12) that El Sur Ranch is pumping water just before it is “wasted” to the ocean must be considered. As Mr. Hill states that any water flowing to the ocean is wasted, he does not place value on the public trust resources that

depend on that water for survival. How can the Board trust any diverter that has made such statements when that diverter is proposing to monitor, provide oxygen, proper temperature and other life sustaining necessities to the river? If the diverter does not value the resources then that diverter will not put forth the effort necessary to provide adequate conditions.

Any monitoring, supplemental or artificial environmental additives to the river must be by an independent third party.

B: ANY PERMIT MUST BE ONLY FOR THE TIME CATTLE
USE THE PASTURE

The El Sur Ranch wants year around water rights yet in cross examination James Hill stated that “In August, we bring in the cows usually mid to late August,” (transcript 6-16-11 page 96) There is no valid legal argument for year around water diversions when the pasture is only used in late summer. There is adequate winter rain to maintain the pasture and supplemental water would only be needed during the time cows actually use the pasture.

Any permit must allow pumping only during the period when cows use the pasture.

C: THE EL SUR RANCH ALREADY RECEIVED CONSIDERABLE
MONEY FROM THE PEOPLE OF CALIFORNIA AND SHOULD NOT BE
ALLOWED TO FURTHER TAKE AWAY PUBLIC TRUST RESOURCES

Under cross examination Mr. Hill stated that the ranch was placed in a conservation easement **after** the ranch knew it did not have a water right. (transcript 6-17-11 page 36 and 37). The act of placing the ranch in a conservation easement resulted in requiring the ranch to find water to irrigate the pasture, purchase additional feed, or abandon the cattle operation. The choice was El Sur Ranch's to make and the choice was to receive \$11,000,000.00 of taxpayer money knowing that operations would have to change. If the ranch could sell 500 feeder cattle per year (which is higher than the noted herd size) at 600 pounds each and at \$1.25 per pound that would amount to \$375,000.00 per year without any expenses. If expenses were about 50%, the net would be reduced to \$187,500.00 per year. If the \$11,000,000.00 was invested at only 2% it would generate \$220,000.00 per year in income. The El Sur Ranch could have abandoned the cattle operation after receiving the conservation easement money and still been ahead financially. In short, the El Sur Ranch is nothing more than a hobby ranch as noted in the policy statement of Tom Hopkins (transcript 6-16-11 page 11 and 12).

The Board must not consider the plight of the owner in their decision; in fact income from the conservation easement, paid for by the public, should diminish the need for a water right that will further cost the public by harming public trust resources.

D: ANY WATER ALLOWED MUST BE CONDITIONAL ON THE TYPE
OF USE LISTED

ESR-42 is a Glossary of Selected Terms presented by El Sur Ranch for their argument that the water required should be based on the category of “**Cropland**” (page 2 of 9). Under the definition of Cropland in the glossary El Sur Ranch provided, the crop must be harvested. Nowhere in its presentation did El Sur Ranch provide any data, witnesses, or evidence that the pasture they irrigate was ever “harvested”. Even “**Hayland**” (page 3 of 9) must be machine harvested and no data, witnesses or evidence was presented showing that. The only classification that fits the pasture that El Sur irrigates is “**Pastureland**”.

Any permit issued to El Sur Ranch must be based on water requirements for Pastureland and not Cropland.

E: STEELHEAD ARE ACTUALLY IN DANGER OF EXTINCTION AND
THE POPULATION IS NOT LARGE AND HEALTHY AS STATED BY EL SUR
RANCH

The one thing that cannot and should not be denied is that steelhead are severely threatened in the Big Sur River. The El Sur Ranch in the DEIR (page 2-18) and through its entire presentation has stated that “the fish population is large and healthy under the conditions of historic diversions”, yet they present no documentation to prove that assertion.

In fact during cross examination of El Sur Fisheries expert Dr. Hanson, he admitted that there are no precise numbers of fish (transcript 6-16-11 page 267) “we certainly don’t have numbers that track a trend or be able to tell us over time how it’s

changed.” Dr Hanson further stated (transcript 6-16-11 page 267-268) that no one knows the carrying capacity of the Big Sur River. Yet another statement made by Dr Hanson, this time in reference to his snorkeling surveys in the lower river showing only around 400 fish (transcript 6-16-11 page 268) “that number would be very low.” Given the testimony of its own expert, it is hard to believe anyone, even the El Sur attorneys, could state that the number of fish is large and healthy.

The opponents of granting El Sur Ranch a permit provided countless evidence to show just how threatened steelhead are in the Big Sur River.

1: CA Dept. of Fish and Game fisheries expert Dr. Titus’s testimony (transcript 6-17-11 page 57) stated that by DFG estimates the population on the Big Sur River has gone down from 300 fish in 1965 to around 100 fish now. That would be a 66 percent decline.

2: Center for Biological Diversity fisheries expert Dave Dettman stated (transcript 7-8-11 pages 35-36) a 2008 review by the Center for Ecosystem Management and Restoration showed “there was evidence that there existed a significant decline in abundance during the last ten years.” Mr. Dettman further stated (transcript 7-8-11 pages 57-58) in comparing the data collected by Dr. Hanson to that collected by Dr. Titus “it appears that at least between 1994 and the current conditions that there’s been a reduction.” Mr. Dettman further stated (transcript 7-8-11 pages 74-75) that the 0.06 juvenile fish per foot reported by Dr. Hanson was critically low.

3: CRSA presented evidence that the population on the Big Sur River has declined from 80 percent to 99.3 percent (CRSA-22 & CRSA-23). CRSA further presented evidence comparing the fall juvenile fish count from the Carmel River of 0.85

fish per foot of river (CRSA-15) to the Big Sur River of 0.06 fish per foot (transcript 7-8-11 page 74). Considering the Carmel River is a dewatered and severely impacted river and can produce .85 fish per foot, the Big Sur River producing 0.06 fish per foot is alarming.

By any measure and by all experts and other witnesses, the population of fish in the Big Sur River has dropped to a critical level. It has moved from listed as federally threatened to actually now in danger of becoming extinct.

If any water permit is issued to the El Sur Ranch the Board must err on the side of conservative requirements. The Board must provide optimal conditions and not minimum conditions for the fish to recover.

G; FLOW REQUIREMENTS MUST BE SET THAT ALLOW
STEELHEAD TO RECOVER.

During the hearing there was quite a lot of testimony regarding flow requirements for steelhead with proposals offered by El Sur Ranch, CA DFG, and the Center for Biological Diversity. One of the objectives of listing a species as threatened is to try to recover the species (transcript 7-8-11 page 73) and a species cannot recover when man only provides for minimum habitat. The only tool we have for providing habitat is by setting flows that allow for that habitat. Flows must be set that allow for optimal habitat (not minimum habitat) for both juvenile and adult steelhead and must provide that habitat at times adults are in the river.

Of the proposals presented, the one that comes the closest to achieve the goal of recovering the federally listed Steelhead Trout is the proposal from CA DFG. CRSA will recommend slight modifications to that proposal.

El Sur Ranch was very good at trying to convince everyone that removing over 300 AF of water in 30 days from an aquifer that is less than 800 AF would not affect surface flows. I will admit I do not have the skill to argue this point, I only ask the Board to put that premise to the logic test. Several people at the hearing tried to make the point that it was illogical to state there would be no affect on the river, and they all came up with the same conclusion; El Sur Ranch did not test far enough out to make a statement that removing 300 AF of water in 30 days will have no affect. I took a class in business statistics when I was in college and I have always remembered the professor's opening remark; "Figures do not lie, but liars figure." I do not wish to accuse the El Sur Ranch of lying, but I do believe we were shown findings that would not hold up if others had the time or money to perform independent tests. CRSA believes that removing water from the Big Sur River will affect the surface flows and we are basing our request on that belief.

1: The Thompson criteria for measuring flow, sets a minimum for migration of steelhead. The Board cannot consider any proposal that only allows for minimum habitat. As stated by Dave Dettman in cross examination, prolonged lowering of a river could further diminish steelhead populations (transcript 7-8-11 page 73) therefore allowing pumping that could lower a river to minimum will more than likely further jeopardize steelhead.

2: The El Sur proposed summer flow levels were set using an arbitrary level of 0.03 feet for juvenile fish rearing and did not consider juvenile fish passage (transcript 6-17-11 pages 38-39-40.) As admitted by Dr. Hanson in those same pages, juvenile fish do migrate. “You would expect those juveniles to migrate from one habitat type to another.” Any flow designed for juvenile fish must be at least 0.05 feet and that is still minimum and not optimal flow.

3: The El Sur flow proposals do not allow for adult migration when adults are in the river. Every group that has studied the Big Sur River reported seeing adult fish in the river from September until April or May. Dr Hanson in the EIR (EIR page 4.3-22) (confirmed in transcript 6-17-11 pages 267-268) reported an adult fish in the river in October. Dr. Titus stated DFG saw adult sea-run fish in the river in August of 1995 and again in fall of 2010 (transcript 6-17-11 pages 268-269.) CRSA provided multiple sightings of sea-run fish in the river starting in September (CRSA-22.) Any flow designed to allow adult fish passage must start in September and not November as proposed by El Sur Ranch.

CRSA recommends the following flow requirements be set before any water is removed from the Big Sur River: September 1 to May 31 Daily median 132 cfs, June 1 to August 31 40 cfs. CRSA would prefer to use the “new gauge” at Andrew Molera. If that gauge is not available then the USGS gauge should be use.

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By Brian LeNeve President

For Carmel River Steelhead Association

