

1 Thomas M. Berliner (SBN 83256)
Jolie-Anne S. Ansley (SBN 221526)
2 **DUANE MORRIS LLP**
Spear Tower
3 One Market Plaza, Suite 2200
San Francisco, CA 94105-1127
4 Telephone: +1 415 957 3000
Fax: +1 415 957 3001
5 tmberliner@duanemorris.com
jsansley@duanemorris.com

6 Attorneys for EL SUR RANCH

7 Kevin Takei (SBN 247429)
8 **CALIFORNIA DEPARTMENT OF FISH
& WILDLIFE**
9 1416 Ninth Street, 12th Floor
Sacramento, CA 95814
10 Tel.: (916) 653-3715
Fax.: (916) 654-3805
11 Email: Kevin.Takei@wildlife.ca.gov

12 Attorneys for CALIFORNIA DEPARTMENT OF
FISH & WILDLIFE

14 **BEFORE THE**

15 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

16 **WATER RIGHT APPLICATION 30166 OF EL**
17 **SUR RANCH, BIG SUR RIVER IN**
MONTEREY COUNTY

JOINT HEARING MANAGEMENT
CONFERENCE STATEMENT AND
HEARING MANAGEMENT PLAN

Date: April 30, 2019
Time: 9:30 a.m.
Room: Conference Room 230 (2nd Fl.)
Location: Joe Serna, Jr. CalEPA Bldg.
1001 I Street
Sacramento, CA 95812
Dial-in: (888) 273-3658
Passcode: 300828

1 **INTRODUCTION**

2 El Sur Ranch (“ESR”) and the California Department of Fish and Wildlife (“CDFW”) hereby
3 submit the following Hearing Management Conference Statement (“Conference Statement”) and
4 Hearing Management Plan (“Plan”). ESR and CDFW are proponents of a Settlement Agreement
5 that seeks to resolve most outstanding issues between these two parties. The unresolved issues in the
6 Settlement Agreement are submitted for resolution to the State Water Resources Control Board
7 (“State Water Board”).

8 **BACKGROUND**

9 The current proceeding before the State Water Board arises out of an application by ESR to
10 divert water from the Big Sur River in Monterey County, California. The Big Sur River is an
11 uncontrolled coastal stream where summer- and wintertime flows can vary from as little as 3 cubic
12 feet per second (“CFS”) to greater than 1,000 CFS.

13 ESR is the farthest downriver diverter on the Big Sur River. It owns and operates two wells
14 on an easement it has with the California Department of Parks and Recreation, which easement is
15 located adjacent to and just north of the Big Sur River. These wells are used to irrigate
16 approximately 267 acres of irrigated pasture.

17 In 2011, the State Water Board held a hearing regarding the application. Both prior to and
18 since the hearing, ESR and CDFW have been negotiating terms for the resolution of all issues raised
19 in the proceedings by those parties. As a show of good faith, ESR began implementing its proposed
20 settlement terms and those agreed to between ESR and CDFW following the hearing. Those
21 measures include limitations on pumping from the wells and implementation of numerous non-flow
22 measures. The flow measures take into consideration the objectives of providing suitable habitat
23 during all life stages for the steelhead fishery and the livelihood of the cattle ranching operation on
24 ESR.

25 The terms of the Settlement Agreement are summarized below and a copy of the Settlement
26 Agreement dated April 15, 2019 is attached as Exhibit C. ESR and CDFW recognize that the
27 Settlement Agreement includes measures that are not within the State Water Board’s jurisdiction and
28 that the terms of the Settlement Agreement within the jurisdiction of the State Water Board will have

1 to be set forth in terms appropriate for a water rights permit.

2 The State Water Board has requested both a Hearing Management Conference Statement
3 (“Conference Statement”) and a Hearing Management Plan (“Plan”). Both the Conference
4 Statement and the Plan are attached hereto as Exhibits A and B, respectively.

5 **SUMMARY OF SETTLEMENT AGREEMENT**

6
7 The following is a general summary of the Settlement Agreement. This summary is to
8 provide the reader with a basic idea of the settlement and does not contain important detail included
9 in the proposed Settlement Agreement attached hereto.

10 ESR agrees not to pump from its two wells during such times as the flow level in the River as
11 measured at USGS gage 11143000 falls below the following benchmark levels (“Bypass”):
12 November 1-April 30 Bypass 75 cfs (if flows drop below 75 cfs, the Bypass is reduced to 55 cfs,
13 subject to specified terms); May 55 cfs; June 1-October 31 23-17 cfs.

14 30-day average pumping rate 5.34 cfs. Maximum annual diversion 1320 AF, not to exceed
15 1087 on 20-year rolling average. Water year October 1-September 30.

16 Provides for a conference year under critical conditions.

17 Flow monitoring and reporting is required.

18 Off-stream reservoir to be constructed on what is now Pumphouse Field. Replacement
19 pasture to be developed on north side of existing irrigated pasture. Interim bypass flows specified
20 until reservoir is built.

21 Specified conditions regarding water use and land management. (See Attachment 1 to
22 Settlement Agreement.)

23 The Settlement Agreement does not resolve all issues. Remaining issues are

- 24 - Implementation of the Stepdown from 23-17 cfs.
- 25 - Reset mechanism when November –April Bypass drops below 75 cfs, is then reset to
26 55 cfs and under what condition it may return to 75 cfs.
- 27 - Bypass implementation effective date following final approval of permit conditions
28 by State Water Board

CONCLUSION

CDFW and ESR respectfully request the following of the State Water Board:

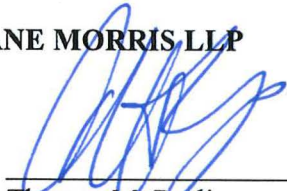
1. The State Water Board give due consideration to the approach suggested by these parties at the upcoming Hearing Conference.
2. That CDFW, ESR, and other parties be afforded an opportunity to work with State Water Board staff to a) prepare settlement agreement conditions subject to the jurisdiction of the State Water Board in an appropriate form, b) prepare amendments to the application for adoption as permit terms, and c) hold a hearing at the appropriate time to consider the permit terms, proposed amendments to the application, and determine the issues not resolved by the Settlement Agreement.
3. The State Water Board accept the Settlement Agreement terms subject to its jurisdiction without material modification

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: April 15, 2019

DUANE MORRIS LLP

By: _____



Thomas M. Berliner
Jolie-Anne S. Ansley
One Market Plaza
Spear Tower, Suite 2200
San Francisco, CA 94105
Telephone: 415.957.3000
Facsimile: 415.957.3001
Email: tberliner@duanemorris.com
jsansley@duanemorris.com

Attorneys for Applicant EL SUR RANCH

Dated: April 15, 2019

CALIFORNIA DEPARTMENT OF FISH & WILDLIFE

By: _____



Kevin Takei
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
Tel.: (916) 653-3715
Fax.: (916) 654-3805
Email: Kevin.Takei@wildlife.ca.gov

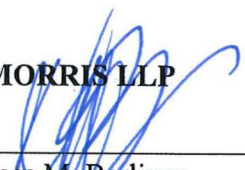
Attorneys for CALIFORNIA DEPARTMENT OF
FISH & WILDLIFE

1 issues, hydrologic issues, and possibly ranch management issues.

2 At this time neither ESR nor CDFW anticipate making any motions in advance.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: April 15, 2019

DUANE MORRIS LLP
By: 
Thomas M. Berliner
Jolie-Anne S. Ansley
One Market Plaza
Spear Tower, Suite 2200
San Francisco, CA 94105
Telephone: 415.957.3000
Facsimile: 415.957.3001
Email: tberliner@duanemorris.com
jsansley@duanemorris.com

Attorneys for Applicant EL SUR RANCH

Dated: April 15, 2019

CALIFORNIA DEPARTMENT OF FISH & WILDLIFE
By: 
Kevin Takei
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
Tel.: (916) 653-3715
Fax.: (916) 654-3805
Email: Kevin.Takei@wildlife.ca.gov

Attorneys for CALIFORNIA DEPARTMENT OF FISH & WILDLIFE

1 EXHIBIT A

2 JOINT HEARING MANAGEMENT CONFERENCE STATEMENT

3 By letter dated March 28, 2019, the State Water Board requested ESR and CDFW to submit
4 an update to the status of their conversations with other hearing participants concerning the
5 settlement terms and a Hearing Management Plan by April 14, and to appear at a hearing with all
6 parties on April 30, 2019 regarding the application by El Sur Ranch (“ESR”) to divert water through
7 pumps located on its property adjacent to the Big Sur River, Monterey County, California.

8 1. Application: 30166, Filed July, 1992

9 2. Hearing held: June 16, 17, July 8, 11, 2011.

10 3. Further proceedings: Amendment to application for off-stream reservoir storage and
11 additional place of use. Compliance with California Environmental Quality Act to address
12 amendments to application.

13 4. Are additional hearings required? Yes. A hearing will be required on proposed
14 Settlement Agreement, outstanding issues submitted to the State Water Board by ESR and CDFW,
15 consideration of amended application.

16 5. Conversations with other hearing participants: The other parties to the proceeding
17 received a draft of the Settlement Agreement on March 1, 2019. ESR and CDFW held a conference
18 call with the other parties to the proceeding on April 4, 2019. During the call ESR and CDFW went
19 through each of the Settlement Agreement’s terms and the outstanding issues to be referred to the
20 State Water Board. ESR and CDFW would like to receive an early indication of issues that remain
21 of concern to the other parties so they may be addressed at a hearing.

22 6. Additional considerations: ESR will need time to prepare an amended application
23 supported by appropriate engineering information and environmental analysis concerning the
24 proposed off-stream storage and environmental information concerning the proposed new place of
25 use, as well as environmental review of the proposed amended application. Estimated timeframes to
26 prepare the aforementioned information is presented below.

27 7. Estimated length of time required for hearing: 3 days.

28

1
2 **8.** Proposed hearing dates: No hearing date is proposed at this time because ESR and
3 CDFW have not agreed upon one. ESR recommends that a hearing date be scheduled to permit the
4 preparation of the necessary environmental and engineering information, the amended application
5 for a water rights permit, opportunity for the parties and other interested persons to comment on the
6 environmental and engineering information, preparation of written testimony, analysis of that written
7 testimony, and preparation for hearing. Assuming that the engineering information could be prepared
8 within the next 120 days; settlement agreement conditions subject to the jurisdiction of the State
9 Water Board in an appropriate form are prepared with input from State Water Board staff; an
10 amended application is filed at the State Water Board within 150 days; a contractor is available to
11 prepare the environmental documentation; the contractor could complete environmental review
12 within a nine month timeframe if it will be possible to use the same environmental consultant,
13 Atkins, that prepared the current environmental impact report (SCH No. 2006061011, May 2011);
14 the parties and other interested persons are afforded 30 days to review and comment on the
15 environmental documentation; and the parties are afforded sufficient time to prepare for a hearing
16 (+30 days), including the submittal of written testimony (+30 days) and review thereof (+30 days);
17 then ESR believes it appropriate to schedule a hearing in approximately 18-20 months. CDFW
18 prefers a hearing date be scheduled sooner than 18-20 months and that preparation of an amended
19 application and related environmental and engineering information be included in a compliance
20 schedule as part of any order issued after a hearing.

1 Dated: April 15, 2019

DUANE MORRIS LLP

2 By: _____

3 Thomas M. Berliner
4 Jolie-Anne S. Ansley
5 One Market Plaza
6 Spear Tower, Suite 2200
7 San Francisco, CA 94105
8 Telephone: 415.957.3000
9 Facsimile: 415.957.3001
10 Email: tmlberliner@duanemorris.com
11 jsansley@duanemorris.com

12 Attorneys for Applicant EL SUR RANCH

13 Dated: April 15, 2019

CALIFORNIA DEPARTMENT OF FISH & WILDLIFE

14 By: _____

15 Kevin Takei
16 1416 Ninth Street, 12th Floor
17 Sacramento, CA 95814
18 Tel.: (916) 653-3715
19 Fax.: (916) 654-3805
20 Email: Kevin.Takei@wildlife.ca.gov

21 Attorneys for CALIFORNIA DEPARTMENT OF
22 FISH & WILDLIFE
23
24
25
26
27
28

1 **EXHIBIT B**

2 **HEARING MANAGEMENT PLAN**

3 ESR and CDFW agree that the record should not be reopened in this proceeding except as is
4 specifically and narrowly necessary to address facts that are in dispute. The parties and interested
5 persons have had an opportunity to address issue of concern and reopening the record to address
6 issues that were the subject of policy statements or evidence is unnecessary and inappropriate.
7 However, ESR and CDFW agree that the record should be reopened to address the facts that are in
8 dispute in the Settlement Agreement and to address new issues raised by the settlement. In
9 particular, the record should be reopened to address the issues concerning:

- 10 - Implementation of the Stepdown from 23-17 cfs.
11 - Reset mechanism when November –April Bypass drops below 75 cfs, is then reset to
12 55 cfs and under what condition it may return to 75 cfs.
13 - Bypass implementation effective date following final approval of permit conditions
14 by State Water Board
15 - The amended application issues regarding the off-stream reservoir and the additional
16 place of use.
17 -

18 **I. Any facts to which ESR and CDFW Can Stipulate**

19 A multitude of facts were raised in this proceeding by various witnesses. It does not appear
20 to ESR or CDFW that it is necessary to identify each and every fact to which these parties agree or
21 disagree, but rather that the focus should be on those facts that are supportive of the SA and those
22 new facts that may be raised by other parties to the proceeding in response to the SA. To that end,
23 ESR and CDFW agreed on the following factors as detailed in the SA:

- 24 - Bypass would be measured at USGS gage 11143000
25 - From November 1-April 30, the Bypass would be at 75 cfs. When flows are below
26 75 cfs for 14 consecutive days then on the 15th day a 55 cfs Bypass would apply.
27 - From May 1-May 31, the Bypass would be at 55 cfs.
28

- 1 - From June 1 – October 31 the Bypass would be at 23 – 17 cfs. The flow requirement
- 2 is 23 cfs. However, the Parties agree that pumping may continue after the flow drops
- 3 below 23 cfs so long as the pumping rate is reduced and there is a complete cessation
- 4 of pumping when flow is 17 cfs.
- 5 - 30-day average pumping rate 5.34 cfs. Maximum annual diversion 1320 AF, not to
- 6 exceed 1087 on 20-year rolling average. Water year October 1-September 30.
- 7 - Flow monitoring and reporting is required.
- 8 - A conference year under critical conditions is available.
- 9 - Off-stream reservoir to be constructed on what is now Pumphouse Field.
- 10 Replacement pasture to be developed on north side of existing irrigated pasture.
- 11 - Interim bypass flows specified until the Bypass becomes effective.
- 12 - Use and replacement of water in off-stream reservoir allowed.
- 13 - Specified conditions regarding water use and land management. (See Attachment 1 to
- 14 Settlement Agreement.)

15 **II. The Specific Areas of Fact and Law that Are In Dispute**

16 ESR and CDFW were unable to come to agreement on the following factors:

- 17 - Implementation of the Stepdown from 23-17 cfs. ESR and CDFW agree on the
- 18 appropriateness of the Stepdown range and that there would be a reduction in rates of
- 19 pumping, but do not agree on the reduced rate of pumping and by implication the
- 20 impact of pumping on river flow or stage.
- 21 - Reset mechanism when November –April Bypass drops below 75 cfs, is then reset to
- 22 55 cfs and under what condition it may return to 75 cfs. CDFW’s view is that the
- 23 Bypass should drop from 75 cfs to 55 cfs once flow is below 75 cfs for 14
- 24 consecutive days and return to the 75 cfs if the flow increases above 75 cfs for 1 day.
- 25 It is ESR’s view that an increase in Bypass flow from 55 cfs to 75 cfs should be on
- 26 the same timescale as the reduction in Bypass flow, e.g. 14 consecutive days to go
- 27 from 75 cfs down to 55 cfs and 14 consecutive days to go up from 55 cfs to 75 cfs.
- 28

- 1 - Bypass implementation effective date following final approval of permit conditions
2 by State Water Board. This time is primarily necessary to process the permits for
3 approval and construction of the storage reservoir. It is CDFW’s view that ESR
4 should be allowed 24 months from the time the State Water Board’s order is “final”.
5 It is ESR’s view that it should be allowed 60 months with the time tolled while an
6 agency is processing and “finalizing” the permit.

7 It is unknown what issues may be raised by other parties or as a result of CEQA review.
8 ESR and CDFW reserve the right to address those issues as well.

9 **III. The Disputed Factual Issues on which ESR and CDFW Intend to Present Evidence
10 in the Supplemental Hearing**

- 11 - Implementation of the Stepdown from 23-17 cfs.
12 - Reset mechanism when November –April Bypass drops below 75 cfs, is then reset to
13 55 cfs and under what condition it may return to 75 cfs.
14 - Bypass implementation effective date following final approval of permit conditions
15 by State Water Board.

16 While not disputed, ESR and CDFW will or may present evidence to support the terms of the
17 SA and the amended application for the storage reservoir and the additional place of use.

18 **IV. Amount of Time Necessary to Conduct the Supplemental Hearing Including the
19 Number of Expert Witnesses CDFW and ESR Plan to Call and Any Motions They
20 Plan to Make in Advance of the Hearing.**

21 ESR and CDFW estimate the supplemental hearing will require up to three days.

22 ESR anticipates it will call as witnesses Mr. James Hill and experts to address crop water
23 needs (1 witness), biological issues (2 witnesses), other environmental issues (1 witness), and
24 hydrologic issues (1 witness).

25 CDFW anticipates it will call as expert witnesses to address biological and scientific studies
26 issues, hydrologic issues, and possibly ranch management issues.

27 At this time neither ESR nor CDFW anticipate making any motions in advance.
28

1 Dated: April 15, 2019

DUANE MORRIS LLP

2 By: _____

3 Thomas M. Berliner
4 Jolie-Anne S. Ansley
5 One Market Plaza
6 Spear Tower, Suite 2200
7 San Francisco, CA 94105
8 Telephone: 415.957.3000
9 Facsimile: 415.957.3001
10 Email: tberliner@duanemorris.com
11 jsansley@duanemorris.com

12 Attorneys for Applicant EL SUR RANCH

13 Dated: April 15, 2019

CALIFORNIA DEPARTMENT OF FISH & WILDLIFE

14 By: _____

15 Kevin Takei
16 1416 Ninth Street, 12th Floor
17 Sacramento, CA 95814
18 Tel.: (916) 653-3715
19 Fax.: (916) 654-3805
20 Email: Kevin.Takei@wildlife.ca.gov

21 Attorneys for CALIFORNIA DEPARTMENT OF
22 FISH & WILDLIFE
23
24
25
26
27
28

1 EXHIBIT C

2
3 DRAFT SETTLEMENT AGREEMENT
4 DATED APRIL 15, 2019

5
6 DRAFT.

7 EL SUR RANCH SETTLEMENT PROPOSAL
8 TO DEPARTMENT OF FISH AND WILDLIFE

9 **Privileged and Confidential. Settlement Communication.**
10 **Not Admissible Pursuant to Evidence Code Section 1152.**

11 The following represent settlement terms and principles to be agreed to between El Sur
12 Ranch ("E.S.R.") and the Department of Fish and Wildlife ("CDFW") regarding resolution of the
13 CDFW protest before the State Water Resources Control Board ("Water Board") concerning
14 Application No. 30166. These terms are proposed consistent with the Principles agreed to between
15 CDFW and E.S.R. E.S.R. and CDFW are each referred to as a "Party" or collectively as the
16 "Parties."

17 The Parties agree as follows.

18 PRELIMINARY MATTERS

19 A. The Parties agree to advocate for the terms of settlement with all parties who
20 provided negative comments in the Water Board proceedings and to advocate to the Water Board
21 that the settlement should be adopted in its entirety without material modification. However, the
22 Parties also recognize that there are issues the Parties could not reach agreement on and as a result
23 require resolution by the Water Board.

24 B. In the event that the Water Board adopts an order inconsistent with this agreement or
25 should the order require more of E.S.R. than agreed to by the Parties, E.S.R. shall have the right to
26 withdraw from this settlement and to object and challenge the Water Board's order. In the event that
27 the Water Board's order does not provide the level of protection sought by CDFW, CDFW shall
28 have the right to withdraw from this settlement and to object and challenge the Water Board's order.
Prior to either Party withdrawing from the settlement, they shall promptly meet and confer in an
effort to develop a compromise agreement among themselves that meets the needs of both Parties. If
neither Party opposes the order of the Water Board, which differs in any material respect from this
Agreement, this Agreement shall be deemed modified to be consistent with the Water Board's order.

C. CDFW understands that E.S.R. has, as a measure of good faith, started implementing
measures from Attachment 1. To the extent CDFW can verify such implementation, those measures
will be part of the settlement and compliance with a Water Board order. The completed measures
and those underway will not be deemed to be part of the baseline. The parties agree to advocate this
treatment of the implemented measures to the Water Board.

1 1. Diversion Limits

2 a. E.S.R. agrees to not pump or to reduce the rate of pumping, as applicable, from its
3 two wells that divert water from what E.S.R states is the subterranean flow of the Big Sur River and
4 what CDFW states is the Big Sur River (without supporting either party’s characterization, this
5 documents refers to both characterizations as the “River”), during such times as the flow level in the
6 River, as measured at the USGS gage 11143000 (the “Upper Gage”), falls below the benchmark
7 levels set forth below. The benchmark levels are referred to as the Bypass. River flow will be
8 measured on a daily mean and that information can be accessed on the website provided by the
9 USGS for the Upper Gage here:

10 https://nwis.waterdata.usgs.gov/ca/nwis/dv?cb_00010=on&cb_00060=on&format=html&site_no=11143000&referred_module=sw&period=&begin_date=2017-03-05&end_date=2018-03-05

11 b. From November 1-April 30, the Bypass shall be at 75 cfs. The Parties also agree that
12 when flows are below 75 cfs for 14 consecutive days then on the 15th day a 55 cfs Bypass would
13 apply. The Parties are not in agreement as to when the 55 cfs Bypass is reset to 75 cfs and as a
14 result it is mentioned in section 6.b. below.

15 c. May 1- May 31: 55 cfs

16 d. June 1 – October 31: 23 – 17 cfs. The flow requirement is 23 cfs. However, the
17 Parties agree that pumping may continue after the flow drops below 23 cfs so long as the pumping
18 rate is reduced and there is a complete cessation of pumping when flow is 17 cfs (the “Stepdown”).
19 The Parties are not in agreement as to the pumping reductions during the Stepdown and as a result it
20 is mentioned in section 6.a. below.

21 e. 5.84 cfs E.S.R. maximum instantaneous pumping rate, year round.

22 f. 5.34 cfs E.S.R. pumping rate on a 30-day average, year round.

23 g. Maximum annual diversion amount 1320 AF per year, not to exceed 1087 AFY on a
24 20-year rolling average. The year is measured October 1-September 30.

25 h. Conference Year. A Conference Year (CY) occurs in a critically dry year that was
26 preceded by a normal or dry year (the year type can be determined based on the flows in Attachment
27 2) in which there were at least three months of reduced diversions (i.e. reduced diversions for a
28 portion of the month resulting in an inability for E.S.R. to complete an irrigation cycle based on
direct diversion for use) due to application of the bypass flow requirements. In a CY, the parties
agree to examine the condition of the river, whether or not passage exists and under what conditions,
the presence or absence of steelhead seeking passage between habitat units in the river and lagoon
within the zone of influence of the pumps, and to determine if a program could be implemented that
will permit limited pumping sufficient to keep the pasture alive, prevent the creation of dust
conditions and protect against the growth of noxious weeds and the occurrence of invasive plants. In
a CY, pumping would occur from the Old Well only, unless conditions exist at times when use of the
new well would not have a material impact on river flows needed for the fishery purposes set forth in
this paragraph.

29 2. Monitoring

30 a. E.S.R. has and will maintain flow meters at each well used in the irrigation of the
31 pasture. E.S.R. will record, on an hourly basis, the volume and rate of diverted water from each
32 well, including instantaneous and cumulative diversion amounts (the “Monitoring Data”).

33 b. E.S.R. shall maintain Monitoring Data for at least 10 years from the date of
34 collection. E.S.R. shall provide the Water Board and CDFW the data by the 15th day of each month

1 beginning with the first month after the Bypass Effective Date (defined in section 4.a. below). After
2 18 months of providing the data to the Water Board and CDFW, E.S.R. may change the frequency it
3 provides data to the 15 day of every third month (i.e. quarterly basis). After 18 months of providing
4 the data to the Water Board and CDFW on a quarterly basis, E.S.R. may change the frequency it
5 provides data to an annual basis.

6 c. If E.S.R. intends to change the frequency by which it provides data as provided in
7 section 2.b. above, E.S.R. shall inform the Water Board and CDFW of such intent at least 30 days
8 before the next date that data would be provided. E.S.R. may proceed with changing the frequency
9 of providing data if the neither the Water Board nor CDFW object to such change within 30 days of
10 receiving notice of E.S.R.'s intent. If either the Water Board or CDFW object to a change in the
11 frequency, E.S.R. will continue the frequency of providing data for an additional 9 months before
12 E.S.R. may seek to change the frequency again.

13 d. E.S.R. will also provide the monitoring data to the Water Board or CDFW upon
14 request of either entity. E.S.R. will provide the data within two business days of such request.

15 3. Reservoir

16 a. E.S.R. intends to construct a reservoir on the Pumphouse Field. E.S.R. is also
17 considering construction of a second reservoir at a location to be determined. To replace the land lost
18 to the Pumphouse Field reservoir, E.S.R. intends to develop additional pasture on the north side of
19 the existing pasture in an area that is not habitat to listed endangered species and uses, per acre and
20 in total, less water than the Pumphouse field. CDFW supports the concept of the reservoirs and
21 replacement pasture. However, until CDFW receives specific information about the reservoirs and
22 replacement pasture it reserves its support for the specific proposal.

23 b. If water is to be removed from the Pumphouse Field reservoir and immediately used
24 in fighting an active fire or requested by a public agency to be immediately used for some other
25 public health and safety emergency, E.S.R. shall be permitted to divert a sufficient amount of water
26 to replace what was taken. E.S.R. shall in said instance either refill the lost water within the
27 limitations set forth herein or if that is not practical, then E.S.R. may exceed the limitations by 10%
28 or if the allowable diversion is at zero, then at a rate of pumping of approximately 0.5 CFS, until the
reservoir is refilled. E.S.R. may exceed the limitations set forth herein only if the public agency that
removed the water provides E.S.R. the quantity of water removed and the means by which the
quantity was measured. E.S.R. will provide CDFW that information from the public agency before
exceeding the limitations.

4. Interim Diversion

a. The Parties are not in agreement as to the date or time when the Bypass becomes
effective ("Bypass Effective Date"), and that is mentioned in section 6.c. below.

b. Until the Bypass Effective Date, E.S.R. may operate its pumps and divert until the
river flow drops to 10 cfs at which point diversions shall cease. There shall be no diversions
commencing on Friday night at 5:00 pm until Monday at 5:00 pm on Memorial Day and Labor Day
weekends and from July 3 at 5:00 pm until July 5 at 5 am.

5. Recalculation of Bypass

If USGS gage number 11143010 ("Lower Gage") is made operational and permanent
funding is provided to maintain and otherwise operate the Lower Gage, once the upper and Lower
Gages are synchronized, E.S.R. can request and CDFW will recalculate the Bypass to be at the
Lower Gage. Either Party may then request a modification to the Water Board's Order, or other
applicable procedural mechanism, to measure the recalculated Bypass at the Lower Gage.

1 6. Terms to be resolved by the Water Board

2 a. Stepdown: as mentioned in section 1.d. above, the Parties have not reached agreement
3 as to how the Stepdown would be implemented. CDFW proposes that the flow requirement is 23
4 cfs, but that E.S.R. may continue to operate its pumps such that net river flow never drops below 17
5 cfs. Net river flow is calculated by subtracting the instantaneous pumping rate from the river flow.
6 Under CDFW's proposal, once river flow decreases below 23 cfs, E.S.R. is to reduce its
7 instantaneous pumping rate to maintain net river flow at 17 cfs or higher. E.S.R. proposes the
8 following:

6 < 23 – 21 cfs. Maximum rate of pumping 4.8 cfs.

7 < 21 – 19 cfs. Maximum rate of pumping 4.3 cfs.

8 < 19 – 17 cfs. Maximum rate of pumping 3.8 cfs.

9 b. Bypass reset from 55 cfs to 75 cfs: As mentioned in section 1.b. above, the Parties
10 agree that from November 1-April 30, the Bypass shall be at 75 cfs. The Parties also agree that
11 when flows are below 75 cfs for 14 consecutive days then on the 15th day a 55 cfs Bypass would
12 apply. The Parties have not reached agreement as to when the 55 cfs Bypass would reset to 75 cfs.
13 E.S.R. proposes that the 55 cfs Bypass does not return to 75 cfs until flows return to or exceed 75 cfs
14 for 14 consecutive days. Stated differently, if flows return to or exceed 75 cfs for 14 consecutive
15 days, the Bypass would reset to 75 cfs. For illustrative purposes, if from January 1-14, flows are at
16 70 cfs, during this time there should be no pumping. If on January 15 the flow is at 70 cfs, the
17 Bypass is lowered to 55 cfs and pumping may occur. On January 20 the flow rises to or exceeds 75
18 cfs and if it continues for 14 consecutive days the 75 cfs Bypass applies again. If on February 4 the
19 flow is at 70 cfs and continues for 14 consecutive days the 55 cfs Bypass would apply again. The
20 reason for the lowered Bypass of 55 cfs is to recognize variability in water year types and allow
21 some pumping during the drier years. CDFW proposes that the 55 cfs Bypass would return to 75 cfs
22 once flows return to or exceed 75 cfs. The flows do not need to meet or exceed 75 cfs for 14
23 consecutive days. Under CDFW's proposal the example is modified as follows: on January 20 the
24 flow rises to or exceeds 75 cfs and as a result the 75 cfs Bypass applies again. If on January 21 the
25 flow is at 70 cfs, pumping must stop and the counting up to 14 consecutive days begins again before
26 the 55 cfs Bypass may apply.

27 c. Bypass Effective Date: As mentioned in section 4 above, the Parties have not reached
28 agreement as to the date or time of the Bypass Effective Date. E.S.R. expects that permitting and
29 construction of the Pumphouse Field reservoir could take at least 5 years from the time of "Final"
30 action by the State Water Board to obtain all additional required permits and to develop the reservoir
31 (including completion of construction). When used in this section, the term "Final" in all of its
32 forms, includes exhaustion of all judicial reviews or other proceedings. E.S.R. proposes that the
33 Bypass Effective Date be when the Pumphouse Field reservoir is fully operational, which requires
34 certification by an authorized engineer and all permits, provided that E.S.R.: a) files annual progress
35 reports with the Board, b) the Board does not make a final determination that the E.S.R. has not been
36 diligent in seeking to complete the reservoir construction and E.S.R. has not taken more than 5 years
37 to complete its tasks necessary for obtaining all permits. Time taken by permitting agencies and any
38 judicial processes is not included in calculating E.S.R.'s 5 year timeframe, that is, the 5 years is
39 tolled during the time that an agency is processing and finalizing a permit or other application for
40 E.S.R. CDFW proposes that the Bypass Effective Date be 24 months from a Final Order by the
41 Water Board with "Final Order" defined as the exhaustion of all appeals, including CEQA, CWA
42 Section 401 certification and other regulatory and judicial review(s) of an order or other action by
43 the Water Board on this matter.

1 7. Water Board Order

2 The Parties recognize that these terms will have to be reduced into a form which is
3 capable of being incorporated into a Water Board order and permit terms. The Parties agree to work
4 cooperatively with the Water Board to prepare permit terms in a form acceptable to the Water Board
5 but without material modification to such terms.

6 8. Support

7 E.S.R. and CDFW will support implementation of the settlement agreement. Such support
8 could include, but is not required to be except within CDFW's sole discretion, CDFW
9 supporting any permitting applications submitted by E.S.R. to another public agency.

10 9. Form of Settlement Agreement

11 Shortly after finalization of the terms in this document, the Parties will provide it to the
12 Water Board as a term sheet containing the terms that are in agreement and to be resolved by the
13 Water Board ("Term Sheet"). Separate from submitting the Term Sheet to the Water Board, the
14 Parties also agree to develop a settlement agreement memorializing the final terms of settlement that
15 is consistent with this document, including typical boilerplate, including but not limited to, binding
16 nature, settlement of all claims unless excepted, waiver, entire agreement, uncontrollable forces,
17 representation by counsel, warranties, partial invalidity, assignability, notice, no third-party
18 beneficiary, and others. Developing such a settlement agreement will not delay submitting the Term
19 Sheet to the Water Board.

20
21
22
23
24
25
26
27
28
**Privileged and Confidential. Settlement Communication.
Not Admissible Pursuant to Evidence Code Section 1152.**

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 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. *Nearly complete. Upgraded to variable speed drive.*
- (iii) R-3 – Night irrigation during low flow period. *This will not be possible under the sliding scale reduced rate of diversion approach requested by CDFW*
- (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*

1 water than used by Pumphouse field. Pumphouse field reservoir would be filled primarily
2 during high flow events on an opportunistic basis.

3 (vi) R-11 – Expand tailwater pond. *This may or may not be practical, depending*
4 *upon the results of the SDI study. If there is excess tailwater after irrigation improvements*
5 *have been made such that there is a material amount of water to be produced.*

6 (vii) R-12 – Build new tailwater recovery pond. *See R-11.*

7 (viii) R-13 – Build small night pond catchment in Swiss Canyon drainage.
8 *CDFW/U.S.F.W.S. will have to determine if this can be permitted. Utility of a night pond will*
9 *depend upon the authority to fill it on a regular basis.*

10 (ix) R-15 – Modify Pumphouse field irrigation practices. *This is being explored at*
11 *this time.*

12 (x) R-17 – Pre-irrigate. *This will be instituted if a flow regimen is instituted that*
13 *permits pre-irrigation.*

14 (xi) R-18 – Install soil moisture gauges. *In process.*

15 (xii) R-20 – Improve dryland rangeland conditions. *In process.*

16 (xiii) R-22 – CDFW to provide permit and funding assistance.

17 (xiv) R-23 – Weed abatement. *Ongoing.*

18 (xv) R-24 – Watershed management. *E.S.R. has been working with Monterey Co.*
19 *watershed management process. Completed.*

20 (xvi) R-25 – Prepare water conservation and operational management plan.
21 *Completed. See Orrin Sage (2012).*

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

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

26 b. Meters shall keep a log of all water use. E.S.R. shall use its best efforts to keep a
27 daily log of all water use and shall make these records available to the Board and the Department of
28 Fish and Wildlife.

29 c. E.S.R. shall employ a fisheries biologist to periodically assess conditions in the
30 B.S.R. within the zone of influence of the E.S.R. wells and of the lagoon. The fisheries biologist, or
31 appropriately supervised personnel working under the direction of the biologist, shall take the
32 following measurements once monthly between May 1 and October 31: (1) deploy water
33 temperature monitoring units at three locations (near the old U.S.G.S. 11143010 gauge site, adjacent
34 to the E.S.R. wells, and in the lagoon) to monitor and record temperature at 10-minute intervals; (2)
35 grab sample measurements of water temperature, dissolved oxygen, and electrical conductivity at a
36 location adjacent to the E.S.R. wells and at two locations in the lagoon (near the head of the lagoon
37 and mid-lagoon); and (3) conduct a visual inspection of the river between the lower U.S.G.S. gauge
38 site and the lagoon to characterize surface water connectivity among habitat units (identify any areas
39 that are dewatered), potential passage barriers or impediments, and areas where potential juvenile

1 stranding may occur as flows decrease. Results of monitoring will be reported to CDFW each year
2 for the first five years of permit implementation.

3 d. The following biological measures are taken from the 2012 joint efforts of biologists
4 Rob Titus/Chuck Hanson. If grant funding is available for any of these measures, CDFW will
5 support E.S.R.'s efforts to obtain grant funding. These are measures that are being considered for
6 future deployment and may or may not involve E.S.R. To the extent E.S.R. becomes involved with
7 these measures, such involvement will be subject to the same funding parameters as implementation
8 of the ranching and land management BMPs.

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

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

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

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

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

19 - Participate in the watershed wide management plan process. *Completed.*
20
21
22
23
24
25
26
27
28

Attachment 2

[insert Exhibit DFG-C-4]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 *Water Right Application 30166 of El Sur Ranch, Big Sur River in Monterey County*

3 I am a citizen of the United States, over the age of 18 years, and not a party to this action. I
4 am an employee of Duane Morris LLP and my business address is One Market, Spear Tower, Suite
5 2200, San Francisco, California 94105. I am readily familiar with this firm’s practices for collecting
6 and processing correspondence for mailing with the United States Postal Service and for transmitting
7 documents by FedEx, fax, email, messenger and other modes. On the date stated below, I served the
8 following documents:

9 **JOINT HEARING MANAGEMENT CONFERENCE STATEMENT AND HEARING
10 MANAGEMENT PLAN**

11 **BY ELECTRONIC SERVICE:** I caused the documents to be sent to the person(s) at
12 the e-mail addresses listed on the attached Service List. I did not receive, within a
13 reasonable time after the transmission, any electronic message or other indication that
14 the transmission was unsuccessful.

15 *Please See Attached Service List*

16 I declare under penalty of perjury under the laws of the State of California that the foregoing
17 is true and correct. Executed on April 15, 2019, at San Francisco, California.

18 
19 Blanca Herrera

20 DM2\9851603.1

HEARING REGARDING WATER RIGHT APPLICATION 30166 FILED BY EL SUR RANCH
(BIG SUR RIVER) – MONTEREY COUNTY

HELD ON
JUNE 16, 17, 2011
AND JULY 8, 11, 2011

UPDATED SERVICE LIST
(March 28, 2019)
corrected for typographical errors

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

<p>EL SUR RANCH Mr. Tom Berliner Duane Morris LLP One Market Plaza, Suite 2200 San Francisco, CA 94105 tmberliner@duanemorris.com (415) 957-3333</p> <p>updated 02/27/19</p>	<p>CALIFORNIA DEPARTMENT OF FISH & WILDLIFE Mr. Kevin Takei 1416 Ninth Street, 12th Floor Sacramento, CA 95814 Kevin.Takei@wildlife.ca.gov (916) 653-3715</p> <p>updated 06/22/16</p>
<p>TROUT UNLIMITED Mr. Brian Johnson 2239 5th Street Berkeley, CA 94710 bjohnson@tu.org (510) 528-4772</p>	<p>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 (323) 533-4416</p> <p>CALIFORNIA SPORTFISHING PROTECTION ALLIANCE Mr. Chris Shutes 1608 Francisco St. Berkeley, CA 94703 blanpaloma@msn.com (510) 421-2405</p> <p>updated 03/07/19</p>

CARMEL RIVER STEELHEAD ASSOCIATION Mr. Brian LeNeve P.O. Box 1012 Carmel, CA 93921 bjleneve@att.net (831) 624-8497	
---	--

THE FOLLOWING ARE INTERESTED PERSONS WHO WILL PARTICIPATE BY POLICY STATEMENT ONLY. IT IS NOT NECESSARY TO SERVE THEM WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS.

CALIFORNIA STATE PARKS Mr. Stephen Bachman 2211 Garden Road Monterey, CA 93940 stephen.bachman@parks.ca.gov (831) 649-2862 updated 06/02/16	CAL FIRE Mr. Richard Hutchinson 2221 Garden Road Monterey, CA 93940 Rick.hutchison@fire.ca.gov (831) 333-2600
CALIFORNIA CATTLEMEN'S ASSOCIATION Mr. Justin Oldfield 1221 H Street Sacramento, CA 95814 Justin@calcattlemen.org (916) 444-0845	FRIENDS OF THE RIVER Mr. Steve Evans 1418 20 th Street, Suite 100 Sacramento, CA 95811 sevans@friendsoftheriver.org (916) 442-3155 ext 221
VENTANA WILDERNESS ALLIANCE Mr. Tom Hopkins P.O. Box 506 Santa Cruz, CA 95061 tom@ventanawild.org (831) 566-9988 updated 06/07/16	MONTEREY COUNTY CATTLEMEN'S ASSOCIATION Mr. Aaron Johnson 295 South Main Street, Suite 600 Salinas, CA 93901 Aaron@johnsonmoncrief.com (831) 759-0900
MONTEREY COASTKEEPER Mr. Steve Shimek 475 Washington Street, Suite A Monterey, CA 93940 exec@montereycoastkeeper.org (831) 646-8837 ext 114	BIG SUR RIVER INN Mr. Alan Perlmutter Highway One at Pheneger Creek Big Sur, CA 93920 alan@bigsurriverinn.com (831) 667-1250

<p>NATIONAL MARINE FISHERIES SERVICE Mr. David Hines & Mr. Devin Best David.Hines@noaa.gov Devin.Best@noaa.gov (707) 578-8553</p>	<p>DEPARTMENT OF ECOLOGY & EVOLUTIONARY BIOLOGY, LONG MARINE LAB UNIVERSITY OF CALIFORNIA SANTA CRUZ Dr. Peter Raimondi Santa Cruz, CA 95060 raimondi@biology.ucsc.edu (831) 459-5674</p>
<p>CENTRAL COAST LIGHTHOUSE KEEPERS Mr. John O'Neil P.O. Box 223014 Carmel, CA 93922 johnoneil@montereybay.com (831) 647-8261</p>	<p>Mr. Butch Kronlund 48280 Highway 1 Big Sur, CA 39320 bpkronlund@aol.com (831) 667-0332</p>