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 11 STATE OF CALIFORNIA

12 STATE WATER RESOURCES CONTROL BOARD

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 14 In the Matter of:
 15 Hearing Regarding Water Rights Application
 16 30166 of El Sur Ranch

TESTIMONY OF BRIAN J. JOHNSON

Hearing Date: June 16, 2011
 Time: 9:00 a.m.

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1 I am testifying on behalf of Trout Unlimited. Trout Unlimited is the nation's oldest and
2 largest coldwater conservation organization, with approximately 150,000 members nationwide
3 and almost 15,000 in California. The group's mission is to protect, conserve, and restore North
4 America's native trout and salmon resources. (See Exhibit TU-6, Trout Unlimited and Brian
5 Johnson biographies.)

6 I testify in answer to two of the key issues listed in the hearing notice:

7 1. Is water available for appropriation under the application? If so, when is water
8 available and under what circumstances, taking into consideration prior rights?

9 What terms and conditions, if any, should the State Water Board adopt to protect
10 prior rights?

11 2. Will approval of the application result in any significant adverse impacts to
12 water quality, the environment, or public trust resources? What terms and
13 conditions, if any, should the State Water Board adopt to avoid or mitigate any
14 such potential adverse impacts?

15 Based on a review of the record, I answer that there may be water available during the
16 wetter months, that there may not be water available for the full amount of the requested
17 appropriation during the drier summer months after terms and conditions that are protective of
18 public trust resources are developed. However, it is impossible to definitively answer whether
19 water is available in summer and fall or develop specific protective terms and conditions, for
20 three reasons.

21 First, the Draft Environmental Impact Report uses an incorrect baseline, which renders
22 deficient the impacts analysis. In particular, the baseline includes future diversions by El Sur
23 Ranch at historic (unauthorized) levels, even though those are precisely the diversions that are
24 the subject of the application, and those diversions will not continue if the permit is denied. My
25 testimony on this point is continued in the presentation that I propose to present orally at the
26 hearing, which is attached as Exhibit TU-2. Trout Unlimited previously commented on this issue
27 with a letter I co-wrote with our outside counsel at Shute, Mihaly & Weinberger, which is
28 attached as Exhibit TU-3.

1 Second, the Division has not yet prepared a Public Trust Resources Assessment for the El
2 Sur Ranch application. Although Trout Unlimited maintains that the approach to CEQA baseline
3 that the Division has taken with this project is in violation of CEQA, I acknowledge that it is
4 consistent with recent past practice at the Division. However, TU's difference of opinion about
5 the CEQA baseline has not prohibited us from resolving water rights disputes with the Division
6 and settling protests in the past. This is because the Division has always, in my experience,
7 prepared a Public Trust Resources Assessment (PTRA) that uses a baseline that does not include
8 previously conducted but unauthorized activities. This is important because almost all of the
9 pending applications before the board are already operating illegally. If the Division used the
10 CEQA baseline to evaluate the effects of those operations according to the method employed in
11 the El Sur Ranch DEIR, there would be nothing to evaluate: the proposed project would be
12 defined to equal the existing conditions, so there could not possibly be impacts to other water
13 right holders or natural resources. Thus, all of these existing unauthorized diversions would be
14 grandfathered in, and there would have been no reason (for example) to work for most of the
15 past decade on the North Coast Instream Flow Policy.

16 As evidence of the State Water Board's consistent practice of requiring a Public Trust
17 Resources Assessment for water right applications, and doing so independently of its CEQA
18 baseline determination, I refer to the Annual Water Code section 1259.2 Report (2010). The
19 document would be subject to official notice, but it is short and I attach it here as Exhibit TU-4
20 for convenience. Note that it includes a "next step" of a PTRA for many of the pending
21 applications, including many for which the Division recommends a finding of CEQA
22 exemption.

23 As evidence of the large number of pending applications that are operating without
24 authorization, I will request official notice of the North Coast Instream Flow Policy ("Policy"),
25 including the Supplemental Environmental Document and the Task 3 (Scientific Basis) Report. I
26 will refer to it as TU-5. The document is available in full at:

27 www.waterboards.ca.gov/waterrights/water_issues/programs/instream_flows/. The Policy and
28 Scientific Basis Report are also evidence of the Division's general approach to Water Code

1 environmental impact and public trust resources evaluations, and specifically the use of a
2 baseline that does not include ongoing but unpermitted activities. For example, the Policy
3 requires mitigation in the form of gravel augmentation, large woody debris placement, and fish
4 passage at existing unpermitted dams. This would make no sense if the Division used its CEQA
5 impacts framework as its only method of evaluating public trust impacts, because there would
6 be no CEQA impacts from the existing dam.

7 I have no reason to believe that either the Applicant or Division staff disagrees with this
8 characterization of the Water Code and Public Trust Resources Assessment use of a baseline as I
9 describe it. Indeed, the El Sur Ranch draft Water Availability Analysis appears to consider the
10 full face value of the application, rather than the marginal increase over historic use that it relies
11 on in the DEIS. This is consistent with the approach I describe.¹

12 Unfortunately, since the PTRAs has not yet been prepared for this application, and the
13 DEIS uses a flawed baseline, it is impossible to adequately characterize the effects of the project
14 on steelhead and other public trust resources.

15 The third and final reason it is premature to set terms and conditions for the protection of
16 public trust resources is that the Department of Fish and Game is currently preparing an
17 Instream Flow Study for this purpose, but it is not yet complete.

18 Finally, my presentation refers to a recently completed Superior Court baseline case
19 known as *Klamath Riverkeeper v. DFG* (San Francisco Superior Court No. CPF-09-509915).
20 Although it is not binding precedent, I offer it as persuasive evidence of the proper baseline to
21 be used when an agency prepares environmental documents for activities that have been
22 proceeding without authorization. *See* Exhibit TU-8. Although my organization was critical of
23 the EIS, Trout Unlimited supported DFG's effort to put in place for the watershed-wide
24 permitting program for streambed alteration agreements, and we were working with several
25 landowners to try and make it a reality. We are disappointed that the program's future is now in
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27 ¹ The WAA has other flaws, such as its failure to include water rights on tributaries.
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1 doubt because of the EIS. Therefore I offer the decision not only for what it says about baseline
 2 but also a cautionary tale for everyone working on stream flow improvements that require
 3 CEQA documents.

4 I am qualified to offer this testimony based on my experience with water rights
 5 permitting, instream flow standard setting, water law, and the California Environmental Quality
 6 Act. Please refer to my biography and the biography of Trout Unlimited, which are attached as
 7 Exhibit TU- 6. The powerpoint presentation and the comment letter (TU-2 and TU-3,
 8 respectively) were prepared in consultation by my outside counsel at Shute, Mihaly &
 9 Weinberger. They are quite possibly the most well-respected CEQA law firm in the State.
 10 Biographies for Shute, Mihaly & Weinberger; Amy J. Bricker and Rachel B. Hooper are
 11 attached as TU-7.

12 In summary, I recommend that the State Water Board complete the PTRAs, require
 13 recirculation of the DEIS, and rely on the final DFG Instream Flow Study before granting the
 14 permit. If the State Water Board desires to issue a permit before then, it should impose
 15 conservative terms and conditions (more protective than are expected to be necessary) and
 16 schedule a hearing to consider whether to amend those terms and conditions upon completion of
 17 the DFG Study.²

18 Thank you for considering my testimony.

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 20 DATED: May 18, 2011

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 23 By: 

24 _____
 25 BRIAN J. JOHNSON

26 Attorney for TROUT UNLIMITED

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 28 ² As I completed this testimony, we received notice that the FEIR has been completed, but I
 have not yet received a copy. I reserve the right to adjust my testimony as necessary based upon
 that review.