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10  
11 STATE OF CALIFORNIA

12 STATE WATER RESOURCES CONTROL BOARD

13  
14 In the Matter of:  
15 Hearing Regarding Water Rights Application  
16 30166 of El Sur Ranch

**TROUT UNLIMITED CLOSING BRIEF**

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

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1 **SUMMARY**

2 Although this application raises many complex scientific issues, the most important  
3 question can be stated simply: How much water must El Sur Ranch bypass to protect aquatic  
4 resources? Trout Unlimited's closing brief focuses on that question.

5 All parties to the hearing agree that there should be a bypass flow. However, the El Sur  
6 Ranch (ESR) proposed bypass flow is significantly lower than the Department of Fish and  
7 Game (DFG) flows and the California Sportfishing Protection Alliance / Center for Biological  
8 Diversity (CSPA) flows. Moreover, ESR's proposal would allow the bypass flow to be avoided if  
9 the ranch also pumps water from the well back into the river. DFG and CSPA also recommend  
10 that the fish protection terms and conditions should be considered interim and should be  
11 reconsidered after DFG's ongoing instream flow study is complete.

12 In section I of this brief we explain why Trout Unlimited believes that DFG's bypass  
13 proposal should be adopted.

14 In section II of this brief we argue, as we have before, that the Environmental Impact  
15 Report (EIR) is inadequate because it uses the wrong baseline. As the CEQA consultants  
16 conceded at the hearing, it cannot be used to establish bypass flows or other measures to  
17 protect public trust resources. Moreover, the Division of Water Rights did not prepare a Public  
18 Trust Resources Assessment for the parties to review prior to drafting its proposed permit  
19 terms. For these reasons, the effort to reach agreement about permit terms has been much  
20 more difficult than it could have been.

21 **ARGUMENT**

22 Trout Unlimited is the nation's oldest and largest coldwater conservation organization,  
23 with approximately 150,000 members nationwide and almost 15,000 in California. The group's  
24 mission is to protect, conserve, and restore North America's native trout and salmon  
25 resources. (See Exhibit TU-6, Trout Unlimited and Brian Johnson biographies.)

26 Trout Unlimited and its outside counsel at Shute, Mihaly & Weinberger LLP submitted  
27 comments on the CEQA document and provided testimony at the hearing.

28 The Big Sur River is extremely important to Trout Unlimited members. It remains one of

1 the last places south of San Francisco where our members maintain hope of a decent  
2 recreational fishery for steelhead. Given the poor state of affairs for steelhead on the Central  
3 Coast, their very survival is in doubt without a healthy Big Sur River.

4 Unfortunately, as eye-witness accounts from the Carmel River Steelheaders  
5 Association and scientific testimony from DFG and others demonstrated, the Big Sur River is  
6 not what it used to be—or what it should be. (See CRSA-1 to CRSA-11, CRSA-18 to CRSA-  
7 23, TU-9.) The decline in population appears to be in the range that ESR’s own consultant  
8 would consider an indicator of a long-term and serious decline. (CRSA-23, TR 6-16-11 at 264  
9 lines 4-10.)

10 **I. THE STATE WATER BOARD SHOULD ADOPT THE DEPARTMENT OF FISH**  
11 **AND GAME’S BYPASS FLOWS AS INTERIM MEASURES**

12 The Environmental Impact Report states that it should not be used to set bypass flow  
13 requirements to protect public trust resources. (Response to Comment 3-1, p.364; see Cross-  
14 Examination of Rick Hanson and Sabrina Cook, TR 6-16-11 at 57-58.) The Division of Water  
15 Rights also did not prepare a Public Trust Resources Assessment for consideration by the  
16 parties, although this is its usual practice. (See Testimony of Brian Johnson, TR 6-17-11 at  
17 326-27, 333.)

18 Therefore, there are three the options on the table, and they come from the parties.

19 The Department of Fish and Game (DFG) recommends 29 cubic feet per second (cfs)  
20 from June through November and 132 cfs for from December through May. (Testimony of  
21 Robert Titus, DFG-T-A at 17; Testimony of Kit Custis, DFG-C-A at 21.)

22 El Sur Ranch (ESR) recommends 10 cfs from May through October, or a flow sufficient  
23 to provide 0.3’ of water over 25 percent of a channel cross-section and 10 percent of the  
24 contiguous cross-section at a designated point in the river, or ESR pumps 3 cfs of water into  
25 the river, and ESR recommends bypass flows of 30 cfs from November through April, or 0.7’  
26 water over 25 percent of a channel cross-section and 10 percent of the contiguous cross-  
27 section at a designated point in the river (this is based on the so-called “Thompson Method”),  
28 or ESR pumps 3 cfs of water into the river. (Letter describing Fourth Amended Application

1 dated June 14, 2011, ESR-40 at 1-2.)

2 The California Sportfishing Protection Alliance, Center for Biological Diversity and  
3 Ventana Wilderness Alliance (CSPA) recommend 15-20 cfs minimum for summer months and  
4 historical median daily flows for winter months (about 20 cfs in November and up to 160 cfs in  
5 February and March, then down to about 20 cfs again by July). (Testimony of David Dettman,  
6 CSPA/CBD-100 at 14-16.)

7 All of the parties' bypass flow numbers refer to flows at USGS gage no. 11143000.  
8 However, the parties have differing views as to the amount of streamflow that is lost between  
9 that gage and the diversion. DFG and CSPA also recommend translating their bypass flow  
10 recommendations to the new lower gage no. 11143010 for compliance purposes.

11 The El Sur Ranch recommendations cannot be adopted by the Board. Counsel for  
12 ESR stated that the ESR witnesses had not reviewed it, and that the experts could not testify  
13 as to why the number was chosen. (TR 6-17-11 at 25, 29.) However, Mr. Hanson's testimony  
14 referred to a juvenile migration flow threshold of 0.3' that he believed occurred at 8-10 cfs, and  
15 it appears that this was the source of the ESR attorneys' proposal. (TR 6-16-11 at 134.) This is  
16 consistent with ESR's alternate bypass flow recommendation, which is to allow diversions  
17 when flows provide a depth of 0.3' measured over 25 percent of a channel cross-section and  
18 10 percent of the contiguous cross-section. Mr. Hanson also clarified that the 0.3' threshold  
19 was strictly a proxy for juvenile fish movement, and that it was not a measure of habitat  
20 availability or habitat productivity. (TR 6-16-11 at 258 line 25 to 259 lines 2-4.) The ESR winter  
21 bypass flow recommendations are also based on migration thresholds. (TR 6-16-11 at 134.)

22 Assuming for the sake of argument that 10 cfs is in fact sufficient for juvenile steelhead  
23 movement and 30 cfs is sufficient for adult migration, migration is only one of the variables that  
24 a bypass flow must protect. DFG's expert Mr. Titus confirmed that while the "Thompson  
25 Method" is sometimes used to determine migration thresholds, it cannot be used to measure  
26 spawning habitat, rearing habitat, benthic macroinvertebrate habitat, or any other habitat  
27 values. (TR 6-17-11 at 316.) Nor is it a measure of habitat values for any of the other species  
28 that depend on the river. But those are all values that must be protected. (Id.)

1 The Department's bypass flow recommendations by contrast are intended to account  
2 for a broad range of public trust resource values. Mr. Titus based his summer bypass flow  
3 recommendation on a "wetted perimeter" analysis he conducted as an interim measure  
4 pending the results of the DFG instream flow study. (Titus Testimony, DFG-T-A at 15, DFG-T-  
5 22.) Specifically, the DFG 29 cfs recommendation is built on Mr. Titus's wetted perimeter result  
6 of 17 cfs, plus Mr. Custis's estimation of losses from the gage to the point of diversion, plus the  
7 rate of diversion. (Id.)

8 As Mr. Titus's testimony explains, the wetted perimeter method is a way of quantifying  
9 the relationship between the stream's flow and the stream's channel that provides a very  
10 minimal level of protection for a fish population. (DFG-T-22 at 2.) It is expected to protect  
11 aquatic life in riffle habitats at a level sufficient to maintain a fish population at an adequate  
12 level. Moreover, protecting riffle habitats at that level is expected to confer a minimal level of  
13 protection to deeper water habitats such as pools and runs. (Id.)

14 The Titus wetted perimeter analysis and its result of 17 cfs (plus losses from the gage  
15 to the diversion and the diversion rate) is corroborated by an earlier DFG report recommending  
16 a bypass flow of 19 cfs (DFG-T-23). Moreover, it is generally in line with Mr. Dettman's  
17 recommendation of 15-20 cfs.

18 The DFG winter bypass flow recommendation is based on the formula from the North  
19 Coast Instream Flow Policy. (Custis Testimony, DFG-C-A at 7.)

20 To be sure, ESR attempted to undermine Mr. Titus's wetted perimeter analysis at the  
21 hearing. But that analysis, as corroborated by the earlier DFG recommendations and Mr.  
22 Dettman's testimony, is the best available information to guide the Board. The ESR  
23 recommendations account at most for only one variable, migration. The CEQA document is  
24 unusable. If DFG's recommendation cannot be used, the only remaining avenue for the Board  
25 would be to follow general purpose recommendations such as those found in the North Coast  
26 Instream Flow Policy or the prior DFG/NMFS "Joint Recommendations." Of course, neither the  
27 Policy nor the Joint Recommendations would allow *any* diversion during summertime.

28 The Department of Fish and Game does recognize that it is possible to provide more

1 systematic flow recommendations than those available at this time, and TU would agree. That  
2 is why DFG is conducting the instream flow study, and that is why DFG recommends that its  
3 current recommendations be considered interim measures until that study is completed. Trout  
4 Unlimited agrees with that recommendation as well.

5 **II. THE CEQA DOCUMENT CANNOT BE USED FOR DECISION-MAKING**

6 **a. The EIR Should Not Be Used to Set Terms and Conditions for Fish**

7 None of this might have been necessary if the CEQA analysis worked as it should. At  
8 the hearing, the authors of the Environmental Impact Report (EIR) stated that it should not be  
9 used for establishing bypass flows or other measures to protect the public trust. The EIR itself  
10 says so explicitly, in response to comment 3-1:

11 The mitigation measures are not intended to be bypass flows to protect public trust  
12 resources. Determining and defining bypass flow requirements to protect public trust  
13 resources is not within the scope of CEQA.<sup>1</sup>

14 Trout Unlimited asked to clarify this comment at the hearing: "You're saying the CEQA  
15 document should not be used to establish minimum bypass flow requirements to protect public  
16 trust resources?" Mr. Hanson replied, "I don't think that's the purpose of the CEQA document,  
17 if that's your question."

18 With all due respect to the Division and its consultants, Trout Unlimited disagrees. The  
19 CEQA process must inform bypass flow requirements and other conditions to protect the  
20 public trust. If it cannot, then what is it for?

21 **a. The EIR Is Legally Inadequate**

22 Trout Unlimited has commented at length on the legal inadequacy of the EIR. (TU /  
23 Shute, Mihaly & Weinberger letter dated June 3, 2010, TU-3; see Testimony of Brian Johnson

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25 <sup>1</sup> The EIR states that "To date, there have been no studies determining what minimum bypass  
26 flow requirements would be required to protect public trust resources." (Id.) If that is true, no  
27 permit can issue.

1 TR 6-17-11 at 322-336.)

2 An EIR's "purpose is to inform the public and its responsible officials of the  
3 environmental consequences of their decisions *before* they are made." (*Citizens of Goleta*  
4 *Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564) (emphasis in original)). It is intended  
5 to identify ways that environmental impact(s) can be avoided or significantly reduced. (Pub.  
6 Res. Code § 21002.) The Intent of CEQA is to "afford the fullest possible protection to the  
7 environment." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.)

8 One critical step is to determine the baseline. The baseline must meet the following  
9 criteria to comply with CEQA: (1) It must accurately characterize the existing environment; and  
10 (2) it must allow the agency to analyze and mitigate the full scope of a project's impacts. The  
11 baseline here fails its second duty.

12 Although baseline issues are notoriously complicated, the basic principle is simple. The  
13 EIR should compare what will happen if the project is approved with what will happen if it is  
14 rejected. (*Woodward Park Homeowners Ass'n v. City of Fresno* (2007) 150 Cal.App.4th 683,  
15 707.) The current EIR however "grandfathers" in most of the project's effects. By  
16 incorporating portions of the proposed project into the baseline, the agency in effect  
17 grants a unilateral exemption from CEQA for that activity. (See *County of Inyo v. City of*  
18 *Los Angeles* (1977) 71 Cal.App.3d 185, 195-97.) That is what the baseline for the ESR  
19 project would do: simply because it has been operating illegally, it concludes that future  
20 operations of those pumps would have no effect. That is not true as a matter of  
21 common sense, and it is not correct as a matter of CEQA.

22 California courts have allowed EIRs to incorporate prior illegal activity into the project  
23 baseline only under the following circumstances: (1) The prior illegal activity resulted in  
24 permanent physical environmental damage; and (2) The prior illegal activity either: (a) was  
25 subject to prior enforcement actions or (b) was/is subject to enforcement action by another  
26 agency; and/or (3) The prior illegal activity already underwent CEQA environmental review.

27 Some cases incorporate prior illegal activity into the baseline when it results in  
28 permanent physical environmental damage. *Riverwatch v. County of San Diego* (1999) 76

1 Cal.App. 4th 1428 (permanent physical conditions from prior illegal sand mining and disking  
2 activities properly incorporated in baseline); *Fat v. County of Sacramento* (2002) 97 Cal. App.  
3 4th 1270, 1281 (illegally constructed airport expansion part of baseline); *Eureka Citizens for*  
4 *Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 370 (allegedly illegally  
5 constructed playground included in baseline for evaluating impacts on the surrounding  
6 neighborhood). The reasoning behind this is that if the prior illegal activity resulted in a  
7 permanent change in the environment, then the consequences of that activity would be  
8 present whether the approval is granted or it is not.

9         Some cases incorporate prior illegal activity in the baseline because (a) it was subject  
10 to prior enforcement actions (*Fat v. County of Sacramento* (2002) 97 Cal.App. 4th 1270, 1281  
11 (prior enforcement actions taken)); or (b) it was or is subject to enforcement action by another  
12 agency (*Riverwatch v. County of San Diego* (1999) 76 Cal.App. 4th 1428 (enforcement actions  
13 being undertaken by another agency); *Eureka Citizens for Responsible Government v. City of*  
14 *Eureka* (2007) 147 Cal.App.4th 357 (illegality of pre-existing playground was question for  
15 enforcing agency)). The reasoning behind this is that the approval agency should not interfere  
16 with matters under the purview of another agency. It would also be difficult in many cases for  
17 the lead agency to determine the nature and scope of the illegal activity. Here, the agency with  
18 enforcement responsibility is the State Water Board, and it could have halted the diversion at  
19 any time.

20         The other way prior illegal activity might be included in a baseline is because it already  
21 underwent environmental review. (See *Fat v. County of Sacramento* (2002) 97 Cal.App. 4th  
22 1270, 1281 (historic levels of airport use properly included in baseline where previously subject  
23 to environmental review). The reasoning for this is that CEQA should not require repetition of  
24 environmental analysis. Again, that is not the case here.

25         The current baseline for DEIR includes future appropriative diversions at historical rates  
26 even though:

- 27         (1) The diversions are not permanent and caused no permanent harm;
- 28         (2) They have never been previously authorized;

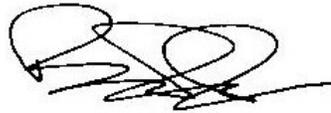
- 1 (3) They have never undergone previous environmental review;  
2 (4) The Board has enforcement authority to end the diversion; and  
3 (5) The diversion will not continue if the Board denies the application.

4 There has never been a decision that put future effects of ongoing operations in  
5 baseline under those circumstances

6 The proper baseline for the El Sur Ranch project includes permanent physical  
7 structures (such as the wells themselves), the permanent effects of past diversions (there is no  
8 evidence of any such effects), and future activities that will continue regardless of whether the  
9 project is approved (such as future riparian diversions). It does not include the future effects of  
10 activities that will occur only if the project is approved (the effects of diverting according to the  
11 permit).

12  
13 Thank you for your consideration of our testimony and of these arguments.

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15 DATED: September 15, 2011



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17 By: \_\_\_\_\_

18 BRIAN J. JOHNSON

19 Attorney for TROUT UNLIMITED  
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1 **SERVICE LIST**

2 **(March 1, 2011)**

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

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