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March 18, 2010

Charles Rich, Chief
 State Water Resources Control Board
 Division of Water Rights
 1001 I Street
 Post Office Box 2000
 Sacramento, California 95812

Subject: Comments on State Water Resources Control Board – Division of Water Rights February 2010 Investigation Report, Santa Margarita Ranch, San Luis Obispo County

Dear Mr. Rich:

The Department of Fish and Game (Department) has reviewed the Division of Water Rights (Division) February 22, 2010 Investigation Report (Report) of the Santa Margarita Ranch (Ranch) in San Luis Obispo County. The investigation was performed in response to a complaint by North County Watch alleging, among other things, that wells operated by the Ranch were dewatering blue-line streams and impacting steelhead critical habitat. The Department asserted these same concerns in communications with the Division as well.

The Department is responsible for protecting in the public trust, fish and wildlife resources and habitat necessary to support biologically sustainable populations of those species. Certain fish and wildlife are reliant upon aquatic ecosystems, which in turn are reliant upon adequate flows of water. The Department therefore has a material interest in assuring that adequate water flows within streams for the protection, maintenance and proper stewardship of those resources. As a Trustee Agency, the Department is consulted by the Division for appropriate measures to protect fish and wildlife resources. The comments below are submitted in response to statements made in the Division's report; statements upon which the report's findings are established.

Santa Margarita Ranch lies within central San Luis Obispo County, approximately 8 miles northeast of the city of San Luis Obispo, just east of the Santa Lucia Range and west of the La Panza Range. The ranch encompasses several headwater streams of the Salinas River including Rinconada Creek, Santa Margarita Creek, Yerba Buena Creek, and Trout Creek. The Salinas River system, including its tributaries, is designated under the federal Endangered Species Act (ESA) as critical habitat for the federally threatened, and State species of special concern, steelhead – south central coast distinct population segment (*Oncorhynchus mykiss*).

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The Report's analysis indicated, with respect to potential impacts to public trust resources, that any action requiring the Ranch to terminate or modify its diversions would depend upon evidence being presented to demonstrate the following:

1. Valuable public trust resources exist within the stream;
2. The resources are being adversely affected due to diversions from the stream by water rights holders; and
3. Termination or modification of diversions would result in increased benefits to the general population of California.

The Report states that neither the Complainant nor the Department has submitted such a body of evidence. However, the Department submits the following as evidence of public trust resources within the aforementioned tributaries to the Salinas River.

With respect to number one above, occurrences of steelhead in affected streams have been documented by research scientists, as well as Department fisheries staff. Associate Fisheries Biologist Robert Tibstra and Fish Habitat Specialist Dave Highland, identified multiple year classes of steelhead during surveys performed in Trout Creek during 2008. This indicates steelhead spawning is occurring in Trout Creek (Tibstra, pers. comm.). Additionally, a study¹ completed in July and August 2006 documented steelhead during snorkel surveys in multiple sections of Salinas River tributaries. Steelhead were observed at two locations in Atascadero Creek, three sites on Tassajara Creek and Santa Margarita Creek, and at four sites on Trout Creek from its upper to lower reaches.

The Department maintains a database of the status and locations of rare plant and animal species in the state. This California Natural Diversity Data Base (CNDDDB) verifies and documents observations of special-status species and describes the local environment in which they were found. According to the CNDDDB, there are within the project area cited occurrences of the federally-threatened, State species of special concern California red-legged frog (*Rana draytonii*). This amphibian has been extirpated (locally extinct) from 70% of its former range, and is now found primarily in coastal drainages of central California. Red-legged frogs rely on semi-permanent ponds for breeding, and either permanent bodies of water during the late summer/early fall, or upland refugia where they will aestivate until the next breeding season.

These documented occurrences of steelhead and red-legged frog constitute direct evidence of public trust resource presence, and also points out that

¹ Lisa C. Thompson et.al. 2006. Role of hardwood in forming habitat for southern California steelhead. USDA Forest Service General Technical Report PSW-GTR-19x.

reduced instream flow and potential dewatering of sections of these streams may adversely affect federally designated critical habitat, and may result in take of these special-status species.

With regards to number two above, the Division's report from a previous investigation performed on the Ranch in 2000, stated "Complaint unit staff believe that withdrawals of water from the alluvial wells on the Ranch will likely result in reduced streamflows in Santa Margarita Creek, Yerba Buena Creek, and Trout Creek." The Report further stated that "...if groundwater withdrawals are of a sufficient magnitude over a long enough period of time, water levels in the surface water bodies could be adversely impacted from the deeper wells as well." More recently, a hydrogeological study² prepared for proposed development of the Ranch, shows an aquifer storage depletion corresponding to increased water production from January 2000 to January 2007. The study projects a 125 to 225 percent increase of groundwater use to meet the increased demands associated with the proposed development. While the study does not suggest the aquifer system beneath the Project area is in overdraft, it does establish a direct response by decreases in groundwater elevation to increased pumping stress. Increased water demand from additional development would further lower groundwater elevation, which may in turn reduce surface water flow in area streams tributary to the Salinas River. Although this does not constitute direct evidence of impacts to public trust resources from groundwater pumping, and may only be circumstantial, it is evidence nonetheless.

Finally, the evidence fulfilling numbers one and two above also provides a basis for the Department's evaluation of public benefit required by number three. Fish and wildlife resources and the habitat upon which they depend are held in trust for the people of California. The Public Trust Doctrine requires resource management agencies to take a more broad-scale perspective rather than a narrow one. Excessive use of surface and groundwater on the Ranch threatens to modify critical habitat and to detrimentally affect federally listed, and State special-status, fish and wildlife resources. Division should consider the evidence provided and weigh the potential costs to the general public against benefits provided locally to owners/operators of the Ranch. Maintaining viable populations of special-status species, not only for their own intrinsic value but also for ecological, aesthetic, and socio-cultural values, benefits all Californians. Steelhead also are valued economically for their contribution to recreational and commercial fisheries. Reduction or elimination of instream flows restricts access to, or eliminates, habitat for red-legged frog and various steelhead life stages.

² Hopkins Groundwater Consultants, Inc., June 2006. Preliminary Hydrogeological Study: Santa Margarita Ranch Agricultural Residential Cluster Subdivision (Tentative Tract 2586) Water Supply Study, San Luis Obispo County, California

Concerning water availability for fish and wildlife, the California Water Code (CWC) Section 1243 states in part:

"The use of water for preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources... for protection of beneficial uses, including any uses specified to be protected in any relevant water quality control plan..."

The Water Quality Control Plan for the Central Coastal Basin designates for the Salinas River headwaters the following beneficial uses: recreation including fishing, and aesthetic enjoyment; preservation or enhancement of aquatic habitats and associated vegetation, fish and wildlife; preservation or enhancement of water and food sources for wildlife; and uses of water that support migration, spawning and early development habitat for anadromous species. For the preservation or enhancement of fish and wildlife resources, Rinonada Creek, Santa Margarita Creek, Yerba Buena Creek, and Trout Creek water should only be available for appropriation after these beneficial uses are supported. Only after public trust resources are preserved or enhanced and beneficial uses protected may water be available for appropriation.

In *National Audubon Society vs. Superior Court*, the California Supreme Court held that California water law is an integration of both appropriative right and the public trust, and that appropriations may be subject to change if circumstances warrant their reconsideration and reallocation. Permitting surface and groundwater pumping to the extent surface waters run dry, resulting in potentially adverse modification of critical habitat and take of listed species, is contrary to our responsibility of protecting the public trust. At its basic tenet, the Public Trust Doctrine requires preservation of natural resources to benefit all Californians generally, above any potential benefit to local developers.

The Department therefore requests that this letter be incorporated into the water rights file regarding complaints against the Ranch; documented as evidence of red-legged frog and steelhead occurrence in streams potentially affected by the Ranch's water diversion activities; and as the Department's evaluation of the overarching benefit these public trust resources provide to the general public outweighing the localized benefits to the owners/operators of the Ranch.

Given the above information, the Department recommends that Division require the Ranch to prepare appropriate habitat-based instream flow studies so that adequate stream flows can be maintained. The Department also recommends the Division consult with the National Oceanic and Atmospheric Administration (NOAA) – National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS), to determine the proper course of action to eliminate

immediate threats to steelhead and red-legged frog respectively, and direct the Ranch to begin working toward effective mitigation on the affected stream reaches to restore and maintain habitat. Until these recommended measures are accomplished, the Ranch should be required to immediately reduce volumes and rates of diversion to ensure habitat availability for federally listed species to persist in a healthy manner capable of completing their life cycles.

The Department believes it is premature for the Division to consider all unauthorized diversions to be resolved, and to dismiss any complaints against the Ranch. To the Department's knowledge, Division has not yet received sufficient evidence from the Ranch in the form of well logs and pump test data, or an adequate accounting of pipeline locations to determine from where water is diverted and to where it is conveyed. The Ranch must provide monitoring data from well pumps and storage ponds, and disclose all pumping and plumbing schematics. Until the Ranch can provide this necessary information for the Division to determine whether water rights should be permitted as riparian or appropriative, Division should err on the side of caution for the protection of public trust resources, and assume all unknown diversions are appropriative and require the proper permits and/or approvals. Further, after the necessary monitoring data and schematics are received, the Division should share all submitted information with the Department for consultation regarding potential effects on fish and wildlife resources.

Finally, pursuant to CWC Section 1228.3, registration of appropriation for livestock stockpond use requires consultation with the Department. The Department has records of communication indicating it initiated consultation with Ranch representatives on previously approved registrations, but does not have any record indicating terms and conditions were agreed to and/or implemented. The Division should ensure any such terms and conditions were included with the registration, and require the Ranch to submit evidence of compliance.

If you have any questions regarding the above discussion, please contact Brian Erlandsen, Staff Environmental Scientist, at (559) 243-4014 extension 220.

Sincerely,

Andrew G. Gordin, Ph.D.

for Jeffrey R. Single, Ph.D.
Regional Manager

cc: Joyce Ambrosius, NOAA Fisheries, Santa Rosa, California
Susan Harvey, North County Watch, Templeton, California