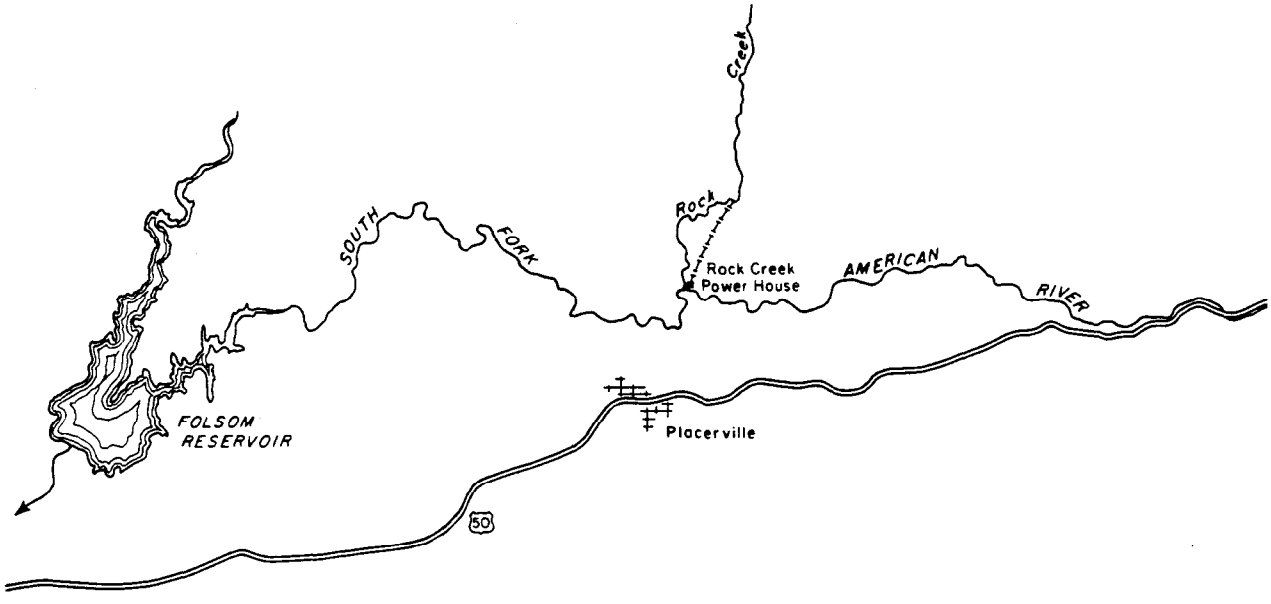
ROCK CREEK HYDROELECTRIC PROJECT
PERMITTED APPLICATIONS 26380 AND 27353

Order 87-2

Amending Water Rights

Permits 19259 & 19260



MARCH 1987

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits 19259 and 19260, Issued on Applications 26380 and 27353, ROCK CREEK LIMITED PARTNERSHIP, Permittee,	ORDER: WR 87- 2 SOURCE: Rock Creek COUNTY: El Dorado

ORDER AMENDING WATER RIGHT PERMITS 19259 AND 19260

BY THE BOARD:

1.0 INTRODUCTION

Permits 19259 and 19260 having been granted on Applications 26380 and 27353 subject to terms and conditions; the Department of Fish and Game (hereinafter referred to as "Department") having requested that the State Water Resources Control Board (hereinafter referred to as "Board") amend Permits 19259 and 19260 to require a greater bypass of streamflow for the fishery; a public hearing having been held before the Board on May 19, 1986 and on September 15, 1986; permittee and the Department having appeared and presented evidence; the Board having considered all evidence in the record, the Board finds as follows:

2.0 BACKGROUND

2.1 On February 16, 1984, the Board in Water Right Decision 1596 ordered that Permits 19259 and 19260 be issued to Joseph Martin Keating subject to certain terms and conditions. Mr. Keating subsequently sold the project to Rock Creek Limited Partnership, which became the water right permittee. Conditions 9 and 10 of Decision 1596, which became terms 16 and 17 of Permits 19259 and 19260, are the subject of the current proceeding.

2.2 Permit term 16 provides:

> "For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:
>
> "a. From October 1 through April 30, a minimum of 15 cubic feet per second;
>
> "b. From May 1 through September 30, a minimum of 11 cubic feet per second;
>
> "The total streamflow shall be bypassed whenever it is less than the amount designated for that period.
>
> "No water shall be diverted under this permit until permittee has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring these bypass flows."

2.3 Permit term 17 provides:

"a. Permittee, in consultation and cooperation with the Department of Fish and Game, shall conduct an Instream Flow Incremental Methodology IFG-4 flow study within the reach of Rock Creek from 500 feet upstream of the diversion dam downstream to the point of return of water from the proposed powerhouse at the confluence of Rock Creek with South Fork American River. The study shall evaluate the effects of flow levels on trout life history stages and on habitat needed to support the different life stages.

The study shall model all representative habitats of the affected reach of Rock Creek including the habitats not previously modeled by the permittee's contractor. (These include the spawning habitat, the low gradient riffle habitat in the upper part of the affected reach, and the side channel of the stream segment previously modeled by the permittee's contractor.) To the extent possible, and with the agreement of the Department of Fish and Game, the permittee may use the original IFG-4 study to supplement the new study.

"b. All field work elements of the study described in a. shall be completed prior to commencement of any construction work in the channel and overflow areas of Rock Creek within the reach described in a. No diversion of water shall be made from Rock Creek until the study described in a. is completed and the results evaluated.

"c. The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after evaluating the results of the study described in a. and after notice to interested parties and opportunity for hearing."

2.4 The key issues for hearing were listed as:

> "1. Has the permittee performed the fisheries habitat study as required by terms 17a and 17b?
>
> "2. Should the bypass flows required in term 16 be revised and, if so, what flows should be required?
>
> "3. Should term 20 be amended to allow static tests to determine the seepage loss of the tunnel?"

The third issue, regarding term 20, was resolved before the hearing and term 20 of each of the two permits was amended in accordance with the permittee's request. The first and second issues, therefore, were the subject of the hearing.

2.5 Permits 19259 and 19260 authorize direct diversion not to exceed 100 cubic feet per second (cfs) all year and not to exceed 140 cfs from October 1 through May 31, respectively, for the purpose of generating hydroelectric energy.

2.6 The Department, after reviewing and evaluating the fishery studies performed by the permittee, requests that the permittee be required to bypass flows of the lesser of 30 cfs or natural flow from October 1 through February 29 and the lesser of 60 cfs or natural flow from March 1 through September 30. Permittee opposes the Department's recommendation and recommends that the permits continue to require the bypass of 15 cfs from October 1 through April 30 and 11 cfs from May 1 through September 30. To support its position, permittee has raised

several procedural and jurisdictional issues which we will consider before discussing the merits of the bypass flow requirements recommended by the two parties.

3.0 JURISDICTIONAL ASSERTIONS

Permittee asserts three jurisdictional claims which may be summarized as follows:

1. With respect to hydroelectric power licensees of the Federal Energy Regulatory Commission ("FERC"), California law governing appropriation of water is preempted by federal law;

2. Permittee's project may be operated in exercise of riparian rights recognized under California law; and

3. Permittee's project may be operated in exercise of a combination of such riparian rights and federal reserved rights.

The relevance of these claims to the present stage of this proceeding is highly questionable. If any one of these claims is wholly correct, then permittee wouuld not be required to obtain a permit from this Board to appropriate unappropriated water. Permittee has, however, made application for such permit and a permit has in fact been issued. The proceeding at this stage is concerned with the issue of what streamflow bypass conditions should be required of permittee to protect the fishery; the Board has expressly reserved jurisdiction to address this issue and amend the permits in accordance with its

findings. We do not perceive what permittee's jurisdictional claims have to do with the issue of the streamflow bypass flows that should be required in the permits; these claims go to the question of whether permittee is bound to obtain a conditional appropriative water right permit at all, not to the question of what conditions should, in the public interest, be imposed in the permits. In other words, permittee cannot reasonably urge absence of permit jurisdiction as grounds for retaining the existing provisional streamflow bypass permit conditions.

However, notwithstanding that permittee's jurisdictional assertions have no apparent relevance to the issue whether the bypass flows should be revised, we briefly discuss permittee's claims below, to explain why the Board has jurisdiction in this matter and therefore has not dismissed the proceeding herein.

3.1 Federal Preemption of Control Over Appropriation of Water

Permittee argues that the Board has no power to issue permits for hydroelectric power plants licensed by the Federal Energy Regulatory Commission (hereinafter referred to as "FERC"). The FERC is a successor of the Federal Power Commission (hereinafter referred to as "FPC"). In support of its contention that the FERC has jurisdiction to license the Rock Creek Project and that federal jurisdiction over the Rock Creek project is exclusive, permittee cites several cases decided in the United States Supreme Court and in other federal courts.

We agree with permittee that the FERC has jurisdiction to license the Rock Creek Project. However, we disagree with permittee's contention that FERC's jurisdiction is exclusive with regard to the control of the diversion and use of water for hydroelectric power generation.

First, the language of the Federal Power Act is explicit in requiring that an applicant for a license from the FERC comply with state law requirements with respect to the beds and banks of streams and the appropriation, diversion, and use of water for power purposes. 16 U.S.C. § 802(b) (Section 9(b) of the Act). Further, the Federal Power Act provides that nothing contained in the Act affects or is intended to affect or interfere with state laws relating to the control, appropriation, use or distribution of water. 16 U.S.C. §821 (Section 27 of the Act). Together, these sections make it clear that applicants for hydropower licenses from the FERC must obtain state water right permits if state law so requires, and that the Federal Power Act does not preempt the operation of state water right laws.

None of the cases cited by permittee to oppose the Board's jurisdiction involved a challenge to a state's authority to regulate the appropriation of water by a licensee of the FERC. Rather, the cases address the authority of the FERC to issue a license. As we have stated above, we do not question the FERC's authority to license a hydropower project in California.

Throughout the history of the United States, Congress has consistently deferred to state water right laws. California v. United States (1978) 438 U.S. 645, 653, 98 S.Ct. 2985, 2990. Recognizing this deference and the clear language of Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), the United States Supreme Court in California v. United States, supra, held that the United States must obtain its water rights for the New Melones Reservoir on the Stanislaus River from the State of California, and must comply with the state-imposed terms and conditions on the appropriation of water. This decision disapproved dicta which had been assumed to be law regarding Section 8 in a series of cases. Prior to the decision in California v. United States, the United States had asserted that it could appropriate water for its reclamation project without complying with state law.

The language of Section 27 of the Federal Power Act is nearly identical to the relevant part of Section 8 of the Reclamation Act. Section 27 states:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. § 821)

Similarly, Section 8 of the Reclamation Act of 1902 states in relevant part:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control,

> appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." (42 U.S.C. § 383).[1]

Based on the Congressional Record, it is apparent that Section 27 of the Federal Power Act, adopted in 1920, is patterned after Section 8 of the Reclamation Act and is intended to require that developers of hydropower projects obtain their water rights under state law. Remarks of Senator Nelson, 59 Cong. Rec. 1040 (1920); 56 Cong. Rec. 9110-9115 (1918) (debate on an earlier version of the bill that became the Federal Power Act). The cases containing dicta (disapproved in California v. United States) which suggested a contrary result under the Reclamation Act were not decided until many years later, and cannot be used to imply an intent by Congress in 1920 to override state water laws. Rather, the prevailing view at the times when both acts were passed was that Congress already had passed laws sufficient to ensure that the states would always have control over water rights within their boundaries. United States v. Rio Grande Dam & Irrig. Co. (1899) 174 U.S. 690, 19 S.Ct. 770, California Oregon Power Co. v. Beaver Portland Cement Co. (1935) 295 U.S. 142, 55 S.Ct. 725, California v. United States, supra.

---

[1] Another part of Section 8 is codified separately at 43 U.S.C. § 372.

The leading case in the series of cases cited by permittee in support of its argument is First Iowa Hydro-Electric Cooperative v. FPC (1946) 328 U.S. 152, 66 S.Ct. 906. An examination of the First Iowa decision shows that the Iowa law under consideration was not a water right law. Rather, it involved the regulation of dams. Because no state water right law was involved, the court based its holding only on Section 9(b) and not Section 27 of the Federal Power Act, which specifically provides that the Federal Power Act does not affect or interfere with state laws regarding the control, appropriation, use or distribution of water.

However, the First Iowa court in dicta discussed Section 27 of the Federal Power Act. In its discussion, the court observed that Section 27 saves state laws regarding water rights from supercession by the Federal Power Act.

Based on the above considerations, we conclude that we have jurisdiction in this matter to regulate the Rock Creek Project, notwithstanding the concurrent exercise of jurisdiction over other aspects of the project by the FERC. Any differences from the FERC license should be handled by complying with the stricter terms and conditions.

3.2 Permittee's Claim of Riparian Rights

Permittee argues that it does not need a water right permit because it has riparian water rights. Therefore, permittee apparently contends

that the Board should not exercise jurisdiction over the Rock Creek Project.

Permittee alleges that part of the Rock Creek Project is located on federal Bureau of Land Management ("BLM") land contiguous to Rock Creek and that the remainder of the project is located on land contiguous to Rock Creek that is owned in fee by permittee. Permittee further alleges that it has permission in its FERC license to use the BLM land including whatever riparian rights attach to it,[2] and that the downstream part of the BLM land has been privately owned. Permittee admits that the upstream part of the BLM land contiguous to Rock Creek never has been privately owned.

Assuming that all of the above factual allegations are true and that permittee's interpretation of the FERC license is correct, it is our opinion that the permittee lacks sufficient riparian rights to operate the project. Therefore, permittee requires a permit to appropriate water.

First, the power generation entitlement of a riparian landowner is to the hydraulic effect of the natural flow of the stream measured by its

---

[2] We are unable to find any provision in the FERC's Order Issuing License for this project (No. 3189-003), issued April 29, 1983, which purports to authorize the permittee to use whatever riparian rights may be held by the Bureau of Land Management in the project area. The only provision therein referring to riparian rights is Order paragraph (B)iii, which defines certain properties and rights which are necessary to the operation or maintenance of the project as part of the project. Order paragraph (B)iii in no way can be read as a grant. Rather, it is a definition. If anything, its implication is that water rights are a necessary part of the project, to be acquired by the permittee.

drop from the highest point to the lowest point on his land. Seneca Consolidated Gold Mine v. Great Western Power (1930) 209 Cal. 206, 219, 287 Pac. 93. When water is used to generate power, the use made of the water is to develop and capture the force inherent in the fall of the water from one level to another. The force that results from the fall of water is dependent on the distance of the fall. Thus, a greater use can be made of water that falls a greater distance. However, a water right holder acquires only the right to the use of water. Water Code § 102. Therefore, if Seneca, supra, is correct as to the measure of a riparian landowner's right to use water to generate hydroelectric power, the Rock Creek Project has a riparian entitlement only to the drop of water from the highest point on the stream where the project has a possessory interest in the adjacent riparian land, to the lowest point where it possesses adjacent riparian land, but does not include the drop attributable to any intervening segment of the stream in which the project lacks a possessory interest or to which riparian rights are not attached. Therefore, if permittee's factual allegations are correct, permittee has a riparian right to use the hydraulic energy attributable to the fall of water in the creek on its own land and, if the FERC license were correctly interpreted as allowing permittee to use any riparian rights attached to the BLM land, then permittee also would have a riparian right to use energy attributable to the part of the creek that flows through the BLM land that once was held in private

ownership.[3] Even if riparian rights attach to the upstream portion of the BLM land, which has not been held in private ownership, we believe permittee must have appropriative rights to use the hydraulic energy attributable to this portion of the creek.

Permittee argues that, even if it does not have a right to use the United States' water rights or even if the United States lacks riparian rights, permittee can go upstream from its riparian property to divert water for its hydroelectric project. Permittee bases its argument on several cases which allow a riparian landowner to go upstream to divert its water supply. The cited cases are distinguishable, however. Most of them are cases in which the water was to be put to consumptive use on riparian property. To the extent

---

[3] Based primarily on the holdings in McKinley Bros. v. McCauley (1932) 215 Cal. 229, 9 P.2d 298 and Rindge v. Crags Land Co. (1922) 56 Cal.App. 247, 205 Pac. 36, we have previously taken the position that riparian rights do not attach to land until it is patented to private ownership. In McKinley and in Rindge, appropriative rights which were initiated prior to the patenting of certain riparian properties to private ownership were given priority over the riparian rights appurtenant to subsequently patented lands upstream. The basis for these holdings was that "riparian rights do not attach to land held by the government until such land has been transmitted to private ownership." McKinley, supra, 9 P.2d 299.

The question of whether the United States has riparian rights on lands which have never been held in private ownership was the subject of a recent opinion by the Court of Appeal, Third Appellate District. (In the Matter of the Determination of the Rights of the Various Claimants to the Waters of Hallett Creek Stream System in Lassen County, California, No. 3 CIV 24355). Our position in the Court of Appeal was that the United States Forest Service does not have riparian rights on its lands which never have been held in private ownership. The Court of Appeal disagreed with our position, and held that the United States has riparian rights which lack priority over any other user of water, whether the other user is using water now or will use it in the future. We are seeking review of this opinion.

that a riparian right holder diverts water upstream of his property solely for convenience and does not put it to use by capturing the hydraulic energy in the water attributable to the upstream lands, we believe that the cited cases apply. However, wherever the riparian diverter for power purposes puts the water to use by capturing its hydraulic energy, it must have a water right appurtenant to the land on the part of the stream to which the energy is attributable. We reach this conclusion because when water is used in generating power, it is used for the purpose of developing a force which can be converted to electricity. Such a force is developed because of the topography of land adjacent to the stream, and the incremental addition of any part of the stream above the riparian property will add an incremental amount of force attributable to the upstream nonriparian property. The use of the fall of water attributable to the upstream property is subject to appropriation under Water Code § 1201.

3.3 Permittee's Claim of Federal Reserved Water Rights

Permittee argues that it does not need a water right permit because it has federally reserved water rights to use the water flowing in Rock Creek. Permittee apparently makes this argument as a further basis for contending that the Board should not exercise jurisdiction over the Rock Creek Project.

Permittee correctly points out that Section 24 of the Federal Power Act, at 16 U.S.C. § 818, includes the following language:

"Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located."

Permittee interprets Section 24 as according permittee a federal reserved water right. However, no court in a reported case has ever held that Section 24 operates in combination with the reserved water rights doctrine to accord reserved water rights to a hydroelectric project. To the extent that reserved water rights have been implied to exist in connection with a hydroelectric project, the reservations of federal land were made under laws other than the Federal Power Act. See, e.g., Federal Power Commission v. Oregon (1955) 349 U.S. 435, 75 S.Ct. 832. Thus, no holding exists that Section 24 can itself operate to reserve water.

Section 24 of the Federal Power Act must be read in context with other provisions of the Act. Particularly, it must in this case be read with Sections 9(b) and 27 of the Act.

Section 9(b) provides:

"Each applicant for a license under this chapter shall submit to the commission --

* * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter." (16 U.S.C. § 802.)

More importantly, Section 27 provides:

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. § 821.)

Together, Section 9(b) and 27 clearly provide that a hydropower proponent must acquire water rights under the laws of the state, and that nothing in the Federal Power Act is to be construed as interfering with state water right laws. Thus, the plain meaning of these sections is that Section 24 does not accord water rights to a hydropower licensee of the FERC. Since all three of these sections were enacted together in the original act, there can be no argument that Section 24 overrides the other sections.

As we found above in finding 3.1, Section 27 of the Federal Power Act is patterned on Section 8 of the Reclamation Act of 1902. Regarding the Reclamation Act section, the U.S. Supreme Court held that the United States must comply with state water right laws in obtaining water for its reclamation projects. California v. United States

(1978) 438 U.S. 645, 98 S.Ct. 2985. Thus, if Section 27 is to be interpreted in the same way as Section 8 of the Reclamation Act, which it copies, it must be construed as requiring compliance with state water right laws, including Permits 19259 and 19260.

Based on the foregoing discussion, we conclude that permittee does not have federally reserved water rights that would eliminate the requirement that permittee obtain and comply with appropriative water rights under the California Water Code.

4.0 QUESTIONS OF PROOF

4.1 Burden of Proof

Permittee argues that the Department of Fish and Game, since it requested that the bypass flow requirements in Permits 19259 and 19260 be amended, has the burden of proving that the bypass flows should be amended.

For the reasons stated below, we conclude that permittee and the Department each have the burden of proving the facts to support their own proposals for a minimum bypass flow. Each party must meet its burden by a preponderance of the evidence.

This case comes to the Board for decision on a condition in permittee's permits reserving jurisdiction. The reservation of jurisdiction was imposed by the Board in Decision 1596 when it approved issuance of the permits. As provided in Water Code § 1381,

"The issuance of a permit gives the right to take and use water only to be extent and for the purpose allowed in the permit."

The reservation of jurisdiction, in Term 17(c), is to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels after evaluating the results of a study the permittee was required to conduct pursuant to Term 17(a). The bypass flow requirements in Term 16 are for 15 cubic feet per second from October 1 through April 30 and 11 cubic feet per second from May 1 through September 30.

The reasons for the reservation of jurisdiction and for setting the current bypass flow requirements are set forth in Decision 1596 at finding 7, pages 8 and 9. To summarize, the Board found that the instream flow study presented to the Board by the permittee's predecessor at the 1983 hearing was deficient in several important respects, and that because of the deficiencies no valid basis existed for the minimum flow requirements set forth in Permit Term 16. However, the protestant (the Department of Fish and Game) agreed that the project could be approved with the 11 cfs/15 cfs minimum flows pending further study, if the Board reserved jurisdiction to change the flow requirements after the further study. These flows were matched to the interim flow requirements in the license issued by the Federal Energy Regulatory Commission. See Decision 1596, pp. 8-9.

Because no valid basis was provided at the 1983 hearing for the current minimum flow requirements, permittee's predecessor failed to

meet its obligation to provide information to the Board concerning the effects of the appropriation on fish, under Water Code § 1260(j), and failed to demonstrate how much water actually is available for its appropriation after fishery needs are satisfied. (See Water Code § 1243).

Rather than deny the applications or defer a decision on them until a fishery study was done, the Board decided to approve the application subject to terms and conditions including Terms 16 and 17, in which the Board required a further fishery study and reserved jurisdiction. By approving the project, the Board relieved the permittee of the delays that would be involved in either reapplying for permits or having to wait for its permit while it did the additional fishery study.

Since the Board was satisfied that sufficient water would be available for the project after the bypass of some flows for fishery and riparian vegetation protection (see finding 6.a. of Decision 1596), the question of the level at which to set the bypass flows was not a matter that would require a delay in approving the basic project. Rather, it was a question that would affect the amount of flow the project would have to bypass. (We recognize that the amount of the bypass affects the amount of water that may be passed through the project's generators, and thereby affects the amount of energy the project will produce and the amount of money it will earn. However, permittee made the decision to proceed with construction of the project notwithstanding the uncertainty as to the final bypass flow.)

This proceeding is not, as permittee suggests, a disciplinary or revocation proceeding. Such proceedings are conducted under Water Code §§ 1410 et seq. and 1825 et seq. This proceeding is instead an exercise of reserved jurisdiction under Permit Term 17. Exercises of reserved jurisdiction to amend permit terms and conditions are appropriate in the administration of water rights. See United States v. State Water Resources Control Board, (1986) 182 Cal.App. 3d 82, 227 Cal.Rptr. 161.

By its nature, a proceeding on reserved jurisdiction is a continuation of the original proceeding, for the purpose of adjusting the terms and conditions of water rights in response to new information and changing circumstances. See Water Code §1394.

Further, this proceeding does not threaten in fact to revoke a part of permittee's water right. Under Term 16, permittee's authorization to divert and use water was from its inception, and remains, subject to the needs of the Rock Creek fishery. The permit clearly shows that uncertainty exists as to the exact needs of the fishery and that further action may be taken after a fishery study. The permittee has no rights under the permit to take and use water beyond the authorizations contained therein, and the permittee takes the permit subject to its conditions. Water Code §§ 1381, 1391. Also, the fishery is protected by the public trust doctrine, against which no one has a vested right. (See National Audubon Society v. Superior

Court, 33 Cal.3d 419, 658 P.2d 709 (1983); People v. Truckee Lumber Co. (1897) 116 Cal. 397, 48 Pac. 374; and Decision 1596, page 8.) Thus, no threat exists that the permittee may lose something to which it has a right.

Permittee is generally correct that the moving party has the burden of proof in administrative proceedings. However, this rule varies when public policy considerations favor protecting a particular interest. CEEED v. Calif. Coastal Zone Conservation Comm'n (1974) 43 Cal.App.3d 306, 118 Cal.Rptr. 315, State v. City and County of San Francisco (1979) 94 Cal.App.3d 522, 156 Cal.Rptr. 542. In this case, public policy, including the public trust doctrine, favors the protection of fisheries in connection with the appropriation of water. Water Code §§ 386, 1243, 1260(j); National Audubon and Truckee Lumber, supra. To place the burden of proof that the current bypass flow requirement is inadequate on the party who seeks to provide the greater protection for the fishery would favor the limitation or destruction of the fishery. Therefore, public policy considerations favor putting the burden on the permittee to prove that the 11 cfs/15 cfs bypass flow requirement is adequate to protect the fishery at the natural preproject level.

Further, since the bypass flow requirements were not finally determined and were established provisionally in Decision 1596, the affirmative case in the instant proceeding remains with the permittee to prove the correct bypass flow. Having failed initially to satisfy

all of the requirements of an application, the permittee still has the burden of proving its assertions regarding the fishery's needs which it did not prove before. The Board in Decision 1596 determined that the appropriate bypass flow for Rock Creek would be the bypass flow that would protect the fishery in Rock Creek at the preproject level. (See Decision 1596, page 8, finding 7.b.) Consequently, permittee must prove that the fishery will be protected at preproject levels under the 11 cfs/15 cfs flow regime.

Finally, we note that the Evidence Code at § 500 provides that:

> "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

Since establishing the 11 cfs/15 cfs bypass flow requirement as the appropriate flow is essential to permittee's case, permittee has the burden of proving that this is the appropriate requirement. Likewise, the Department of Fish and Game has the burden of proving that the 30 cfs/60 cfs bypass flows it recommends are appropriate.

4.2 Standard of Proof

Permittee asserts that the standard of proof in this case should be that of clear and convincing proof to a reasonable certainty. This argument is founded on the theory that permittee has a vested property right to the use of water in Rock Creek. Permittee cites in support of the theory that it has a vested right a general dictum in United States v. State Water Resources Control Board, supra, at 182

Cal.App.3d 101. However, the dictum states only the general rule and does not explain when rights are acquired to use water. Nor does it explain the limitations on either the extent of a water right or the extent of vestedness.

A permit to divert and use water is merely permission to commence the acquisition of an appropriative water right. As the California Supreme Court explained in Temescal Water Co. v. Department of Public Works:

> "A permit itself confers no appropriative rights but fixes the priority of its recipient over subsequent appropriators, Water Code §§ 1450-1456; it expressly provides that its issuance is subject to vested rights." Temescal Water Co. v. Department of Public Works (1955) 44 Cal.3d 90, 280 P.2d 1.

Subsequently, in Eaton v. State Water Rights Board (1959) 171 Cal.App.2d 409, 340 P.2d 722, the Court of Appeal made this same point and elaborated on it as follows:

> "The final procedural step in perfecting a water right is the issuance of a license as prescribed in sections 1600 through 1677 of the Water Code. The issuance of a license is merely confirmatory of a right acquired by use in accordance with the permit.
>
> "On the issuance of a permit the permittee has the right to take and use the water to the extent allowed in the permit." (Emphasis added.)

Also see Madera Irr. Dist. v. All Persons (1957) 306 P.2d 886, 892, 47 Cal.2d 681; Hutchins, The California Law of Water Rights (1956), pp. 108-112; Water Code §§ 1455, 1600-1651.

Thus, an appropriative water right is acquired by taking water under control and putting it to beneficial use in accordance with a permit to appropriate the water and in accordance with the Water Code, Division 2, Part 2. After the water has been put to beneficial use, the Board issues a water right license which confirms the right to appropriate the amount of water which has been applied to beneficial use within the terms and conditions of the permit. Water Code § 1610. It is the responsibility of the appropriator to show that the claimed amount of water has been appropriated. Water Code § 1610.5.

In this case, no license has been issued confirming an appropriation of water pursuant to Permits 19259 and 19260. Further, there is no evidence in the record that permittee has, since it acquired its permits, perfected a right to appropriate water up to the limits of its permits or for an amount less than that allowed in its permits. Since a permit legally is not evidence of a vested right to appropriate water, and nothing else in the record evidences the existence of a vested right, we conclude that permittee does not have a vested right. In fact, permittee appears to have just the bare permission to start acquiring a right. Under Water Code § 1455, the effect of issuance of a permit is limited: it continues the permittee's priority as of the date of the application and allows the permittee to take and use a specified amount of water for the life of the permit.

Even if, for sake of argument, permittee had a vested right in the sense of having perfected a water right, permittee nevertheless would have no vested right to take and use water needed to protect public trust values. National Audubon, supra, at 189 Cal.Rptr. 363-366; United States v. State Water Resources Control Board, supra, at 182 Cal.App.3d 106. Since, as we have noted above and in Decision 1596, the fishery is protected by the public trust, there can be no vesting of a right to harm it.

Generally, the proper standard of proof in cases where no fundamental vested right is involved is the preponderance of the evidence standard. Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853, 185 Cal.Rptr. 601. Also, it appears that few matters qualify as fundamental vested rights. Professional licenses of physicians, lawyers and dentists have been held to be fundamental vested rights. However, continued employment and worker's compensation have not been held to have this stature, and have been subject to the preponderance standard and substantial evidence review. Ettinger, id. We conclude that changes in water right permits likewise are subject to the preponderance standard and substantial evidence review. See Bank of America v. State Water Resources Control Board (1974) 42 Cal.App.2d 202, 116 Cal.Rptr. 770.

5.0 HYDROLOGY OF ROCK CREEK

Three different estimates have been made a part of the hearing record to depict the hydrology of Rock Creek's watershed, for the Rock Creek Project. The three hydrologies estimates are (1) the September 1981

estimated hydrology by Sierra Hydrotech; (2) the October 1985 synthetic flow record by Ott Water Engineers, and (3) the April 1986 synthetic flow record by Ott Water Engineers.

Probably the most accurate way to predict the hydrology of a watershed is to use a continuous long-term record of flows within the watershed to develop statistical probabilities of future flow occurrences at the same location. However, no continuous long-term record of flows exists for Rock Creek. Therefore, the permittee and its predecessor have commissioned studies based on other methods.

5.1 September 1981 Hydrology

In the first study, Sierra Hydrotech used isohyetal maps to determine average annual precipitation, estimated a ratio of runoff to precipitation and then computed average annual runoff. Sierra Hydrotech then developed estimates of average monthly runoff by first computing the percentage of average annual runoff that occurs each month on similar streams and then applying these percentages to Rock Creek. While this provides an estimate of <u>average</u> monthly runoff, "average" runoff seldom actually occurs as rainfall varies dramatically in this area. To develop flow-duration data for Rock Creek, Sierra Hydrotech compared the shape of flow-duration curves from other streams and then used one observed flow on Rock Creek, the accuracy of which is unknown, to extrapolate a curve for Rock Creek. We cannot determine from the evidence that this data is accurate or typical of Rock Creek. Therefore, we find that the only useful

portions of this hydrology are the average annual and monthly runoff figures.

5.2 Hydrologies Based on Synthesized Data

The second and third hydrologies by Ott Water Engineers both were made by comparing measured flows on Rock Creek with long-term gage-recorded flows on other streams, to develop correlation factors. The correlation factors were then used to synthesize a long-term record for Rock Creek. This method is considered adequate if the two stream basins are similar, and if their characteristics do not differ significantly.

The October 1985 synthetic hydrology used data from Oregon Creek and the April 1986 synthetic hydrology used data from Forest Creek. Table 1 compares the major characteristics of each of these watersheds with the Rock Creek watershed. Table 2 summarizes the effects of these characteristics on hydrology. The tables show that the differences between the watersheds are significant. Therefore, it is questionable whether the resulting synthetic hydrologies are representative of what will occur on Rock Creek.

5.2.1 April 1986 Hydrology

For the April 1986 hydrology, permittee did not present its methodology for calculating the synthetic flows from the raw data (i.e., the 14 measured flows from Rock Creek and the gaged streamflow records from Forest Creek). Consequently, we do not know the means by which the synthetic flows were developed. Additionally, we have been

TABLE 1

Comparison of Basin Characteristics

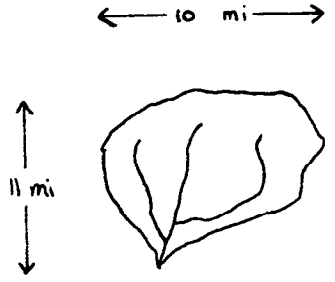
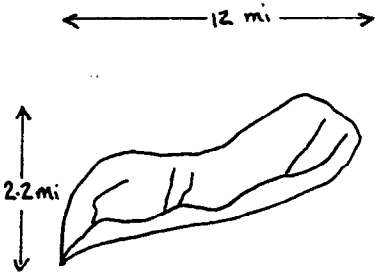
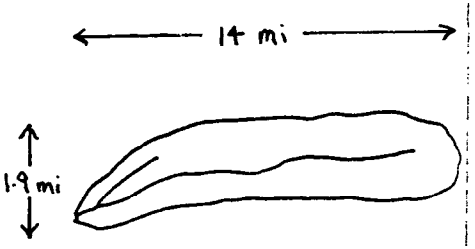
Element / Watershed	Rock Creek	Oregon Creek	Forest Creek
Area	68 sq. miles	23.0 sq. miles	20.8 sq.miles
width x length	10 mi. x 11 mi.	2.2 mi. x 12 mi.	1.9 mi. x 14 mi.
minimum elevation	1,300 ft.	2,230 ft.	2,950 ft.
maximum elevation	4,762 ft.	5,744 ft.	7,042 ft.
orientation	north to south	east to west	east to west
Dist. from Rock Creek	N/A	50 miles north	30 miles south
basin shape			

TABLE 2

(Effect of Watershed Characteristics on Hydrology)

CHARACTERISTIC	EFFECT		
	Rock Creek	Oregon Creek	Forest Creek
Basin Shape:	Large, heart-shaped basin with significant channel storage capacity. Storm induced runoff attenuated reducing maximum flows with low flows slightly higher and of longer duration.	Long, narrow basin with little channel storage. Runoff concentrated quickly to produce high peak flows that drop off quickly after storm passes.	Long, narrow basin with little channel storage. Runoff concentrated quickly to produce high peak flows that drop off quickly after storm passes.
Elevation:	Predominately below the snow-line. Little impact from snowmelt. Flows tend to decrease rapidly as soon as the storm season ends.	Fairly high elevation for lattitude. Significant amounts of snowmelt extend flows after winter storm season ends.	Fairly high elevation for lattitude. Significant amounts of snowmelt extend flows after winter storm season ends.
Orientation:	North-South orientation. Winter storms move from the northwest to the southeast and would tend to stay over the basin longer producing more effective precipitation and runoff.	East-west orientation. Winter storms move from the northwest to the southeast and can pass quickly over the basin if not stalled; producing less effective precipitation and runoff.	East-west orientation. Winter storms move from the northwest to the southeast and can pass quickly over the basin if not stalled; producing less effective precipitation and runoff.
Geographic Location:	Located near the southern limit of the northern Sierra. Not all winter storms pass over this basin.	50 miles north of Rock Creek. This basin is located in the heart of the northern Sierra and most winter storms pass directly over the basin.	30 miles south of Rock Creek. This basin is located in the central Sierra and many storms either miss it or produce little effective precipitation.

unable to reproduce the methodology to verify the accuracy of the synthetic flows based on the data.

Permittee has compared the April 1986 synthesized flows with 14 actual flow measurements from Rock Creek. The actual and synthetic flows show an extremely high degree of correlation. The correlation is unexpectedly high. Therefore, staff has attempted to verify the synthetic flows using the data supplied by the parties. However, the Board's staff was able to calculate the monthly correlation factors that permittee must have used to synthesize a flow record. Applying the factor for December, staff calculated a maximum flow of 7,257 cfs for Rock Creek. However, the April 1986 synthesized hydrology shows a maximum flow in Rock Creek of 999.9 cfs. Therefore, at least one unresolved inconsistency exists in the synthesized hydrology, and the accuracy of the hydrology cannot be verified. Permittee, therefore, has failed to demonstrate that the Forest Creek synthetic hydrology is representative of Rock Creek.

5.2.2 October 1985 Hydrology

Permittee did not provide much evidence regarding the synthetic hydrology based on Oregon Creek. Like the Forest Creek-based synthesis, no information was provided regarding the methodology for calculating the synthetic flows.

5.3 Compiled Synthetic Hydrology

All three hydrologies presented for Rock Creek have definite limitations. Because of the lack of evidence to support them, we

cannot with any confidence use any one of the synthetic hydrologies that have been presented to establish bypass flow requirements. However, all three of the hydrologies fall within a range. Notwithstanding that none of the hydrologies standing alone can reliably be considered to approximate Rock Creek's hydrology, the three when compiled provide a range within which substantial evidence shows that the actual hydrology exists. This range is depicted in Tables 3 and 4 and in Figures 1 and 2.

5.4 Reserved Jurisdiction

Since the compiled hydrology is based on several sets of data, it is possible that the permittee will want to develop a more exact hydrology for Rock Creek, for use in reevaluating the bypass flow requirements in the future. Therefore, we will continue the reservation of jurisdiction in Permits 19259 and 19260 to amend the bypass flow requirements set forth in the permits. If a change is requested in the bypass flow based on a new hydrology, we will require the party providing the new hydrology to also provide sufficient documentation so that we may verify the data.

6.0 ADEQUACY OF THE FISHERY STUDIES PERFORMED BY PERMITTEE

The first key issue listed in the Water Right Hearing Notice dated March 28, 1986 was, "Has the permittee performed the fisheries habitat study as required by terms 17a and 17b?"

TABLE 3
ROCK CREEK COMBINED HYDROLOGY
Average Monthly Flows (cfs)

Month	Low	High	Ave.
Oct	10.8	20	16.3
Nov	38	78	51.7
Dec	78	120.9	101.3
Jan	147.1	250	183.4
Feb	173	215	191.2
Mar	202.7	232	212.9
Apr	172.1	217	194
May	71	94	85.3
Jun	29.1	46	38.4
Jul	10.9	31	20.6
Aug	4.9	22	14
Sep	5.9	17	12.3
Ann. Ave.	82.7	109.7	92.8

TABLE 4
ROCK CREEK COMBINED HYDROLOGY
Annual Percent Exceedence Curves

Percent of time flow exceeded	Flow (cfs)		
	Low	High	Ave.
20	95	177	134
25	70	134	115
30	55	118	82.3
35	45	86	63
40	38	67	50.3
45	30	53	40.3
50	25	44	33.7
55	21	36	28
60	17	30	23.3
65	14	24	18.7
70	10	20	15.7
75	8	18	14
80	5	16	11.7
85	4	14	10
90	3	13	8.7
95	2	9	6
100	0	0	0

FIGURE 1

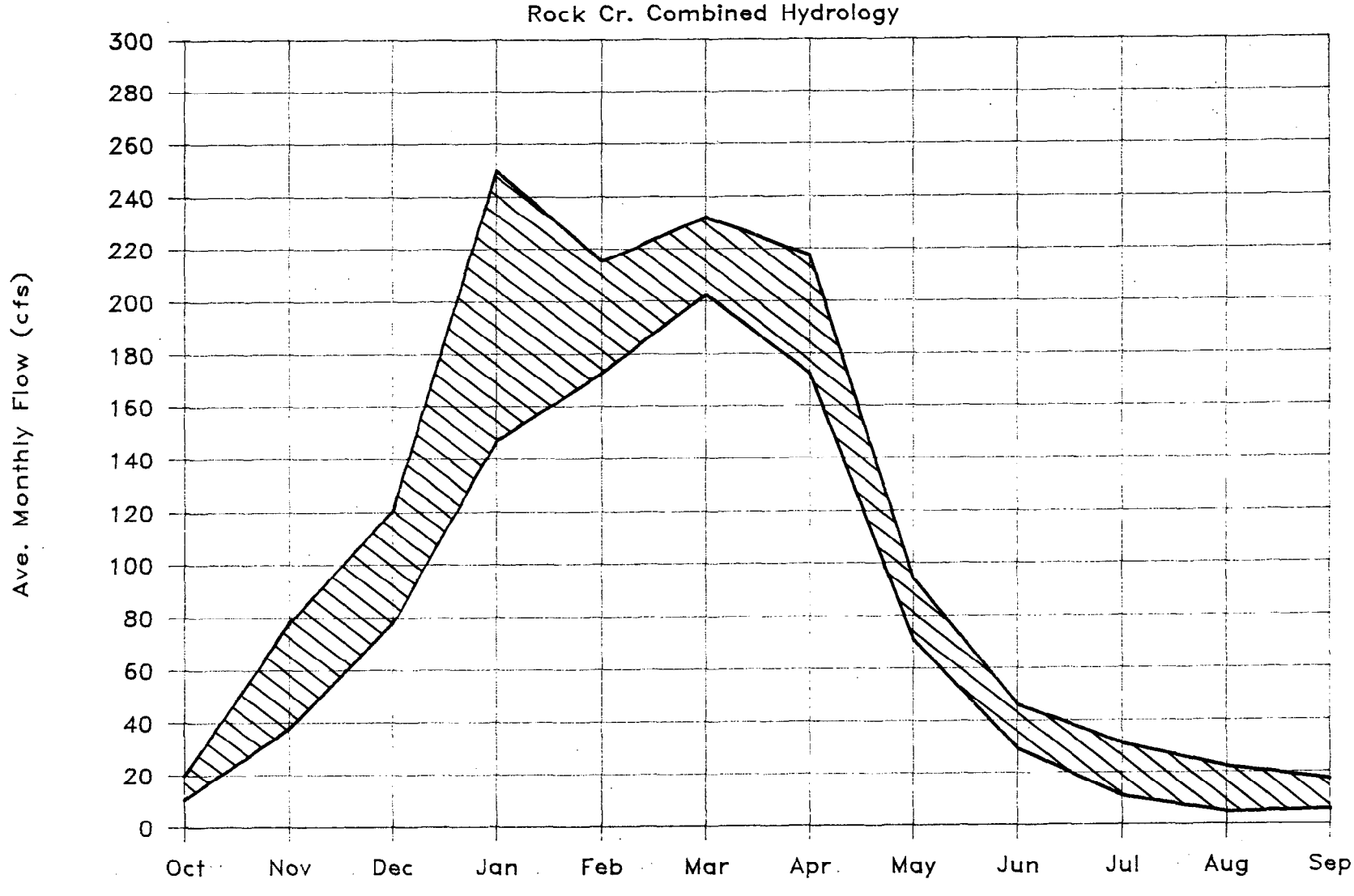
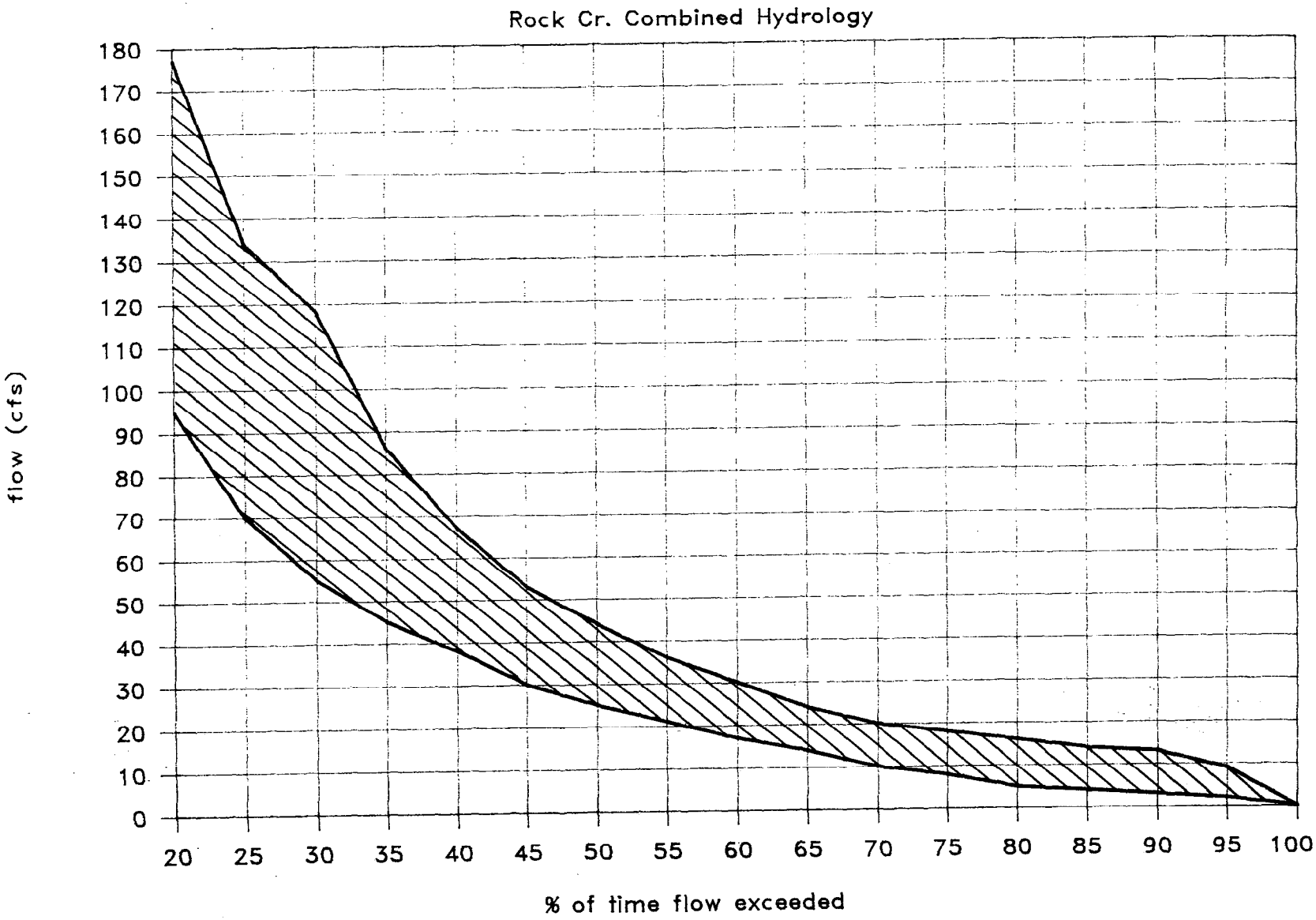

Rock Cr. Combined Hydrology
Ave. Monthly Flow (cfs)
300
280
260
240
220
200
180
160
140
120
100
80
60
40
20
0
Oct
Nov
Dec
Jan
Feb
Mar
Apr
May
Jun
Jul
Aug
Sep

FIGURE 2


Rock Cr. Combined Hydrology
flow (cfs)
180
170
160
150
140
130
120
110
100
90
80
70
60
50
40
30
20
10
0
20
25
30
35
40
45
50
55
60
65
70
75
80
85
90
95
100
% of time flow exceeded

6.1 Compliance With Data Collection Requirements

We find that Permittee has substantially collected the data required for the study, that further data collection would not be useful, and that variances in permittee's data collection from terms 17a and 17b did not impair the purposes of the permit term requirements. Therefore, we will not require permittee to collect further data for the fishery study.

6.2 Appropriate Analytical Method for Habitat Modeling in Rock Creek

The IFG-4 study required by the Board is a habitat modeling study that provides estimates of available fish habitat at different flows. Two types of methods for habitat modeling are in dispute in this case -- the rainbow trout preference criteria that should be used and the modeling technique that should be used.

6.2.1 Depth and Velocity Preference Criteria

Upon commencement of the fishery study ordered by Decision 1596, permittee's predecessor's representatives, after observing the stream jointly with the Department's representatives, agreed with the Department's representatives to use a set of rainbow trout depth and velocity criteria known as the "Bovee" curves. Subsequently, the current permittee decided to use a different set of criteria known as the "Raleigh" curves. The Department argues that the Bovee curves should be used for Rock Creek. The primary difference between the two sets of criteria lies in the velocity curves for the two sets of criteria.

The Raleigh curves generally indicate that rainbow trout prefer lower water velocity than is indicated by the Bovee curves. The Bovee curves are more in agreement with habitat preference data from the Sierra than the Raleigh curves to predict the flow and depth conditions an adult rainbow trout will select. Much of the selection of one or the other of the two curves to analyze a particular stream is dependent on the observations and experience of fisheries biologists with the subject stream and with similar streams in the same geographical area. The fisheries witnesses for the Department have had more extensive and longer term experience with the Rock Creek rainbow trout fishery and the fisheries of other streams in that geographical area than have either of permittee's fishery biology witnesses. The Department's four fishery biology witnesses had at the time of the hearing approximately four years, four years, three years, and three years experience, respectively, with the stream when the hearing commenced. Permittee's witnesses each had had less than a year's experience with the stream, and one of them had less than three months' experience with it. For a fisheries biologist to observe a stream at all times of the year before making predictions about it is especially valuable. Not only have Department's witnesses had much more experience with Rock Creek than the permittee's witnesses, but also the experience of the Department's witnesses in the area of the Sierra where Rock Creek is located is much more extensive than that of the permittee's witnesses. The Department's judgment in matters of protecting fish life is entitled to great weight in the Board's proceedings. Bank of America, supra, at 116 Cal.Rptr. 778-779.

The opinions of the Department's witnesses that the Bovee curves more closely fit the situation in Rock Creek is corroborated by a fish habitat study on Deer Creek by Moyle and Baltz (permittee's exhibit 4, P-61), which is similar to Rock Creek in fish assemblage and temperature regime. Both of these characteristics are important to evaluation of flow and depth preferences. Deer Creek data more closely support the Bovee adult curve, support neither curve for juvenile fish, and more closely support the Raleigh fry curve.

Thus, neither proposed set of curves appears completely representative of Rock Creek for all life stages. The Bovee adult and juvenile curves are more applicable to Rock Creek, and it is uncertain which fry curves are more applicable.

6.2.2 Modeling Technique

Permittee used the IFG-4a modeling technique rather than the IFG-4 modeling technique specified in the permits at term 17a. The IFG-4a technique produces results comparable to the IFG-4 modeling technique using the Rock Creek data. Therefore, we will accept the results of the IFG-4a modeling technique.

7.0 BYPASS FLOW REQUIREMENT

Permittee argues that the provisional bypass flow requirements set forth in the permits at term 16, 11 cfs from May through September and 15 cfs from October through April, are sufficient to protect the fishery resources of Rock Creek at natural preproject levels. The

Department argues that bypass flows of 30 cfs from October through February and 60 cfs from March through September are needed to protect the fishery resources at natural preproject levels. The issues are, (1) whether a "pinch period" operates to reduce the rainbow trout population during the lowest natural flow period in the summer, so that reduction of flow and habitat during other times of year by the project to the "pinch period" level would not adversely affect the fish population more than the effect of the natural "pinch period"; (2) whether the Tennant method should be used to determine the flows needed to protect the fishery resources; (3) how observations of Rock Creek should be applied; (4) which fishery modeling analyses should be used.

7.1 Fishery Habitat Modeling Analyses

We have assumed for purpose of evaluating the modeling analyses that the "average" values listed in Table 3 approximate the mean monthly flows in Rock Creek. Using these flows, the Board's staff has compared the results of the IFG-4a modeling, applying the Raleigh and the Bovee sets of criteria to the results.

7.1.1 Effect of the Two Sets of Minimum Flows on the Adult Life Stages

The adult life stage is important in Rock Creek because the adult stage is the object of angler harvest, and because it is necessary for adults to exist to spawn and perpetuate the population. Using either the Bovee or the Raleigh curves the minimum flows recommended by the Department preserve more fishery habitat for adults than the minimum flows recommended by permittee.

7.1.2 Effect of the Two Sets of Minimum Flows on the Juvenile Life Stage

Using either the Bovee or Raleigh curves, the minimum flows recommend by the Department provide more habitat for juveniles than the minimum flows recommended by the permittee. Under the Bovee curve, which is more applicable to Rock Creek, more habitat is protected by the Department's minimum flows, than by the minimum flows permittee recommends. Although the Raleigh curve suggests that the flows recommended by both permittee and the Department would enhance juvenile habitat in some months, we find that no enhancement of juvenile habitat actually would occur at these flows. Further, the low flows supported by the Raleigh juvenile curves would cause severe losses to the adult and spawning life stages.

7.1.3 Effects of the Two Sets of Minimum Flows on the Fry Life Stage

The Bovee curve shows that the minimum flows recommended by the Department would preserve all of the preproject fry habitat, and that the minimum flows recommended by the permittee would cause large losses of habitat. However, the Raleigh curve shows that the Department's minimum flow recommendation would provide less habitat than the permittee's minimum flow recommendation. Thus, the two sets of criteria are contradictory with regard to the effect on fry of the different flow rates.

7.1.4 Effects of the Two Sets of Minimum Flows on the Spawning Life Stage

Both sets of criteria show reductions in spawning habitat under the minimum flows recommended by both permittee and the Department.

However, the reductions in habitat are greater under the permittee's minimum flow recommendations, and the Raleigh curves show no spawning habitat under permittee's minimum flow recommendation. Maintenance of spawning habitat is essential to the preservation of a fishery. In order to preserve habitat for spawning, the Department's recommendation for minimum flow should be followed during the spawning period.

7.2 Applicability of the Pinch Period Concept

The primary basis for the permittee's minimum flow recommendation is that naturally low flows in August, September and October currently limit the population of adult rainbow trout in Rock Creek to those adults which can find habitat during those months. We have no evidence that low summer flows in fact cause adult trout to emigrate from Rock Creek; nor do we have evidence that they do not emigrate. Fishery ecology in streams such as Rock Creek is complex, and limiting factors may change depending on factors other than streamflow.

Assuming that a pinch period occurs, however, the permittee's minimum bypass flow recommendations would provide less habitat for adult trout in May and June than is available during the alleged natural pinch period. As a result, permittee's recommended flows of 11 cfs and 15 cfs would cause an adverse impact on the adult trout population in the months before August in all normal and above-normal water years; i.e., about 50 percent of all years. If a higher bypass flow of 17 cfs were required (permittee has indicated a willingness to accept a 17 cfs

bypass flow), the adult trout population would be adversely affected in above-normal water years. With a higher minimum bypass flow, more adult trout could remain in the system and available for harvest for a longer period each year, whereas the flow recommended by permittee could limit the adult trout population at any time of year. Preservation of the normal harvest period is a primary incident of the maintenance of a fishery. Therefore, the Department's recommendation of 30 cfs and 60 cfs will better protect the preproject fish population if the pinch concept applies.

7.3 Applicability of the Tennant Method

The Tennant method is a widely accepted procedure to determine minimum flows that will protect fisheries. It uses percentages of the mean annual flow of the stream to estimate the needed minimum instream flow. It is applicable to streams such as Rock Creek in which only the natural flow is available to supply a minimum downstream flow requirement. If it were used more specifically than it was used herein by the Department, it would have to be calibrated. However, the Department supports use of this method only as a starting point in combination with several other analytic methods.

The results of the fishery habitat modeling analyses confirm the conclusions reached under the Tennant method by showing that the bypass flows derived under the Tennant method protect habitat for important life stages of trout.

However, the results of applying the Tennant method do not coincide with hydrologic conditions in Rock Creek in July through September. During those months the natural flow rarely exceeds 30 cfs, and even more rarely reaches the 60 cfs recommendation for those months based on the Tennant method. Therefore, the flow bypass requirement should not be more than 30 cfs during those months.

The Tennant method recommends maintenance of 60 percent of the average flow during the primary periods of growth and 30 percent of average flow during other periods. Since the spring months are the months of primary growth, it is appropriate under the Tennant method to require bypass of 60 percent of the average flow during those months. the Department's recommended minimum bypass flows are based on requiring 30 percent and 60 percent of a mean annual flow of 100 cfs. Based on the hydrologic analyses for Rock Creek, the mean annual flow is between 82.7 cfs and 109.7 cfs. Therefore, bypass recommendations under this method could range from 25 cfs and 50 cfs to 33 cfs and 66 cfs. Thus, after the actual mean annual flow for Rock Creek becomes known, the bypass flows may be varied.

7.4 Maintaining the Fishery

Permittee's recommended bypass flows would greatly reduce the fishery habitat in Rock Creek. As a result, major reductions in fish population are likely. With reductions in population and habitat, a reduction in fish harvest is likely. During low flow periods late in summer, fish have few hiding places and become wary and difficult to catch. If the flows recommended by permittee were instituted, fishing

success would be severely reduced. On the other hand, the Department's flow recommendations likely will substantially maintain the preproject fishery.

7.5 Fishery Recruitment to South Fork American River

The Board found in Decision 1596 that "Rock Creek is important because it provides fishery recruitment to the South Fork American River...." Permittee's recommended minimum bypass flows would substantially reduce the adult and spawning habitat in Rock Creek compared with the Department's recommended flows. Therefore, the Department's recommended flows will better protect fishery recruitment to the South Fork American River.

7.6 Required Flow

The various considerations discussed above more strongly support the Department's minimum flow recommendations, for the purpose of maintaining the fishery resource at natural preproject levels. The Department's recommendation would better protect the adult, juvenile and spawning habitats. It also would maintain a harvestable adult fishery for a longer period into the summer and throughout the year. Further, the Department's recommendation would avoid significant reductions in rainbow trout habitat and population, would protect angler harvest and recruitment to the South Fork American River, and would come much closer than permittee's recommendation to protecting the fishery at natural preproject levels.

8.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Board as lead agency prepared and approved a mitigated negative declaration for the Rock Creek Project in accordance with the requirements of the California Environmental Quality Act (CEQA) (Public Resources Code §§ 21000 et seq.) before it adopted Decision 1596. The action herein applies to the same project, and since it will substantially maintain the fishery resources at natural preproject levels, it will not cause a significant adverse impact on the environment. Therefore, no additional CEQA document is required for the action herein.

After the Board adopts this order it will file a Notice of Determination with the Secretary for Resources. Consideration of the Mitigated Negative Declaration and Initial Study, inclusion of terms and conditions in the permits to carry out the Negative Declaration's mitigation measures, and filing of the Notice of Determination will satisfy the Board's responsibilities under CEQA.

9.0 OTHER MATTERS

Permittee raised two other matters in its brief. First, permittee requested a finding under 23 California Administrative Code § 729.[4] Second, permittee asserted that it should have been allowed to rebut the Department's presentation during the rebuttal phase of correspondence with two fisheries experts at the University of California at Davis and Oregon State University.

---

[4] Effective February 15, 1987, Section 729 of Title 23, California Administrative Code, was revised and renumbered as Section 756.

9.1 Section 729 Finding

Permittee's request for a finding under this section is denied. This section requires the Board upon the request of a party in a proceeding respecting an application to appropriate water, to identify and evaluate the benefits and detriments, including economic and environmental factors, of the various present and prospective beneficial uses of the waters involved and alternative means of satisfying or protecting such uses. The permittee did not make its request for a finding under this section until it filed its closing statement, long after the evidentiary record was closed. During the hearing, permittee failed to provide adequate evidence upon which such a finding could be based.

Additionally, weighing of beneficial uses such as is suggested by Section 729 was not a subject or issue of the hearing. Such a request would have been proper in the hearing leading to Decision 1596. Since the recent hearing was narrowly drawn to consider only specified issues under a reservation of jurisdiction and not the questions relevant to approving an application, the issue of the relative importance of the project compared with the fishery is not an appropriate consideration herein and, additionally, already has been decided in favor of protection of the fishery resource at the natural preproject level.

9.2 Permittee's Request to Rebut the Department's Rebuttal

During the period for introducing rebuttal evidence the Department offered in evidence two letters from fisheries experts regarding the

Rock Creek fishery. Permittee insists that it has a right to rebut the information contained in these letters, and cites several sections from the California Administrative Procedure Act. The Department offered the two letters as rebuttal of some of permittee's evidence, and not as original evidence to support its main case. The letters are accepted in evidence.

Permittee is incorrect in asserting a right to rebut the Department's rebuttal. First, no provision of law requires that a party in a water right hearing be allowed to introduce surrebuttal evidence. Second, the sections of the Administrative Procedure Act cited by permittee do not provide a right to surrebuttal, and do not apply to the Board's proceedings.[5] The Board's proceedings are governed by the Water Code and by the provisions in the Board's regulations at 23 Cal.Adm.Code §§ 648-648.8 and 761-766.

Finally, no provision requires prior notice of exhibits offered in rebuttal. Permittee obviously understood this point, since permittee offered several exhibits during its rebuttal without having previously provided them to the Department and the Board.

---

[5] Government Code § 11501 lists the Department of Water Resources as an agency whose proceedings are subject to the Administrative Procedure Act. The Board is a separate agency from the Department, and in fact regulates the water rights of the Department. Apparently, permittee has confused the two agencies in asserting the the Administrative Procedure Act applies to the Board's water right proceedings.

The letters in question are hearsay, and can only be used to supplement or explain other evidence. They are not sufficient in themselves to support a finding. 23 Cal.Adm.Code § 648.4. Additionally, it is questionable exactly what the statements in the letters mean, in light of the uncertainty over what the experts were told and what their assumptions were. Therefore, we have not relied on the letters in reaching our decision.

10.0 CONCLUSION

Based on the foregoing findings, the Board concludes that Permits 19259 and 19260 issued on Applications 26380 and 27353 should be amended to increase the minimum bypass flow requirement to 30 cfs from July through February and 60 cfs from March through June. Higher high flow requirements may be needed; however, we lack adequate evidence to decide upon a higher requirement. Since the minimum bypass requirements are being raised, permittee may have to install a different measuring device to measure the bypassed flows. Therefore, we will continue to require that permittee install a device that will measure the bypassed flows.

Terms 17a and 17b are no longer needed. Consequently we will delete them. However, we will continue present Term 17c (the reservation of jurisdiction) because further information may show that a different set of minimum bypass flows would be appropriate.

ORDER

IT IS HEREBY ORDERED that Permits 19259 and 19260 shall be amended as follows:

1. Term 16 in both permits is amended to read:

"For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:

a. From July 1 through February 29, a minimum of 30 cubic feet per second;

b. From March 1 through June 30, a minimum of 60 cubic feet per second;

c. The total streamflow shall be bypassed whenever it is less than the amount designated for that period.

"No water shall be diverted under this permit unless a device, satisfactory to the State Water Resources Control Board, is installed and is operating which is capable of measuring these bypass flows."

2. Term 17 in both permits is amended to read:

"The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after notice to interested parties and opportunity for hearing."

3. All other terms and conditions contained in Permits 19259 and 19260 shall remain unchanged and in full force and effect.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on MAR 19 1987

AYE: W. Don Maughan
Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego
Danny Walsh

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marche'
Administrative Assistant to the Board