

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 26651)	DECISION 1626
PACIFIC GAS AND ELECTRIC COMPANY,)	
Applicant,)	
CALIFORNIA DEPARTMENT OF FISH AND)	SOURCE: Hamilton Branch
GAME; CALIFORNIA SPORTFISHING)	COUNTY: Lassen
PROTECTION ALLIANCE,)	
Protestants.)	

DECISION APPROVING APPLICATION 26651

BY THE BOARD:

1.0 INTRODUCTION

Pacific Gas and Electric (applicant or PG&E) having filed Application 26651 for a permit to appropriate water from Hamilton Branch, tributary to North Fork Feather River; protests having been received; a public hearing having been held on November 28, 1989; the Board having considered all evidence in the record; the Board finds as follows:

2.0 SUBSTANCE OF APPLICATION

Application 26651 is for a permit to divert 24,000 acre-feet per annum (afa) of water to storage from Hamilton Branch at Indian Ole Dam which forms Mountain Meadows Reservoir in Lassen County. The water is

rediverted 1.8 miles downstream of Indian Ole Dam into a conduit leading to a powerhouse. The water is used to generate hydroelectric power at the Hamilton Branch Powerhouse located on the northeast shore of Lake Almanor in Plumas County, and is then released into Lake Almanor.

Water has been diverted and stored in Mountain Meadows Reservoir since 1924. The reservoir and associated facilities have been owned by PG&E since 1945. To date, no permit has been acquired to appropriate water at Indian Ole Dam. PG&E filed Application 26651 on December 5, 1980, in response to the decision of the California Supreme Court in People v. Shirokow (1980) 26 Cal.3d 301, 162 Cal.Rptr. 30. In Shirokow the California Supreme Court authorized an injunction against the owner of a dam and reservoir who had been diverting water and putting it to beneficial use. The dam and reservoir had been constructed sometime before 1960, and the respondent had acquired the surrounding land with the dam and reservoir in 1965. The Court held that the procedures set forth in the Water Code at Section 1000 et seq. are the exclusive means of acquiring appropriative rights. The Court further held that the respondent could not claim a prescriptive right to the water against the state.

Although the Hamilton Branch power project includes the direct diversion of water that flows into Hamilton Branch below Indian Ole Dam, PG&E had applied only for the right to divert water to storage in Mountain Meadows Reservoir and redivert the stored water through the Hamilton Branch flume and penstock to the Hamilton Branch powerhouse. PG&E claims a riparian right for the downstream direct diversion of water that is bypassed through the reservoir or that accretes to the creek below the reservoir. Thus, the application considered herein is for only the storage and rediversion components of the power project.

3.0

DESCRIPTION OF PROJECT

The project works authorized herein consist of Indian Ole Dam, which impounds Mountain Meadows Reservoir with a storage capacity of 23,952 acre-feet and a water surface area of 5,772 acres; a diversion dam located 1.8 miles downstream of Indian Ole Dam on Hamilton Branch which rediverts water stored in Mountain Meadows Reservoir into a flume and penstock; a 3.28 mile flume and penstock; a powerhouse with a capacity of over 200 cfs and 5390 kilowatts.

Typically, PG&E has filled Mountain Meadows Reservoir in the spring and released the water into the

powerhouse in early summer to minimize evaporation loss. No minimum pool has been maintained, and the reservoir has at times been drained.

4.0 PROTESTANTS

Three protests were filed against Application 26651, by the California Department of Fish and Game (DFG), the Northern California Council of Fly Fishing Clubs which has been succeeded by California Sportfishing Protection Alliance (CSPA), and California Trout, Inc. California Trout, Inc.'s protest was dismissed April 11, 1983 after PG&E amended its application to delete the direct diversion of water and downstream facilities in the North Fork Feather River from the application. As noted above, PG&E claims a riparian right for its direct diversion of water to the powerhouse.

DFG and CSPA protested on the basis that the project has an adverse effect on fish and wildlife. In its protest, DFG specified as conditions for dismissal of its protest that the permit be conditioned upon the following requirements:

1. that PG&E not release water from the reservoir before September 15 of each year;

2. that PG&E maintain a minimum pool of 6000 acre-feet of water in the reservoir;
3. that PG&E undertake several fishery and wildlife studies.

CSPA concurred with DFG's protest dismissal conditions.

5.0 AVAILABILITY OF WATER FOR APPROPRIATION

We may authorize appropriation of water only in cases where water is available to appropriate. In this case, no water right holder other than the applicant is using water downstream of the reservoir before Hamilton Branch enters Lake Almanor, and we have received no evidence that appropriation of water under this application would interfere with any other water right. It is apparent from the storage records that the water sought to be appropriated is available in most years. Consequently, we find that unappropriated water is available for the project.

6.0 PRIORITY OF RIGHT AND INCLUSION OF TERMS AND CONDITIONS

PG&E argues that because Application 26651 is filed on an existing project, it should not be treated like an application to appropriate water prospectively. PG&E argues that it has a prescriptive right against all other users of water on Hamilton Branch and the North

Fork Feather River. PG&E argues it should receive a water right priority dating from completion of the reservoir in 1924, not from the date PG&E filed its application on December 5, 1980. PG&E also argues that the protests should be dismissed and a permit granted recognizing an existing right and quantifying the right, with no terms and conditions. In effect, PG&E is saying that because it has diverted and used water for many years without authorization from the Board, it should be given a permit without the usual scrutiny to determine whether the appropriation is in the public interest and under what terms and conditions it can be made to conform to the public interest. If this is the law, then every potential diverter would be well-advised to divert illegally for at least five years, so that it could take advantage of the special treatment PG&E requests.

PG&E's argument that the Board should give it unconditional approval is based on a strained interpretation of the California Supreme Court's decision in People v. Shirokow (1980) 26 Cal.3d 301, 162 Cal.Rptr. 30. As stated above, that case holds that the statutory procedure in Division 2 of the Water Code is the exclusive means of acquiring appropriative rights in California since 1914. The court further pointed out, for sake of argument, that even if

Mr. Shirokow were not required to comply with the statutory appropriation procedures, he could not sustain his claim of a prescriptive right because the state's governmental interest in regulating the use of public waters cannot be prescribed. 162 Cal.Rptr. 30, at 37.

In Shirokow, the defendant argued that the state was unreasonably trying to destroy his long-standing use of water, to which he claimed a prescriptive right. In a letter dated December 2, 1980 accompanying its application (PG&E Exhibit 3), PG&E's attorney quoted language in the court's opinion which addressed Mr. Shirokow's and the dissent's concern that the result of the case would be to destroy all property rights in water acquired by prescription. The majority specifically disavowed this result, pointing out that the facts of the case did not provide the necessary elements to support a prescriptive right against another water user. Specifically, the defendant had not provided facts to show that his use of water invaded the interests of any downstream water user. The court emphasized that its holding did not address the question of whether and under what circumstances there could be prescription of water rights between private parties. It is part of that language which PG&E's attorney quoted in the December 2, 1980 letter.

First, PG&E's attorney quoted footnote 15 of the opinion, which states:

"The extensive discussion in the concurring and dissenting opinion of our purported abolition of all property rights in water acquired by prescription [cites] bears no relationship to reality. We hold here only that defendant's claim of prescriptive rights cannot lie as against the state when it seeks to enjoin unauthorized use pursuant to section 1052. It is unnecessary for us to reach the question of whether and under what circumstances prescriptive rights in water may be perfected as between private parties."
(Emphasis in original.)

The court explained that granting the injunction against defendant's unpermitted diversion did not mean that the defendant would necessarily be precluded from making the beneficial uses of water he had made in reliance on prescription. The defendant could still pursue an application for a permit. The court observed that the defendant had twice filed applications to appropriate the water, and had abandoned his efforts to obtain a permit because of the expense of complying with a condition the Board proposed to impose under the public interest. Recognizing that the defendant still had an uncancelled application, the court observed:

"Our holding that the state is entitled to an injunction against defendant's unauthorized diversion of water, will not result in the destruction of all beneficial uses of water originally undertaken in

reliance on prescription. The board's broad discretion to act on appropriation applications is not unfettered; while it is true the issuance of permits depends on questions of policy and judgment (Section 1255) the board may not arbitrarily and capriciously reject an application. [cites] Moreover, the code provides for judicial review by writ of mandate to inquire into the validity of board action. (Sections 1360, 1412, 1615.)" 162 Cal.Rptr. 36.

PG&E relied on the above-quoted language to support its argument that the Board must unconditionally permit PG&E's diversion in the full amount PG&E has diverted. In context, the quoted passage does not support PG&E's argument that it necessarily would be arbitrary for the Board to deny or condition issuance of a permit. The passage simply states that the Board cannot condition or deny the permit arbitrarily.

In the same discussion, after describing the defendant's election to assert a prescriptive right rather than comply with the terms and conditions of the permit that had been offered him, the court stated:

"On the basis of these circumstances, we cannot assume that existing beneficial uses lacking board authorization will be unduly jeopardized by requiring the users to file applications with the board. If the board determines a particular use is not in furtherance of the greatest public benefit, on balance the public interest must prevail." (Emphasis added.)

Thus, the court acknowledged that the Board must exercise the same discretion in considering an application from a person who is already appropriating water without a permit, as from a person who applies before he takes the water. The court's assurances to Mr. Shirokow were that the Board has certain constraints on its discretion in considering any application, and that these constraints would ensure that he would be treated fairly.

In fact, after the court's decision, Mr. Shirokow pursued his second application, which was filed in January 1974, and received a permit with a priority dated in January 1974. We have also issued other permits to existing water users since the Shirokow decision, each with priority dating from the filing of the application.

Based on the Shirokow decision and our consistent administrative practice, no reason exists to treat PG&E differently from applicants who apply before they divert and use water. Also, like Mr. Shirokow, PG&E has not provided evidence showing that any downstream water user has been injured because of PG&E's unauthorized diversion and use of water. Thus, an essential element of proving a prescriptive right

against other water users has not been established in this case.

7.0 ENVIRONMENTAL CONSIDERATIONS

The primary controversy in this case concerns the terms and conditions that should be included in PG&E's permit to mitigate for the diversion and use of water. No one has argued that PG&E should not be allowed to store water in Mountain Meadows Reservoir. The result of denying a permit would be that PG&E would have to stop storing water and allow the reservoir to empty.

Eventually, if no permit were granted, the reservoir site would return to a meadow or pasture environment with Hamilton Branch running through it. The lake fishery currently supported by the reservoir would be lost, as would associated wildlife uses. The downstream direct diversion of water into the powerhouse would continue, since it is being conducted under a claim of riparian right.

7.1 Effects on Fish and Wildlife and Public Trust Uses

Because water has been diverted to storage behind Indian Ole Dam since 1924, the effects of this project on the natural environment that existed before the reservoir are speculative. Currently, the environmental setting is a lake surrounded by grassy

wetlands that are used by waterfowl. Two bald eagle nest sites exist near the shore. The reservoir contains tui chub, largemouth bass, brown bullhead, red ear sunfish, rainbow trout, brown trout, bluegill and Tahoe sucker. The largemouth bass support a popular sport fishery. Approval of Application 26651 with the terms and conditions requested by DFG and PG&E will maintain these fish and wildlife uses. Disapproval of the application would mean that water could no longer be stored in the reservoir. If the reservoir were drained, these fish and wildlife uses would be largely or entirely lost, and would be replaced after a transition period with stream, meadow, and pasture species. Likewise, the use of stored water to generate electricity at the power plant during periods of low natural flow would be lost. Because approval of the application will maintain long-existing beneficial uses whose loss would be detrimental both to the environment and to energy production, we find that it is in the public interest to approve the application, subject to terms and conditions.

The DFG and PG&E have negotiated an agreement which specifies terms and conditions, the inclusion of which will satisfy DFG's protest of Application 26651. The agreement effectively modifies PG&E's proposed project for purposes of the California Environmental Quality

Act (CEQA), set forth at Public Resources Code Section 21000 et seq. While the agreement was sufficiently final for DFG to testify regarding its contents, it was not yet executed at the hearing. We held the record open for it, and received a copy of the executed agreement on December 15, 1989. The negotiated terms and conditions in the agreement accomplish the following:

1. Water will not be drafted from storage during a normal water year between May 15 and July 1.
2. In a dry year, the reservoir will not be drawn down beyond two feet below the maximum surface elevation that year, prior to July 1.
3. PG&E will not draft water from storage after July 1 of each year except for fish releases and leakage when storage is 3500 acre-feet or less. If dam leakage is less than three cfs, PG&E shall not draft when storage is 1750 acre-feet or less.
4. PG&E shall not draft water between November 1 and May 15 if storage is less than 4000 acre-feet.
5. PG&E shall release from Indian Ole Dam sufficient water to provide a net flow of 2 cfs in Hamilton

Branch at the recording gaging station near Keddie Camp (PG&E Gage NF-44).

6. PG&E shall release from Hamilton Branch Diversion Dam a flow of four cfs at the entrance to the fish ladder. PG&E will maintain the fish ladder in operable condition. DFG and PG&E will consult as to the sufficiency of flows if new data becomes available showing a biological need for modifications.
7. PG&E may draft water from storage to below the levels specified in items 1, 2, 3, and 4 to make repairs necessary to minimize leakage. PG&E shall give DFG 14 days written notice before commencing such work.
8. PG&E shall provide DFG with accurate daily records of flow releases and storage upon request.
9. The negotiated terms and conditions may be suspended if: (a) required to perform necessary maintenance, after notice to DFG; (b) an emergency occurs as defined in Public Resources Code Section 21060.3; (c) the Division of Dam Safety requires it; (d) in the interest of public safety;

or (e) for fish and wildlife purposes as requested by DFG.

10. Any modifications of the agreement shall be mutually agreeable to PG&E and DFG.

We will include the substance of the agreed terms and conditions in the permit, modified to conform to the format for permit terms and conditions and to include reporting to the Board and Board approval of modifications. Even if DFG approves a modification, PG&E must obtain Board approval of the modification to avoid violating this permit. The conditions we adopt ensure a reasonable flow below the dam to maintain the fishery in good condition as required by Fish and Game Code Section 5937, and they provide for a minimum pool sufficient to protect the fish and wildlife uses. Fish and Game's witnesses testified that with terms and conditions essentially identical to these, there would be no significant adverse effects on the environment as a result of the storage project. In addition to the negotiated terms and conditions, we will subject the permit to the appropriate standard permit terms and conditions, including continuing authority to modify the permit pursuant to Cal. Const. Article X, Section 2 and the public trust doctrine.

CSPA raised some questions regarding the proposed project and whether it would have a significant adverse effect on the environment. CSPA's representative indicated that he wanted to review the agreement between PG&E and DFG before saying whether it would resolve CSPA's protest. He presented no evidence regarding any adverse effects of the project. On January 10, 1990, CSPA's representative wrote to the Board saying that he had not received a copy of the agreement. The Board hearing officer mailed him a copy, and gave him an opportunity to comment on the agreement. We have received no comments from CSPA on the agreement. The hearing officer also advised CSPA's representative that he could submit some new information attached to his January 10, 1990 letter, as a comment on the Negative Declaration. CSPA filed no comment on the Negative Declaration.

7.2. Environmental Documentation

CSPA argued during the hearing that an Environmental Impact Report, not a Negative Declaration, should be prepared for this project, because CSPA alleged a potential existed for a significant adverse effect on the environment. We have reviewed the effects of the project and the Board's staff has prepared an initial study. The initial study shows that with the changes in the project set forth in the agreement between PG&E

and DFG, there is no substantial evidence that the project as it is proposed may have a significant adverse effect on the environment. Under these facts, the appropriate documentation under CEQA (Public Resources Code Section 21000 et seq.) is a Negative Declaration. 14 Cal. Code of Reg. Section 15070. Consequently, the Board has prepared a Negative Declaration in accordance with CEQA and the State CEQA Guidelines.

On February 8, 1990 the Board circulated the Initial Study/Negative Declaration. The Initial Study found that the project -- which includes the operational provisions set forth in the DFG-PG&E agreement -- could not have a significant effect on the environment. In response to its circulating the Initial Study/Negative Declaration, the Board received petitions from Almanor Basin Concerned Citizens signed by approximately 100 individuals. The petitions criticized the minimum pool levels of the DFG-PG&E agreement and argued that a minimum pool of 3500 acre-feet is more appropriate for protection of fish and wildlife. Mr. Ron Lunder of Almanor Basin Concerned Citizens argued that a minimum pool of 6000 acre-feet is appropriate. The Lassen County Board of Supervisors wrote a letter to PG&E supporting Westwood Community Services District's

request for a 4000 acre-foot minimum pool, and sent a copy to the Board. No state agencies filed comments.

The Board has considered the Initial Study/Negative Declaration and the comments received during the public review process. The main focus of the comments was that higher minimum pool levels than agreed to by PG&E and DFG would provide superior conditions for fish and wildlife. The record lacks substantial evidence to support the contentions that a higher minimum pool is needed and may provide more fish and wildlife benefits. The evidence shows that the agreed minimum pool plus the downstream fish flows and other terms agreed upon by DFG and PG&E will ensure that the fish and wildlife are protected.

Under "no project" conditions, Mountain Meadows Reservoir would not exist. Approval of the project should improve conditions for waterfowl and fisheries as compared to conditions under existing operational criteria. Therefore the Board determines that there will be no significant effect on the environment as a result of the project. Because there will be no significant effect, the Board is not required in this case to examine alternative minimum pool levels to mitigate or avoid impacts.

7.3. Endangered Species Act Consultation

At the hearing, the Department of Fish and Game noted that the Board had prepared an Initial Study under CEQA, and recommended that either a Negative Declaration or an EIR be prepared. DFG noted that two bald eagle nests are located near Mountain Meadows Reservoir and that the bald eagle is an endangered species under the California Endangered Species Act. Because of the eagle nests, DFG urged that the Board consult with DFG under the Endangered Species Act.

The Endangered Species Act, at Fish and Game Code Section 2090, requires that each state lead agency consult with DFG to ensure that the state lead agency's action is not likely to jeopardize the continued existence of any endangered species. Consultation under the Endangered Species Act is to occur concurrently with consultation under Public Resources Code Sections 21080.3, 21080.4, 21080.5, or 21104.2 (CEQA). Fish and Game Code Section 2090. In this case, the Board sent DFG a draft initial study prior to the hearing, for routine consultation under Public Resources Code Section 21080.3 and 14 Cal. Code of Reg. Section 15063(g). The evidence presented at the hearing shows that with the terms and conditions DFG and PG&E have agreed to, there will be no adverse effect on the bald eagles or any other environmental

resource. Consequently, no EIR is necessary. A state lead agency is required to obtain written findings from DFG as to the impact of the project on an endangered species only if the state lead agency prepares an EIR on the project. Public Resources Code Section 21104.2. Under these facts, the Board has discharged its obligations under the Endangered Species Act.

8.0

CONCLUSIONS

1. The Board held the record in this case open for the following documents: a final environmental document, the agreement between DFG and PG&E which was submitted December 15, 1989 by PG&E, and the results of any Endangered Species Act consultation. As we found in part 7.3, no further Endangered Species Act consultation is necessary. The Negative Declaration and the agreement between DFG and PG&E are hereby accepted in evidence.
2. Water is available for appropriation at Mountain Meadows Reservoir and the use of the water by PG&E is beneficial.
3. The permit issued on PG&E's application shall be subjected to such terms and conditions as will ensure that the appropriation is in the public

interest, and shall receive a priority in accordance with the date when the application was filed.

4. There will be no significant adverse environmental impacts as a result of the project approved by this decision, including no adverse effects on any endangered species. A Negative Declaration has been prepared for this action.
5. We will adopt terms and conditions containing the substance of DFG's protest dismissal terms in the agreement between PG&E and DFG.
6. We will include the applicable standard permit terms and conditions in the permit to be issued pursuant to this decision.

ORDER

IT IS HEREBY ORDERED that Application 26651 is approved, subject to prior rights and the following terms and conditions:

1. This permit is subject to standard permit terms 6, 10, 11, 12, 13, 80, 90, and 91, in addition to the following terms and conditions.

2. The water appropriated shall be diverted from Hamilton Branch, tributary to the North Fork Feather River, at Indian Ole Dam located $N18^{\circ}37'55''W$ - 2,063.77 feet from the SE corner of Section 13, T28N, R8E, MDB&M being within the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 13; and shall be rediverted at the Hamilton Branch Diversion Dam located $S87^{\circ}27'E$ - 3,320.24 feet from the NW corner of Section 14, T28N, R8E, MDB&M being within the $NW\frac{1}{4}$ of the $NE\frac{1}{4}$ of said Section 14.
3. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 24,000 acre-feet per annum by diversion to storage, to be collected from October 1 of each year to June 30 of the succeeding year.
4. The water appropriated shall be used for the generation of power at the Hamilton Branch Powerhouse located within the $NW\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 21, T28N, R8E, MDB&M.
5. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.
6. Complete application of the water to the authorized use shall be made by December 31, 1995.

7. Permittee shall comply with the following provisions which are derived from the agreement between permittee and the California Department of Fish and Game, executed on December 14, 1989 and filed with the State Water Resources Control Board on December 15, 1989:

- a. Permittee shall not withdraw water from storage in Mountain Meadows Reservoir during a "normal water year" for hydropower use from May 15 to July 1 of each year. A "normal water year" shall be defined as any 12-month period beginning May 1 in which the State of California Department of Water Resources forecasts on April 1, and adjusts as necessary on May 1, that natural runoff of the Feather River at Oroville will be greater than 50 percent of the average for such period as computed over the previous 50-year period in use at the time.

- b. During a "dry year", prior to July 1, permittee shall draw down Mountain Meadows Reservoir no more than two feet below the maximum water surface elevation previously attained during that "dry year". A "dry year" shall be defined as any twelve-month period beginning May 1 in which the State of California Department of Water Resources forecasts on April 1, and adjusts as necessary on May 1, that natural runoff of the Feather River at Oroville will be 50 percent or less of the average for

such period as computed over the previous 50-year period in use at the time.

- c. (1) After July 1 of all years, if leakage from Indian Ole Dam is equal to or greater than 3 cubic feet per second, permittee shall not reduce storage in Mountain Meadows Reservoir below 3,500 acre-feet (Elevation 4,954.05 - Red River Lumber Company Datum as measured at PG&E Gage NF-43 utilizing the 6/16/47 area/capacity table for Mountain Meadows Reservoir) except for fishery flow releases and existing leakage.
- (2) After July 1 of all years, if leakage from Indian Ole Dam is less than 3 cubic feet per second, permittee shall not reduce storage in Mountain Meadows Reservoir below 1,750 acre-feet (Elevation 4,952.82 - Red River Lumber Company Datum as measured at PG&E Gage NF-43 utilizing the 6/16/47 area/capacity table for Mountain Meadows Reservoir) except for fishery flow releases and existing leakage.
- d. Permittee shall not withdraw water from storage for hydropower purposes between November 1 and May 15 of the following year, if storage in Mountain Meadows Reservoir is less than 4,000 acre-feet (Elevation 4,954.28 - Red

River Lumber Company Datum as measured at PG&E Gage NF-43 utilizing the 6/16/47 area/capacity table for Mountain Meadows Reservoir).

- e. Permittee shall release at all times from Indian Ole Dam sufficient water to provide a minimum flow, in combination with leakage from the dam, of 2 cubic feet per second in Hamilton Branch, as measured at PG&E gage NF-44 located near Keddie Camp.

- f. (1) For the protection of fish and wildlife, permittee shall release at all times from Hamilton Branch Diversion Dam a minimum flow of 4 cubic feet per second, as measured by a staff gage (utilizing a theoretical weir rating) located at the entrance to the fish ladder. The present theoretical weir rating shall be submitted to the Chief of the Division of Water Rights within 30 days of the issuance of this permit. Any changes to this rating shall be submitted to the Chief of the Division of Water Rights within 14 days of the change being made.

- (2) Permittee shall maintain the fish ladder in operable condition as deemed appropriate by the Chief of the Division of Water Rights.

(3) The Board retains continuing authority to amend this term after notice and opportunity for hearing if, in the future, new data become available that indicate a biological need for modifications to keep fish in good condition.

g. Permittee may, after 14 days written notice to the State Water Resources Control Board and the California Department of Fish and Game, withdraw water from storage below the levels specified in a., b., c., and d. above, to determine the extent of and/or perform repairs necessary to minimize leakage from Indian Ole Dam.

Permittee shall not withdraw water from storage under this provision if the Chief of the Division of Water Rights objects.

h. Permittee shall provide the California Department of Fish and Game and the State Water Resources Control Board accurate daily records of flow releases from Indian Ole Dam (PG&E Gage NF-44); storage in Mountain Meadows Reservoir (PG&E Gage NF-43); and diversion into the Hamilton Branch flume (PG&E Gage NF-45) upon request. These gages shall be kept in good operating condition as deemed acceptable to the Chief of the Division of Water Rights. Current rating curves for these gages shall be submitted to any representative of the State Water Resources Control Board upon demand.

i. Permittee may, upon notice to both the California Department of Fish and Game and the State Water Resources Control Board, temporarily depart from the provisions of this permit term under any of the following circumstances:

- (1) to perform necessary maintenance;
- (2) a change in operation becomes necessary due to the occurrence of an emergency as defined in Public Resources Code Section 21060.3;
- (3) a change in operation becomes necessary to comply with an order issued by the Division of Dam Safety;
- (4) a change in operation becomes necessary in order to protect the public safety; or
- (5) a change in operation is requested by the California Department of Fish and Game to protect fish and wildlife.

Permittee shall attempt to give immediate notice to the Chief of the Division of Water Rights of any emergency change by telephone as well as providing some form of written notice within 2 working days of the emergency,

and shall give notice of any other changes at least 14 days in advance. Permittee shall not depart from the provisions of this permit term if the Chief of the Division of Water Rights objects to such departure.

Inclusion in this permit of certain provisions of the referenced agreement shall not be construed as disapproval of other provisions of the agreement or as affecting the enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this permit.

CERTIFICATION

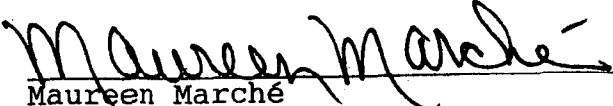
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on JUN 21 1990

AYE: W. Don Maughan
 Darlene E. Ruiz
 Edwin H. Finster
 Eliseo M. Samaniego
 John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to
the Board

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powerhouse in early summer to minimize evaporation loss. No minimum pool has been maintained, and the reservoir has at times been drained.

4.0 **PROTESTANTS**

Three protests were filed against Application 26651, by the California Department of Fish and Game (DFG), the Northern California Council of Fly Fishing Clubs which has been succeeded by California Sportfishing Protection Alliance (CSPA), and California Trout, Inc. California Trout, Inc.'s protest was dismissed April 11, 1983 after PG&E amended its application to delete the direct diversion of water and downstream facilities in the North Fork Feather River from the application. As noted above, PG&E claims a riparian right for its direct diversion of water to the powerhouse.

DFG and CSPA protested on the basis that the project has an adverse effect on fish and wildlife. In its protest, DFG specified as conditions for dismissal of its protest that the permit be conditioned upon the following requirements:

1. that PG&E not release water from the reservoir before September 15 of each year;

2. that PG&E maintain a minimum pool of 6000 acre-feet of water in the reservoir;
3. that PG&E undertake several fishery and wildlife studies.

CSPA concurred with DFG's protest dismissal conditions.

5.0

AVAILABILITY OF WATER FOR APPROPRIATION

We may authorize appropriation of water only in cases where water is available to appropriate. In this case, no water right holder other than the applicant is using water downstream of the reservoir before Hamilton Branch enters Lake Almanor, and we have received no evidence that appropriation of water under this application would interfere with any other water right. It is apparent from the storage records that the water sought to be appropriated is available in most years. Consequently, we find that unappropriated water is available for the project.

6.0

PRIORITY OF RIGHT AND INCLUSION OF TERMS AND CONDITIONS

PG&E argues that because Application 26651 is filed on an existing project, it should not be treated like an application to appropriate water prospectively. PG&E argues that it has a prescriptive right against all other users of water on Hamilton Branch and the North

Fork Feather River. PG&E argues it should receive a water right priority dating from completion of the reservoir in 1924, not from the date PG&E filed its application on December 5, 1980. PG&E also argues that the protests should be dismissed and a permit granted recognizing an existing right and quantifying the right, with no terms and conditions. In effect, PG&E is saying that because it has diverted and used water for many years without authorization from the Board, it should be given a permit without the usual scrutiny to determine whether the appropriation is in the public interest and under what terms and conditions it can be made to conform to the public interest. If this is the law, then every potential diverter would be well-advised to divert illegally for at least five years, so that it could take advantage of the special treatment PG&E requests.

PG&E's argument that the Board should give it unconditional approval is based on a strained interpretation of the California Supreme Court's decision in People v. Shirokow (1980) 26 Cal.3d 301, 162 Cal.Rptr. 30. As stated above, that case holds that the statutory procedure in Division 2 of the Water Code is the exclusive means of acquiring appropriative rights in California since 1914. The court further pointed out, for sake of argument, that even if

Mr. Shirokow were not required to comply with the statutory appropriation procedures, he could not sustain his claim of a prescriptive right because the state's governmental interest in regulating the use of public waters cannot be prescribed. 162 Cal.Rptr. 30, at 37.

In Shirokow, the defendant argued that the state was unreasonably trying to destroy his long-standing use of water, to which he claimed a prescriptive right. In a letter dated December 2, 1980 accompanying its application (PG&E Exhibit 3), PG&E's attorney quoted language in the court's opinion which addressed Mr. Shirokow's and the dissent's concern that the result of the case would be to destroy all property rights in water acquired by prescription. The majority specifically disavowed this result, pointing out that the facts of the case did not provide the necessary elements to support a prescriptive right against another water user. Specifically, the defendant had not provided facts to show that his use of water invaded the interests of any downstream water user. The court emphasized that its holding did not address the question of whether and under what circumstances there could be prescription of water rights between private parties. It is part of that language which PG&E's attorney quoted in the December 2, 1980 letter.

First, PG&E's attorney quoted footnote 15 of the opinion, which states:

"The extensive discussion in the concurring and dissenting opinion of our purported abolition of all property rights in water acquired by prescription [cites] bears no relationship to reality. We hold here only that defendant's claim of prescriptive rights cannot lie as against the state when it seeks to enjoin unauthorized use pursuant to section 1052. It is unnecessary for us to reach the question of whether and under what circumstances prescriptive rights in water may be perfected as between private parties."
(Emphasis in original.)

The court explained that granting the injunction against defendant's unpermitted diversion did not mean that the defendant would necessarily be precluded from making the beneficial uses of water he had made in reliance on prescription. The defendant could still pursue an application for a permit. The court observed that the defendant had twice filed applications to appropriate the water, and had abandoned his efforts to obtain a permit because of the expense of complying with a condition the Board proposed to impose under the public interest. Recognizing that the defendant still had an uncanceled application, the court observed:

"Our holding that the state is entitled to an injunction against defendant's unauthorized diversion of water, will not result in the destruction of all beneficial uses of water originally undertaken in

reliance on prescription. The board's broad discretion to act on appropriation applications is not unfettered; while it is true the issuance of permits depends on questions of policy and judgment (Section 1255) the board may not arbitrarily and capriciously reject an application. [cites] Moreover, the code provides for judicial review by writ of mandate to inquire into the validity of board action. (Sections 1360, 1412, 1615.)" 162 Cal.Rptr. 36.

PG&E relied on the above-quoted language to support its argument that the Board must unconditionally permit PG&E's diversion in the full amount PG&E has diverted. In context, the quoted passage does not support PG&E's argument that it necessarily would be arbitrary for the Board to deny or condition issuance of a permit. The passage simply states that the Board cannot condition or deny the permit arbitrarily.

In the same discussion, after describing the defendant's election to assert a prescriptive right rather than comply with the terms and conditions of the permit that had been offered him, the court stated:

"On the basis of these circumstances, we cannot assume that existing beneficial uses lacking board authorization will be unduly jeopardized by requiring the users to file applications with the board. If the board determines a particular use is not in furtherance of the greatest public benefit, on balance the public interest must prevail." (Emphasis added.)

Thus, the court acknowledged that the Board must exercise the same discretion in considering an application from a person who is already appropriating water without a permit, as from a person who applies before he takes the water. The court's assurances to Mr. Shirokow were that the Board has certain constraints on its discretion in considering any application, and that these constraints would ensure that he would be treated fairly.

In fact, after the court's decision, Mr. Shirokow pursued his second application, which was filed in January 1974, and received a permit with a priority dated in January 1974. We have also issued other permits to existing water users since the Shirokow decision, each with priority dating from the filing of the application.

Based on the Shirokow decision and our consistent administrative practice, no reason exists to treat PG&E differently from applicants who apply before they divert and use water. Also, like Mr. Shirokow, PG&E has not provided evidence showing that any downstream water user has been injured because of PG&E's unauthorized diversion and use of water. Thus, an essential element of proving a prescriptive right

against other water users has not been established in this case.

7.0 ENVIRONMENTAL CONSIDERATIONS

The primary controversy in this case concerns the terms and conditions that should be included in PG&E's permit to mitigate for the diversion and use of water. No one has argued that PG&E should not be allowed to store water in Mountain Meadows Reservoir. The result of denying a permit would be that PG&E would have to stop storing water and allow the reservoir to empty. Eventually, if no permit were granted, the reservoir site would return to a meadow or pasture environment with Hamilton Branch running through it. The lake fishery currently supported by the reservoir would be lost, as would associated wildlife uses. The downstream direct diversion of water into the powerhouse would continue, since it is being conducted under a claim of riparian right.

7.1 Effects on Fish and Wildlife and Public Trust Uses

Because water has been diverted to storage behind Indian Ole Dam since 1924, the effects of this project on the natural environment that existed before the reservoir are speculative. Currently, the environmental setting is a lake surrounded by grassy

wetlands that are used by waterfowl. Two bald eagle nest sites exist near the shore. The reservoir contains tui chub, largemouth bass, brown bullhead, red ear sunfish, rainbow trout, brown trout, bluegill and Tahoe sucker. The largemouth bass support a popular sport fishery. Approval of Application 26651 with the terms and conditions requested by DFG and PG&E will maintain these fish and wildlife uses. Disapproval of the application would mean that water could no longer be stored in the reservoir. If the reservoir were drained, these fish and wildlife uses would be largely or entirely lost, and would be replaced after a transition period with stream, meadow, and pasture species. Likewise, the use of stored water to generate electricity at the power plant during periods of low natural flow would be lost. Because approval of the application will maintain long-existing beneficial uses whose loss would be detrimental both to the environment and to energy production, we find that it is in the public interest to approve the application, subject to terms and conditions.

The DFG and PG&E have negotiated an agreement which specifies terms and conditions, the inclusion of which will satisfy DFG's protest of Application 26651. The agreement effectively modifies PG&E's proposed project for purposes of the California Environmental Quality

Act (CEQA), set forth at Public Resources Code Section 21000 et seq. While the agreement was sufficiently final for DFG to testify regarding its contents, it was not yet executed at the hearing. We held the record open for it, and received a copy of the executed agreement on December 15, 1989. The negotiated terms and conditions in the agreement accomplish the following:

1. Water will not be drafted from storage during a normal water year between May 15 and July 1.
2. In a dry year, the reservoir will not be drawn down beyond two feet below the maximum surface elevation that year, prior to July 1.
3. PG&E will not draft water from storage after July 1 of each year except for fish releases and leakage when storage is 3500 acre-feet or less. If dam leakage is less than three cfs, PG&E shall not draft when storage is 1750 acre-feet or less.
4. PG&E shall not draft water between November 1 and May 15 if storage is less than 4000 acre-feet.
5. PG&E shall release from Indian Ole Dam sufficient water to provide a net flow of 2 cfs in Hamilton

Branch at the recording gaging station near Keddie Camp (PG&E Gage NF-44).

6. PG&E shall release from Hamilton Branch Diversion Dam a flow of four cfs at the entrance to the fish ladder. PG&E will maintain the fish ladder in operable condition. DFG and PG&E will consult as to the sufficiency of flows if new data becomes available showing a biological need for modifications.
7. PG&E may draft water from storage to below the levels specified in items 1, 2, 3, and 4 to make repairs necessary to minimize leakage. PG&E shall give DFG 14 days written notice before commencing such work.
8. PG&E shall provide DFG with accurate daily records of flow releases and storage upon request.
9. The negotiated terms and conditions may be suspended if: (a) required to perform necessary maintenance, after notice to DFG; (b) an emergency occurs as defined in Public Resources Code Section 21060.3; (c) the Division of Dam Safety requires it; (d) in the interest of public safety;

or (e) for fish and wildlife purposes as requested by DFG.

10. Any modifications of the agreement shall be mutually agreeable to PG&E and DFG.

We will include the substance of the agreed terms and conditions in the permit, modified to conform to the format for permit terms and conditions and to include reporting to the Board and Board approval of modifications. Even if DFG approves a modification, PG&E must obtain Board approval of the modification to avoid violating this permit. The conditions we adopt ensure a reasonable flow below the dam to maintain the fishery in good condition as required by Fish and Game Code Section 5937, and they provide for a minimum pool sufficient to protect the fish and wildlife uses. Fish and Game's witnesses testified that with terms and conditions essentially identical to these, there would be no significant adverse effects on the environment as a result of the storage project. In addition to the negotiated terms and conditions, we will subject the permit to the appropriate standard permit terms and conditions, including continuing authority to modify the permit pursuant to Cal. Const. Article X, Section 2 and the public trust doctrine.

CSPA raised some questions regarding the proposed project and whether it would have a significant adverse effect on the environment. CSPA's representative indicated that he wanted to review the agreement between PG&E and DFG before saying whether it would resolve CSPA's protest. He presented no evidence regarding any adverse effects of the project. On January 10, 1990, CSPA's representative wrote to the Board saying that he had not received a copy of the agreement. The Board hearing officer mailed him a copy, and gave him an opportunity to comment on the agreement. We have received no comments from CSPA on the agreement. The hearing officer also advised CSPA's representative that he could submit some new information attached to his January 10, 1990 letter, as a comment on the Negative Declaration. CSPA filed no comment on the Negative Declaration.

7.2. Environmental Documentation

CSPA argued during the hearing that an Environmental Impact Report, not a Negative Declaration, should be prepared for this project, because CSPA alleged a potential existed for a significant adverse effect on the environment. We have reviewed the effects of the project and the Board's staff has prepared an initial study. The initial study shows that with the changes in the project set forth in the agreement between PG&E

and DFG, there is no substantial evidence that the project as it is proposed may have a significant adverse effect on the environment. Under these facts, the appropriate documentation under CEQA (Public Resources Code Section 21000 et seq.) is a Negative Declaration. 14 Cal. Code of Reg. Section 15070. Consequently, the Board has prepared a Negative Declaration in accordance with CEQA and the State CEQA Guidelines.

On February 8, 1990 the Board circulated the Initial Study/Negative Declaration. The Initial Study found that the project -- which includes the operational provisions set forth in the DFG-PG&E agreement -- could not have a significant effect on the environment. In response to its circulating the Initial Study/Negative Declaration, the Board received petitions from Almanor Basin Concerned Citizens signed by approximately 100 individuals. The petitions criticized the minimum pool levels of the DFG-PG&E agreement and argued that a minimum pool of 3500 acre-feet is more appropriate for protection of fish and wildlife. Mr. Ron Lunder of Almanor Basin Concerned Citizens argued that a minimum pool of 6000 acre-feet is appropriate. The Lassen County Board of Supervisors wrote a letter to PG&E supporting Westwood Community Services District's

request for a 4000 acre-foot minimum pool, and sent a copy to the Board. No state agencies filed comments.

The Board has considered the Initial Study/Negative Declaration and the comments received during the public review process. The main focus of the comments was that higher minimum pool levels than agreed to by PG&E and DFG would provide superior conditions for fish and wildlife. The record lacks substantial evidence to support the contentions that a higher minimum pool is needed and may provide more fish and wildlife benefits. The evidence shows that the agreed minimum pool plus the downstream fish flows and other terms agreed upon by DFG and PG&E will ensure that the fish and wildlife are protected.

Under "no project" conditions, Mountain Meadows Reservoir would not exist. Approval of the project should improve conditions for waterfowl and fisheries as compared to conditions under existing operational criteria. Therefore the Board determines that there will be no significant effect on the environment as a result of the project. Because there will be no significant effect, the Board is not required in this case to examine alternative minimum pool levels to mitigate or avoid impacts.

7.3. Endangered Species Act Consultation

At the hearing, the Department of Fish and Game noted that the Board had prepared an Initial Study under CEQA, and recommended that either a Negative Declaration or an EIR be prepared. DFG noted that two bald eagle nests are located near Mountain Meadows Reservoir and that the bald eagle is an endangered species under the California Endangered Species Act. Because of the eagle nests, DFG urged that the Board consult with DFG under the Endangered Species Act.

The Endangered Species Act, at Fish and Game Code Section 2090, requires that each state lead agency consult with DFG to ensure that the state lead agency's action is not likely to jeopardize the continued existence of any endangered species. Consultation under the Endangered Species Act is to occur concurrently with consultation under Public Resources Code Sections 21080.3, 21080.4, 21080.5, or 21104.2 (CEQA). Fish and Game Code Section 2090. In this case, the Board sent DFG a draft initial study prior to the hearing, for routine consultation under Public Resources Code Section 21080.3 and 14 Cal. Code of Reg. Section 15063(g). The evidence presented at the hearing shows that with the terms and conditions DFG and PG&E have agreed to, there will be no adverse effect on the bald eagles or any other environmental

resource. Consequently, no EIR is necessary. A state lead agency is required to obtain written findings from DFG as to the impact of the project on an endangered species only if the state lead agency prepares an EIR on the project. Public Resources Code Section 21104.2. Under these facts, the Board has discharged its obligations under the Endangered Species Act.

8.0

CONCLUSIONS

1. The Board held the record in this case open for the following documents: a final environmental document, the agreement between DFG and PG&E which was submitted December 15, 1989 by PG&E, and the results of any Endangered Species Act consultation. As we found in part 7.3, no further Endangered Species Act consultation is necessary. The Negative Declaration and the agreement between DFG and PG&E are hereby accepted in evidence.
2. Water is available for appropriation at Mountain Meadows Reservoir and the use of the water by PG&E is beneficial.
3. The permit issued on PG&E's application shall be subjected to such terms and conditions as will ensure that the appropriation is in the public

interest, and shall receive a priority in accordance with the date when the application was filed.

4. There will be no significant adverse environmental impacts as a result of the project approved by this decision, including no adverse effects on any endangered species. A Negative Declaration has been prepared for this action.
5. We will adopt terms and conditions containing the substance of DFG's protest dismissal terms in the agreement between PG&E and DFG.
6. We will include the applicable standard permit terms and conditions in the permit to be issued pursuant to this decision.

ORDER

IT IS HEREBY ORDERED that Application 26651 is approved, subject to prior rights and the following terms and conditions:

1. This permit is subject to standard permit terms 6, 10, 11, 12, 13, 80, 90, and 91, in addition to the following terms and conditions.

2. The water appropriated shall be diverted from Hamilton Branch, tributary to the North Fork Feather River, at Indian Ole Dam located N18°37'55"W - 2,063.77 feet from the SE corner of Section 13, T28N, R8E, MDB&M being within the NE¼ of the SE¼ of said Section 13; and shall be rediverted at the Hamilton Branch Diversion Dam located S87°27'E - 3,320.24 feet from the NW corner of Section 14, T28N, R8E, MDB&M being within the NW¼ of the NE¼ of said Section 14.
3. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 24,000 acre-feet per annum by diversion to storage, to be collected from October 1 of each year to June 30 of the succeeding year.
4. The water appropriated shall be used for the generation of power at the Hamilton Branch Powerhouse located within the NW¼ of the SE¼ of Section 21, T28N, R8E, MDB&M.
5. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.
6. Complete application of the water to the authorized use shall be made by December 31, 1995.

7. Permittee shall comply with the following provisions which are derived from the agreement between permittee and the California Department of Fish and Game, executed on December 14, 1989 and filed with the State Water Resources Control Board on December 15, 1989:

- a. Permittee shall not withdraw water from storage in Mountain Meadows Reservoir during a "normal water year" for hydropower use from May 15 to July 1 of each year. A "normal water year" shall be defined as any 12-month period beginning May 1 in which the State of California Department of Water Resources forecasts on April 1, and adjusts as necessary on May 1, that natural runoff of the Feather River at Oroville will be greater than 50 percent of the average for such period as computed over the previous 50-year period in use at the time.

- b. During a "dry year", prior to July 1, permittee shall draw down Mountain Meadows Reservoir no more than two feet below the maximum water surface elevation previously attained during that "dry year". A "dry year" shall be defined as any twelve-month period beginning May 1 in which the State of California Department of Water Resources forecasts on April 1, and adjusts as necessary on May 1, that natural runoff of the Feather River at Oroville will be 50 percent or less of the average for

such period as computed over the previous 50-year period in use at the time.

c. (1) After July 1 of all years, if leakage from Indian Ole Dam is equal to or greater than 3 cubic feet per second, permittee shall not reduce storage in Mountain Meadows Reservoir below 3,500 acre-feet (Elevation 4,954.05 - Red River Lumber Company Datum as measured at PG&E Gage NF-43 utilizing the 6/16/47 area/capacity table for Mountain Meadows Reservoir) except for fishery flow releases and existing leakage.

(2) After July 1 of all years, if leakage from Indian Ole Dam is less than 3 cubic feet per second, permittee shall not reduce storage in Mountain Meadows Reservoir below 1,750 acre-feet (Elevation 4,952.82 - Red River Lumber Company Datum as measured at PG&E Gage NF-43 utilizing the 6/16/47 area/capacity table for Mountain Meadows Reservoir) except for fishery flow releases and existing leakage.

d. Permittee shall not withdraw water from storage for hydropower purposes between November 1 and May 15 of the following year, if storage in Mountain Meadows Reservoir is less than 4,000 acre-feet (Elevation 4,954.28 - Red

River Lumber Company Datum as measured at PG&E Gage NF-43 utilizing the 6/16/47 area/capacity table for Mountain Meadows Reservoir).

- e. Permittee shall release at all times from Indian Ole Dam sufficient water to provide a minimum flow, in combination with leakage from the dam, of 2 cubic feet per second in Hamilton Branch, as measured at PG&E gage NF-44 located near Keddie Camp.

- f. (1) For the protection of fish and wildlife, permittee shall release at all times from Hamilton Branch Diversion Dam a minimum flow of 4 cubic feet per second, as measured by a staff gage (utilizing a theoretical weir rating) located at the entrance to the fish ladder. The present theoretical weir rating shall be submitted to the Chief of the Division of Water Rights within 30 days of the issuance of this permit. Any changes to this rating shall be submitted to the Chief of the Division of Water Rights within 14 days of the change being made.

- (2) Permittee shall maintain the fish ladder in operable condition as deemed appropriate by the Chief of the Division of Water Rights.

(3) The Board retains continuing authority to amend this term after notice and opportunity for hearing if, in the future, new data become available that indicate a biological need for modifications to keep fish in good condition.

g. Permittee may, after 14 days written notice to the State Water Resources Control Board and the California Department of Fish and Game, withdraw water from storage below the levels specified in a., b., c., and d. above, to determine the extent of and/or perform repairs necessary to minimize leakage from Indian Ole Dam.

Permittee shall not withdraw water from storage under this provision if the Chief of the Division of Water Rights objects.

h. Permittee shall provide the California Department of Fish and Game and the State Water Resources Control Board accurate daily records of flow releases from Indian Ole Dam (PG&E Gage NF-44); storage in Mountain Meadows Reservoir (PG&E Gage NF-43); and diversion into the Hamilton Branch flume (PG&E Gage NF-45) upon request. These gages shall be kept in good operating condition as deemed acceptable to the Chief of the Division of Water Rights. Current rating curves for these gages shall be submitted to any representative of the State Water Resources Control Board upon demand.

i. Permittee may, upon notice to both the California Department of Fish and Game and the State Water Resources Control Board, temporarily depart from the provisions of this permit term under any of the following circumstances:

- (1) to perform necessary maintenance;
- (2) a change in operation becomes necessary due to the occurrence of an emergency as defined in Public Resources Code Section 21060.3;
- (3) a change in operation becomes necessary to comply with an order issued by the Division of Dam Safety;
- (4) a change in operation becomes necessary in order to protect the public safety; or
- (5) a change in operation is requested by the California Department of Fish and Game to protect fish and wildlife.

Permittee shall attempt to give immediate notice to the Chief of the Division of Water Rights of any emergency change by telephone as well as providing some form of written notice within 2 working days of the emergency,

and shall give notice of any other changes at least 14 days in advance. Permittee shall not depart from the provisions of this permit term if the Chief of the Division of Water Rights objects to such departure.

Inclusion in this permit of certain provisions of the referenced agreement shall not be construed as disapproval of other provisions of the agreement or as affecting the enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this permit.

CERTIFICATION

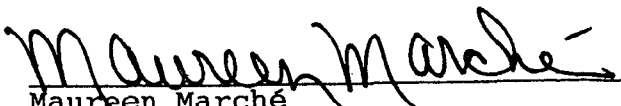
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on JUN 21 1990

AYE: W. Don Maughan
 Darlene E. Ruiz
 Edwin H. Finster
 Eliseo M. Samaniego
 John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to
the Board