

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permitted  
Applications 26380 and 27353

ROCK CREEK LIMITED PARTNERSHIP

Permittee.

ORDER: WR 90-10

SOURCE: Rock Creek

COUNTY: El Dorado

ORDER AMENDING PERMITS

BY THE BOARD:

1.0 INTRODUCTION

The Rock Creek Limited Partnership having received Permits 19259 and 19260 to divert water from Rock Creek; the permits having been amended by State Water Resources Control Board (Board) Order 87-2; the U. S. Supreme Court having determined that a state cannot set fish bypass flow requirements which conflict with those set in the FERC license; the Board finds as follows:

2.0 DESCRIPTION OF PROJECT

Joseph M. Keating filed Applications 26380 and 27353 on May 22, 1980 and June 4, 1982, respectively, to appropriate water from Rock Creek. Permits 19259 and 19260 were issued on June 12, 1984, authorizing diversion of water from Rock Creek for the purpose of hydroelectric generation. On December 20, 1985, the permits were assigned to Rock Creek Limited Partnership.

### 3.0 LITIGATION REGARDING INSTREAM FLOWS FOR PROTECTION OF FISH

On June 12, 1984, permits were issued which contained interim minimum bypass flow requirements identical to the bypass flow requirements in FERC's license. The Board reserved jurisdiction to set permanent minimum bypass flow rates following long-term studies. In July, 1986, permittee petitioned FERC for a declaratory order stating that FERC had exclusive jurisdiction to establish permanent minimum bypass flow rates. In March, 1987, FERC issued a declaratory order in which it held that the State could not establish bypass flow rates that conflict with FERC's. FERC said that the imposition of minimum flow releases was an integral part of its licensing process under section 10(a) of the Federal Power Act (FPA). FERC relied on (First Iowa Hydro-Electric Coop. v. FPC, 328 U. S. 1523 (1946)) for authority to preempt state regulation of flow rates.

The Board held hearings on May 19, 1986 and September 15, 1986 to review fish bypass flow requirements at the request of the Department of Fish and Game. On March 19, 1987, the Board issued Order No. 87-2, amending the permits to increase the minimum flow rates to permanent levels of 30 cubic-feet per second (cfs) from July 1 through February 29 and 60 cfs from March 1 through June 30.

In response to FERC's declaratory order, the State of California filed with FERC a motion for intervention on behalf of the Board and requested a rehearing of the declaratory order. FERC granted the intervention motion but denied the rehearing request.

In December, 1987, California filed a petition with the United States Court of Appeals for the Ninth Circuit requesting a review of the FERC declaratory order. The Ninth Circuit, State of California, ex rel State Water Resources Control Board v. Federal Energy Regulatory Commission, No. 89-333, affirmed FERC's order. California filed a petition for certiorari with the U. S. Supreme Court. On December 4, 1989, the U. S. Supreme Court granted the State of California's petition for a writ of certiorari in the case of State of California v. Federal Energy Regulatory Commission, No. 89-333. On May 21, 1990, the U. S. Supreme Court affirmed the Ninth Circuit's decision.

#### 4.0 CONCLUSION

The U. S. Supreme Court has ruled that the State cannot set fish bypass flows which conflict with those set by the FERC license.

FERC has set interim minimum flow rates of 11 cfs from May 1 through September 30 and 15 cfs from October 1 through April 30. The permits should be amended to reflect these flow rates. Term 17 by which the Board reserved jurisdiction over bypass flows should be amended to retain continuing authority to revise the bypass flows in the event Federal statutes or the flows specified in the FERC license are changed.

ORDER

IT IS HEREBY ORDERED that water right 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 from May 1 through September 30, a minimum of 11 cfs and from October 1 through April 30, a minimum of 15 cfs. The total streamflow shall be bypassed whenever it is less than the amount designated."

"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 this bypass flow."

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

"The State Water Resources Control Board retains continuing authority over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek. This authority may be exercised if, in the Board's discretion, an amendment is needed either to conform the bypass flow requirement to future amendments in the FERC license or, if federal statutes are revised to provide more authority to the states, to establish such bypass flows as the Board may find are appropriate under

all the circumstances. Any action under this term will be preceded by notice to interested parties and opportunity for hearing if the change is not made necessary by law."

#### 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 July 19, 1990.

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

NO:             None

ABSENT:        Edwin H. Finster

ABSTAIN:       None

  
Maureen Marché  
Administrative Assistant to the Board

