

25 FERC P 61010 (F.E.R.C.), 1983 WL 37495

**1 Commission Opinions, Orders and Notices

Pacific Gas and Electric Company

Project No. 77-000

Opinion No. 187; Opinion and Order Denying Appeal, Approving Settlement, and Issuing New License (Major)
(Issued October 4, 1983)

*61053 Before Commissioners: A. G. Sousa, Acting Chairman; J. David Hughes and Oliver G. Richard III.

This case involves a 1970 application by Pacific Gas and Electric Company (PG&E) to relicense the Potter Valley hydroelectric project, which is located on or near the Eel and East Branch Russian Rivers in California. On May 3, 1983, a contested settlement agreement was certified to the Commission. 23 FERC P 63,050. The certification included a denial of a late-filed petition to intervene filed by the Covelo Indian Community (Tribe). The certification provides a detailed chronology of the case and description of the project and its effects on the multiple water uses involved.

On June 22, 1983, the Covelo Indian Community filed an appeal of the judge's denial of its intervention petition. There are thus three matters before the Commission: the Tribe's appeal, the contested settlement, and the application for license.

*61054 For approximately 75 years, PG&E has operated the Potter Valley project by diverting a substantial amount of water from the Eel to the Russian River.¹ This diversion has allowed PG&E to generate roughly 61 million kilowatt-hours annually of low-cost electricity for California counties that are dependent on the Russian River for municipal and industrial water supplies, and for agricultural and recreational purposes. However, it also has had a detrimental effect on the anadromous fish that spawn in the Eel River water system, thereby affecting those who rely on the fishery resources of the Eel. The primary issue in the case is the extent of the increase in minimum water flows that PG&E should be required to provide on the Eel River in order to enhance and protect salmon and steelhead trout populations therein. Both the proposed settlement and the Tribe's petition to intervene center on this issue. These filings will be addressed first, followed by a review of the license application.

The Tribe's Intervention Petition

Twelve years after PG&E filed for relicensing,² while settlement negotiations were underway, the Tribe filed a petition to intervene in this proceeding in order to protect its alleged fishing rights on the Eel River. According to the petition, the Tribe's Round Valley Indian Reservation was created by Executive Orders of President Ulysses S. Grant, as modified by the Act of March 3, 1873, 17 Stat. 633. The petition quotes Section 2 of the Act as specifically providing that the center of the Middle Fork of Eel River shall be the eastern boundary, and the center of Eel River shall be the western boundary of said Reservation, with the privilege of fishing in said streams.

The Tribe claims that the diversion of water caused by the Potter Valley project, and the resulting loss in anadromous fish, is in opposition to the Executive Orders and statute.

The presiding judge conditionally granted the petition to intervene, allowing participation by the Tribe only if the parties did not reach a settlement by a certain date. Because the parties did reach a settlement, the judge denied the Tribe's petition at pages 11-14 of his May 3 certification of the settlement. The Tribe appealed the denial on June 22, 1983.

**2 In its appeal, the Tribe advances three general arguments as to why it should be allowed to intervene: (1) The Tribe was denied due process because the Commission did not provide it with actual notice of the relicensing. Notice through the Federal Register and local newspapers is not constitutionally sufficient notice because of the significant Indian property rights involved, the special trust relationship between the Federal government and Indian tribes, and the Commission's specific obligations under Section 4(e) of the Federal Power Act.³ The notice which was given to the Department of the

Interior does not relieve the Commission of its own responsibility to investigate and protect the Tribe's water and fishing rights. (2) The Tribe's intervention is essential to ensure that its interests are properly represented and protected. (3) The Tribe's silence for 12 years was justified because of, among other things, its isolation and lack of awareness of the nature and scope of its legal rights. Additionally, at the time the relicensing became an issue, the Tribe was busy in a struggle to prevent construction of another project on the Middle Fork Eel.

In determining whether good cause to permit a late intervention exists, the Commission considers four factors: (1) the reasons offered by the late intervenor for not having filed on time; (2) whether permitting the late intervention will prejudice other *61055 parties in the proceeding; (3) whether permitting the late intervention will disrupt or delay resolution of the proceeding; and, (4) whether the interests alleged by the late intervenor may be adequately represented by other parties to the proceeding.⁴

We have carefully reviewed all of the filings made by the Tribe in analyzing the above factors, and we conclude that the judge should be affirmed in denying the intervention petition.

We cannot accept the Tribe's argument that this Commission has a duty to give actual notice to any Indian tribe affected by a hydroelectric project subject to our jurisdiction. We have previously held that Federal Register publication was sufficient to give notice of a **license** amendment proceeding to an Indian tribe.⁵ In that same case we recognized that the Department of the Interior is charged with the primary responsibility for seeing that the rights of affected Indians are protected.⁶ The Tribe itself states at page 20 of its appeal that Interior is charged with the primary responsibility for protecting Indian property rights. Appendix A to the Tribe's appeal also states that the Tribal Council places heavy reliance on the Bureau of Indian Affairs to take appropriate action to preserve and protect the Tribe's property rights. The Interior Department was notified of this proceeding and its comments and recommendations were solicited by letter of May 18, 1971. On July 19, 1972, Interior filed comments with us which included the following statement: "Continued operation of the project also will not adversely impact on any Indian lands administered by this Department."

**3 The Tribe and parties responding to the intervention petition cite numerous cases in support of their positions as to what kind of notice the Commission is required to give of relicensing proceedings.⁷ None of the cases cited, however, is directly on point. The Supreme Court has held that constitutionally sufficient notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁸ Taking into consideration the unique status of the Tribe, we nevertheless find nothing to indicate that the Commission breached any duty of notification in view of the fact that it provided notification in the Federal Register as well as to the Department of the Interior.

We furthermore are in accord with the judge's conclusion that the Tribe's explanation (beyond the alleged inadequacy of notice) for its failure to file a timely intervention is unsatisfactory.

Finally, we agree with the judge that a major reason for disallowing the Tribe's intervention at this stage of the proceeding is its failure to specify any detriment that has or will be incurred by its members. Although the Tribe may have fishing rights in the Eel River under the *Winters* doctrine⁹ and the Act of March 3, 1873, it has failed to indicate in any manner any injury that will occur as a result of the increased minimum water flows provided for under the proposed settlement.

In the various pleadings on file with us, the Tribe repeatedly has failed to specify the alleged harm that would result from the settlement. In its intervention petition, the Tribe asserted an absolute right to use of the waters on or contiguous to its reservation in an unimpaired quantity. It referred to the loss of fish resulting from the water diversion, and the resulting damage to tribal lands and resources. However, it only spoke of a generalized loss and did not specify any injury incurred. When the judge, upon the filing of the proposed settlement, ordered a stay of his conditional *61056 grant of intervention, the Tribe filed a protest of the stay order and request for referral to the Commission. In that filing it reasserted that its water and fishing rights were affected by the Potter Valley project but again failed to specify any harm that would result from the increased flow regime allowed under the settlement.

Subsequent to the Tribe's protest and request for referral, on January 14, 1983, the judge issued an order inviting the Tribe members to:

(1) detail every provision of the proposed settlement, including Schedules A, B, and C appended thereto,¹⁰ with which they

disagree;

(2) set forth every change they would make to the proposed settlement, particularly with regard to the Schedules referenced above;

(3) explain why each change is necessary and what goal it would achieve;

(4) identify each person they would produce as a witness to testify at hearings to support their respective positions, including stating each person's qualifications.

****4** (5) explain fully why their efforts to improve the fishery resources of the Eel—even if they are attainable and go beyond the settlement provisions agreed to by the Department of Fish and Game and Humboldt County—should override, rather than be balanced with, these other discrete interests.

The Tribe's response of February 4, 1983, stated that it was neither appropriate nor possible at that time to provide further, more detailed elaboration of the points it had previously raised, and that there had been insufficient time to submit detailed comments. The Tribe instead asked for hearing or other appropriate procedure to address the issues raised. In its most recent filing before us, the June 22 appeal of the judge's intervention denial, the Tribe attaches as Appendix A an affidavit by the Vice-Chairperson of the Tribal Council. The Vice-Chairperson there states that the fisheries of the Eel and its tributaries historically have provided a major means of subsistence for tribal members and that he and other members of the Community have noticed the serious decline in the fisheries. He nowhere specifies the adverse effect the settlement's increased flows will have on the Tribe's interests.

As shown above, the Tribe has had adequate opportunity to inform the judge and the Commission of the estimated adverse effects that have or will occur as a result of the Potter Valley project. In the context of this proceeding, where the project is not alleged to have damaged the Tribes when it commenced, and where we are now dealing with a proposal to increase the project's minimum flows, we agree with the judge's reasoning and conclusion that such generalized claims as those made by the Tribe do not justify a finding under Section 4(e) that the settlement will interfere or be inconsistent with the purposes for which the Tribe's reservation was created or acquired. We therefore believe we have met our duty under Section 4(e).

We further find that to permit the Tribe's intervention at this juncture would unduly burden other parties who have participated in this lengthy proceeding, including parties who have fought for optimum water flows on the Eel. The Tribe has not advanced sufficient reason for delaying resolution of a case filed some 13 years ago. We affirm the judge's denial of intervention.

One final matter remains concerning the Tribe's claims. Were we to allow the Tribe to intervene in this proceeding, it would need to establish the minimum flows ***61057** needed to support a fishery adequate to maintain its alleged fishing rights. However, in order to make such a determination, an adjudication of the Tribe's rights vis-a-vis other fishermen would be required.¹¹ This Commission is not the appropriate forum for such an undertaking. Such a determination must be made by a Federal court. In the event the Tribe does seek a determination of its water rights in court, we conclude it appropriate to include in the Potter Valley **license** a condition that if the Tribe establishes, before an appropriate tribunal, that the Potter Valley Project's flows interfere with its fishing rights, then the Commission will re-consider the question of appropriate minimum flows. Such a condition is included as Article 50 of the **license** conditions adopted herein.

The Settlement

The proposed settlement agreement stipulates minimum flow releases and capital improvements to enhance existing chinook salmon and steelhead trout populations in the upper Eel River. Among the settlement provisions are certain minimum flow releases:

(1) For the Eel River at the Cape Horn Dam, the normal minimum base flow release will be 100 cfs from the fall/winter triggering storm event through March 31.¹² This will aid upstream migration and provide much improved habitat for both adult salmon and steelhead trout over the existing 2 cfs minimum flow release condition. There will be a gradual reduction in

minimum flow releases from 100 cfs on April 1 to 10 cfs on May 31. From June 1 until the fall/winter triggering storm event, the minimum flow release will be 5 cfs.

****5** (2) For the East Branch Russian River there will be minimum releases of 35 cfs from September 16 through May 14, and 75 cfs from May 15 through September 15, to maintain adequate year-round habitat for rainbow trout and to provide adequate conditions for summer sport fishery.

(3) For the Eel River below Scott Dam, the minimum release will be 100 cfs from December 1 through May 31, to ensure adequate spawning and incubation for both species. It will be 60 cfs from June 1 through November 30.

The minimum flow rates will vary depending not only on the time of year, but also on the type of year (normal, dry, or critical). The settlement also provides for modification of the fish ladder to ensure more successful passage of salmon and steelhead to suitable spawning grounds.

The signatories to the settlement are PG&E, the California Department of Fish and Game, Humboldt County, California, Mendocino County, California, the Mendocino County Russian River Flood Control and Water Conservation District, Sonoma County, California, and the Sonoma County Water Agency. They agree that the flow schedule and other requirements in the settlement will remain in effect for 10 years from the date of PG&E's acceptance of its **license**, and no signatory will take any agency or court action seeking to modify them during that time.

California Trout, Inc., and the Salmon Trollers' Marketing Association and Pacific Coast Federation of Fishermen's Associations, oppose the settlement. Their major objections are: (1) The flow regime is inadequate. (2) The 10-year moratorium should be changed to 7 years. (3) The settlement improperly shifts the burden of proof to the complaining parties once the ten years are up and any complaint is filed. (4) The powerhouse at Scott Dam should not be constructed prior to preparation of an ***61058** environmental impact statement. (5) Even if the flow regime is acceptable, it is made meaningless by an agreement that if the Scott Dam is not able to achieve maximum storage capacity, flows will be reduced. There is no evidence to support the likelihood that the dam will be fully operable. (6) Schedule B, which provides for physical improvements to be made to the project, a monitoring program, and other measures to protect the fish, should be revised.

The Commission staff, although supporting the settlement, suggests that the ten-year moratorium provision (paragraph 6) be revised. The provision states that any future change in the agreement resulting from a formal Commission hearing or other proceedings "shall not become effective until the date on which an order requiring such change becomes final and non-appealable." The staff does not agree that the effective date of future Commission orders modifying the agreement should be automatically stayed until a dissenting party has exhausted its right to judicial review. The staff further comments that, with respect to the modifications and additions to project works proposed in the settlement and PG&E's **license** application as amended, the Commission should exercise its authority to review and approve functional design and "as-built" drawings of the new and modified project works. Also, the Commission must resolve certain environmental problems before approving the Scott Dam powerhouse.

****6** We find that the settlement agreement is supported by the evidence and is in the public interest. There is no issue of fact among the parties and thus no need for a hearing. The judge's analysis of the evidence and disagreements involved is well-reasoned. We consider most important the facts that interests in improving the Eel River fisheries have been adequately represented in this proceeding¹³ and that the settlement substantially increases the water flow releases of the Eel River. Additionally, the settlement permits complete review of the fishery flows after ten years and the opportunity to correct any deficiencies at that time. The settlement also provides for a program to monitor the effectiveness of the capital improvements and the new flow regime.

One matter which concerns us is that the judge gave no consideration to a document dated February 28, 1983, containing comments of the field supervisor, Fish and Wildlife Service, Department of the Interior. The document disagrees with some of the settlement terms, and suggests alternative recommendations. It was ignored by the judge because, according to him, there was no indication that it represented the official views of Interior. However, a few days prior to the judge's May 3 certification, on April 28, 1983, the Department of the Interior filed those comments as an update to its original comments and recommendations filed in 1972. Although the Interior Department never formally intervened in this proceeding, it has participated in a technical advisory capacity since inception of the proceeding. We therefore think it is imperative that the

Department's final comments be considered—particularly in view of the fact that it has the primary responsibility for protecting any Indian property rights that would be affected by the project.

Interior's filing contains recommendations for **license** terms and conditions to be included in a new **license** for the Potter Valley Project. The major difference between Interior's recommendations and those measures provided for in the settlement agreement is the flow regime. Interior recommends a higher flow regime for the Eel River than set forth in the settlement agreement; however, Interior's flow release schedule does not provide for releases to the East Branch of the Russian River, which are proposed for in the Settlement Agreement.

***61059** Although the settlement may not provide for the absolute optimum protection of the fisheries of the Eel River, we believe it represents a reasonable compromise that was reached after consideration of all interests (*e.g.*, municipal, industrial, agricultural, and recreational) in the waters of the Eel and Russian Rivers. As previously noted, the flow regime contained in the settlement agreement provides for dramatically improved habitat conditions for the affected fisheries. Furthermore, the settlement agreement provides for an evaluation of the effectiveness and the need to modify the flow regime at the end of a 10-year period. Consideration of a different flow regime at this stage of this proceeding would require lengthy negotiations and would further delay habitat protection that has long been denied the fishery resources that utilize the upper Eel River.

****7** The proposed settlement is approved with two provisos: (1) The last sentence of paragraph 6 will be modified to provide that any change in the agreement resulting from a formal Commission hearing or other proceedings “ shall become effective on the date the Commission's order is issued, unless stayed by the Commission.” (2) The Commission retains full authority to review and approve functional design and “as-built” drawings of project works proposed in the settlement.

*The **License** Application*

On May 5, 1970, PG&E filed an application for a **license** under Part I of the Federal Power Act (Act) for the continued operation and maintenance of the Potter Valley Project No. 77.¹⁴ The project is located on the Eel and East Fork Russian Rivers, navigable waterways of the United States, in Lake and Mendocino Counties, California. The project occupies lands of the United States within the Mendocino National Forest.

Notice of the application was published, and comments were received from interested Federal, State and local agencies. The County of Sonoma, California; Sonoma County Water Agency; the County of Mendocino, California; Mendocino County Russian River Flood Control and Water Conservation Improvement District; California Trout, Inc.; California Department of Fish and Game; Humboldt County, California; the County of Lake, California; Salmon Troller's Marketing Association, Inc.; and Pacific Coast Federation of Fishermen's Associations were granted interventions. The significant concerns of the intervenors and commenting agencies are discussed below.

In March 1978, the Commission staff issued a Draft Environmental Impact Statement. After reviewing the comments submitted on the draft and performing additional analyses, the staff issued a Final Environmental Impact Statement (FEIS) on December 15, 1978.

Project History

The Eel Power and Irrigation Company commenced construction of the Cape Horn Diversion Dam, intake, tunnels, and the Potter Valley powerhouse in 1905. In 1908, construction of the initial project works was completed by the company which had been reorganized into the Snow Mountain Water and Power Company. Upon completion, the Potter Valley powerhouse had installed Units 1 and 2 rated at 2,000 kVA each. An additional 3,000 kVA unit was installed in 1910, a second penstock was added in 1912, and a fourth unit rated at 2,000 kVA was completed in 1917, thus bringing the total installed capacity to 9,000 kVA.

***61060** In 1920, the Snow Mountain Water and Power Company applied to the U.S. Forest Service for a final power permit for the construction of Scott Dam. During the same year, construction of the dam was begun and a request was made to transfer the application for a final power permit to the Commission. The construction of Scott Dam was completed the following year. The Commission issued a fifty-year **license** for the Potter Valley Project on April 15, 1922. The **license** was transferred to PG&E on August 29, 1930.

The Unit No. 3 generator was updated to 2,000 kW by 1938. In 1939, the original Units No. 1 and 2 were replaced by a 4,400 kW generating unit (now called Unit No. 1). The Unit No. 4 generator was rewound and upgraded to 2,640 kW in 1956. There have been no significant changes to the project since 1956.

****8** A more detailed project description is contained in Ordering Paragraph (B).

Safety and Adequacy

All project structures and appurtenant facilities have been inspected by the Commission's staff and found to be adequately maintained and generally in good operating condition. The capacity and adequacy of the spillway of Scott Dam (Lake Pillsbury), as improved pursuant to the Commission's order issued December 30, 1976 [56 FPC 3881], was evaluated and found to be satisfactory.

The Scott Dam was analyzed for stability and found to be safe against overturning and sliding for various combinations of conditions, excepting earthquake loadings. PG&E's consultant recommended that more and better data on uplift and foundation competence be obtained and a more thorough analysis of the dam's stability be performed. PG&E is presently conducting that analysis. Article 45, therefore, requires PG&E to take such remedial action as may be necessary to ensure the structural stability of the dam dependent upon the results of the current study.

The Cape Horn Dam (Van Arsdale Reservoir) spillway is adequate to protect the dam against flood flows up to 140,000 cfs, which is 75 percent of the probable maximum flood peak. The original storage capacity of Van Arsdale Reservoir has been reduced from 1,457 acre-feet to approximately 600 acre-feet due to sedimentation over the years. Should the dam fail under flood flows exceeding 140,000 cfs, no significant increase in flows would occur downstream because of the relatively small storage capacity. The adequacy and the capacity of the Cape Horn Dam spillway is, therefore, found to be satisfactory.

The analysis for structural stability found the Cape Horn Dam to be safe against overturning and sliding for various combinations of conditions, excepting earthquake loadings. The dam has been classified as a low hazard. The floodplain downstream of the dam is wide and relatively flat. A flood wave resulting from the sudden failure of the dam would be contained within the river banks.

In accordance with standard Commission practice, this **license** includes conditions that require the maintenance of an emergency action plan for the project and the installation of any necessary safety devices to protect the public in its use of project lands and waters. It is concluded that the project, under the conditions of this **license**, will be safe and adequate.

***61061** *Threatened and Endangered Species*

The Department of the Interior (Interior) commented that the bald eagle is known to be present at Lake Pillsbury and, therefore, the Commission should enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) pursuant to the provisions of Section 7 of the Endangered Species Act of 1973, as amended. U.S. Forest Service's (USFS) district biologist reported that an active bald eagle's nest is located along the east shore of Lake Pillsbury in the southwest corner of Section 12 near the USFS's homesite tract lease.

The staff consulted with FWS personnel regarding this matter. The FWS reported in its biological opinion dated March 17, 1981, that the effects of the recreational development at Lake Pillsbury would not jeopardize the likely existence of the bald eagle.

Water Quality Certificate

****9** The California Regional Water Quality Control Board waived water quality certification for the project, in accordance with Section 401 of the Federal Water Pollution Control Act.

Fishery Resources

The decline in numbers of steelhead trout and chinook salmon utilizing the upper reaches of the Eel River for spawning and rearing of young has been attributed to the quantity and timing of releases from the existing Cape Horn and Scott Dams. A minimum flow of 2 cubic feet per second historically has been released from Cape Horn Dam during project operations. Lack of adequate passage and attraction flow downstream of Cape Horn Dam caused by impounding fall and winter runoff in Lake Pillsbury has delayed or prevented adult chinook salmon and steelhead trout from reaching the suitable spawning habitat in the Eel River upstream of Tomki Creek. Even after these species reach this area and spawn, incubating eggs may be dewatered and experience mortality as a result of sudden and substantial reduction in flow. Although spills occur at Cape Horn Dam during the fall and winter, the duration is often insufficient to allow upstream migrating adult salmonids to reach the fish ladder at Cape Horn Dam. Steelhead trout in varying numbers do reach the fish ladder and continue upstream every year; however, numbers have been declining. The Eel River between Cape Horn Dam and Scott Dam provides for a sport fishery for juvenile steelhead trout that is regulated by the California Department of Fish and Game.

The existing fish ladder constructed about 1909 at the Cape Horn Dam has not been efficient in providing for successful upstream migration of adult chinook salmon and steelhead trout over the dam. The alignment of the entrance of the facility in close proximity to the spillway of Cape Horn Dam often results in migrating adults being attracted more to spill over the dam than to flows from the facility. Further, the facility has limited capacity to operate effectively under high flows. Although the facility has been modified several times since construction and does pass some fish, it does not represent state-of-the-art in fish passage technology.

Cool water release from Scott Dam resulting from withdrawal of water from lower levels of Lake Pillsbury has been identified as a factor in the delay in the downstream migration of juvenile chinook and steelhead trout from the Eel River between Scott and Cape Horn Dams. Decreasing streamflow occurring with increasing water temperature, the two major stimuli initiating downstream migration of juveniles, does ***61062** not occur below Scott Dam until late spring/early summer. The juveniles that reach the Eel River below Cape Horn Dam at this time of year may be subjected to lethal high water temperatures during downstream migration. Further, flows below Cape Horn Dam have been reduced drastically as a result of diversion to the Potter Valley Powerhouse.

The Settlement Agreement and Articles 38 through 41 included in this **license** provide measures for the protection and maintenance of the salmonid fishery resources that utilize the upper Eel River for spawning and rearing. Specifically, these articles provide for the following: Article 38—minimum flow release schedule; Article 39—a monitoring program of the flow release schedule; Article 40—modifications and improvement of the Cape Horn Dam fish passage facility; and Article 41—measures to provide a temperature regime downstream of Scott Dam needed to facilitate downstream migration of juvenile salmonids.

Recreation

****10** PG&E proposes to develop new recreational facilities at five locations, including family camp units, boat launching ramps and boat trailer parking areas, lake shoreline improvements for day-use, a group/organizational camp unit, and an informational kiosk in cooperation with USFS. In addition, recreational easements totalling 460 acres would be granted to USFS to enhance the management of the Mendocino National Forest. Open space easements on 220 acres would also be granted to USFS for the protection of the natural environmental setting and the implementation of the fire control management plan. PG&E and USFS entered into an agreement, dated May 31, 1979, which outlines each entity's responsibilities for managing the recreational facilities at the project.

USFS recommended that the maintenance of the water level of Lake Pillsbury for recreational purposes should be dependent upon inflow and season of the year. PG&E responded that such a schedule for the lake level should not be required until the ongoing fishery studies have been completed and the release requirements have been resolved. The establishment of a minimum lake level is now feasible. Article 43, therefore, requires PG&E to file an operational plan to maintain the level of Lake Pillsbury.

USFS also recommended that PG&E prepare a study of transportation system needs within one mile of the project boundary at Lake Pillsbury, in cooperation with USFS and the State and local transportation agencies. PG&E opposes financing such a study, because recreational traffic attributed to USFS's facilities is not project induced. PG&E has, however, the responsibility to maintain all roads used for project purposes within the project boundary. It is concluded, therefore, that the

planning and development of a transportation system for public use, in the general area of Lake Pillsbury, is the responsibility of USFS, which owns the majority of the surrounding public land, and the State and local governments.

California Trout, Inc. (CTI) objected to any expansion of recreational facilities on the Eel River downstream of Lake Pillsbury because it is an important rearing area for steelhead trout juveniles and, therefore, steelhead angling should be discouraged. CTI further stated that existing recreational facilities in the area are adequate to serve winter-time needs for adult steelhead fishing. The only additional recreational facilities proposed for the area in question are improvements to the day-use area at Benmore Creek. Those improvements, which are scheduled for development in three to five years ***61063** after **licensing**, would include: off-site parking for 10 cars; 10 picnic tables; appropriate sanitary facilities; waste collection devices; and signs. Both Federal and State recreation agencies indicated that such facilities are needed. In addition, those agencies commented that the proposed facilities would not attract large numbers of additional visitors but would adequately accommodate the present number of visitors to the area. Therefore, it is concluded that the day-use area at Benmore Creek should be developed as proposed in the revised Exhibit R, approved herein.

****11** California Department of Park and Recreation (CDPR) recommended that the recreational facilities proposed for initial development should be completed within two years rather than the three to five years as specified in the agreement between PG&E and USFS. Interior recommended that those proposed facilities be constructed within one to three years. Staff's contacts with the Forest Recreation Officer (FRO) at the Mendocino National Forest indicated that, although additional camping facilities are warranted, the three to five year schedule took into account both future needs and the primary consideration of budgeting funds to implement that development. The FRO indicated that advancing the schedule, as suggested by CDPR or Interior, would create funding problems for USFS. Because both PG&E and USFS have exerted considerable effort in developing an acceptable Exhibit R by resolving a variety of recreational conflicts and problems, it is concluded that the schedule is reasonable and should be implemented as proposed in the revised Exhibit R.

In addition, CDPR recommended that the west shore campground should be developed within one year from the date of notification by USFS. Because the memorandum of agreement and the revised Exhibit R contain the necessary implementation provisions for future recreational development, it is concluded that no further action is required to provide for the timely future development of the west shore campground.

Interior recommended that a plan should be developed for the expansion of the Sunset and Pogie Point Campgrounds and the Oak Flat area. The revised Exhibit R indicates that the Sunset and Pogie Point Campgrounds should be oriented to day-use, due to their proximity to water. The Oak Flat area has been used to accommodate overflow crowds and as an informal campground during winter months, primarily for deer hunters. The revised Exhibit R also provides for the needs of day-use water-oriented facilities, as well as camping at other facilities to be developed. The characteristics of the three sites make it more desirable to develop the planned sites rather than expanding the three existing sites. Also, PG&E and USFS have agreed that available funds should be used for the development of additional sites in lieu of expanding existing facilities.

Interior also recommended that the specific agreements reached between PG&E and USFS should be incorporated into the revised Exhibit R. USFS submitted a copy of the memorandum of agreement with PG&E regarding their mutual understanding of each party's responsibilities for development and operation and maintenance of the project's recreational facilities. That agreement is on file with the Commission and the commitments made in the agreement have been embodied in the revised Exhibit R.

Interior recommended that the Sunset, Pogie Point and Oak Flat areas should be included within the project boundary. All such project-related recreation facilities should be within the project boundaries. Therefore, Article 44 requires PG&E to file amended Exhibits K and R maps to include those areas within the project boundary.

****12 *61064** Interior commented that no provisions have been made to adequately accommodate increased vehicular traffic between the various recreational facilities. The revised Exhibit R includes an analysis of the road system within the project area, but does not indicate any problems that may result from increased traffic. The proposed initial development would increase the camping facilities by 30 units and proposed future development would increase camping facilities by 20 units and a 50-person group unit. Based on field investigations, it is concluded that, although considerable improvements could be made, the existing road system is adequate to serve both the existing and future needs of the public. Further, a long-term road improvement plan is expected to be implemented within the next 10 to 25 years by Lake County and the USFS under the

Forest Highway System, to serve the needs of the public and the forest products industry. Any long-term effects of increased traffic due to recreational usage of project facilities would be ameliorated through implementation of that plan.

Cultural Resources

Known archeological sites within the project boundary are located in areas that are prime locations for camping and other recreational activities. An archeological survey conducted for PG&E in 1969 indicated that three sites had been disturbed by recreationists and that three other sites were located in areas used informally as campgrounds.

Based on the 1969 survey and PG&E's consultation with the California State Historic Preservation Officer (SHPO), PG&E received and forwarded to the Commission a study proposal to: (1) prepare an ethnographic and ethnohistoric overview of the project area; (2) prepare an historical overview derived from archival and field research; (3) assess historical and historical archeological sites; (4) assess prehistoric and other Native American archeological sites; and (5) evaluate the effects of inundation at Lake Pillsbury on submerged archeological and historical sites. The study area outlined in the proposal for field investigations would include the shoreline of Lake Pillsbury and its tributary streams, the shoreline of Van Ardsdale Reservoir, presently developed and proposed recreational areas at the project, project access roads, Graveyard Point, and other areas likely to sustain direct impacts as a result of project operations.

PG&E objects to all of part 5 and portions of parts 3 and 4. According to PG&E, continued operation of the project would have no further effect on cultural resources and, therefore, the surveys should be limited to those areas proposed for new construction. PG&E opposed the underwater archeological reconnaissance of the town of Hullsville, which was inundated when Lake Pillsbury was filled, but agreed that if and when the reservoir is drawn down to expose the site, it would grant access for study purposes.

It appears that parts 1 and 2 of the proposed study, which have been agreed to by PG&E would provide the necessary background information for an investigation of cultural resources at the project, for an assessment of their importance, and for the development of management recommendations for impacted sites. Parts 3 and 4 of the proposed study also appear to be appropriate, and should not be limited to those areas proposed for new construction. The 1969 survey undertaken by PG&E clearly shows that recreational use of the project lands has had an impact on known cultural resources. Such indirect effects may be attributed to the continued operation of the project, and contrary to PG&E's assertion, it is necessary to identify the ongoing *61065 effects of the project on cultural resources. Part 4 of the study would provide for additional field investigations around project reservoirs, existing and proposed recreation areas, and at undeveloped areas known to be used for recreational activities.

****13** Implementation of Part 5 of the study is not warranted. There is no information available indicating that potentially significant cultural resources are present beneath the waters of Lake Pillsbury. In addition, the lack of information would preclude an accurate assessment of changes that may have taken place in those resources over time. Furthermore, continued operation of the project would not have any new effects on Hullsville.

For the reasons stated above, Article 42 requires PG&E, in cooperation with the SHPO, to design and carry out a study for the identification and protection of cultural resources that may be affected by proposed construction or by project operation.

Comprehensive Development

The 1972 Water Resources Appraisal Report for Hydroelectric **Licensing** of the Eel and Russian River Basins, California describes studies and plans of existing and future development and utilization of the water resources in the basin. The only planned development that would affect the operation of the Potter Valley Project is the Water and Power Resources Service's proposed English Ridge Project. Continued operation of the Potter Valley Project would not interfere with the future construction or operation of the English Ridge Project.

The project, with its average annual generation of 61 million kWh, utilizes a renewable resource that saves the equivalent of approximately 100,000 barrels of oil or 28,000 tons of coal per year. It is concluded that, upon compliance with the terms and conditions of the **license**, the project is best adapted to the comprehensive development of the Eel and Russian River Basins for beneficial public uses and that issuance of the **license** is in the public interest.

Federal Takeover

Section 14 of the Federal Power Act reserves to the United States the right to take over a non-publicly-owned project upon expiration of the **license**. No Federal department or agency, state, or municipality has recommended takeover or redevelopment of the project by the United States or any other entity. The project is not in conflict with any project that has been authorized or is under study by the United States. There appears to be no reason why Federal takeover of the project would better serve the public interest than would issuance of this **license**. Thus, Federal takeover will not be recommended.

The Commission orders:

(A) This **license** is issued to the Pacific Gas and Electric Company (Licensee), of San Francisco, California, under Part I of the Federal Power Act (Act), for a period of 50 years¹⁵ effective the first day of the month in which this **license** is issued for the continued operation and maintenance of the Potter Valley Project No. **77**, located in Lake and Mendocino Counties, California, on the Eel and East Fork Russian Rivers, navigable waters of the United States and occupying lands of the United States within Mendocino National Forest. This **license** is subject to the terms and conditions of the Act, which is incorporated by reference as part of this **license**, and subject to the regulations of the Commission issued under the provisions of the Act.

****14 *61066** (B) The Potter Valley Project No. **77** consists of:

(1) All lands, to the extent of the Licensee's interests in those lands, constituting the project area and enclosed by the project boundary. The project area and boundary are shown and described by certain exhibits that form part of the application for **license** and that are designated and described as:

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(2) Project works consisting of: (1) a reservoir, Lake Pillsbury, having a surface area of 2,280 acres and a gross storage capacity of 86,785 acre-feet, impounded by; (2) Scott Dam, a concrete gravity, ogee-shaped structure, having a maximum height of 130 feet and a total length of 805 feet; (3) a reservoir, Van Arsdale, having a surface area of 106 acres and a maximum useable storage capacity of less than 600 acre-feet, impounded by; (4) Cape Horn Dam, comprised of a 283-foot-long, concrete, gravity structure having a maximum height of 63 feet and a 237-foot long earthfill embankment having a concrete core; (5) an intake structure, located on the south bank of Van Arsdale Reservoir 400 feet upstream of Cape Horn Dam, connecting to; (6) Tunnel No. 1, comprised of a 205-foot-long, concrete-lined, horseshoe-shaped section, 7 feet high, 7.25 feet in diameter; (7) a 457-foot-long day-lighted section of pipe and valve connecting Tunnel No. 1 to Tunnel No. 2, comprised of a 50-foot-long steel pipe section containing a 72-inch butterfly valve and sand trap, a 367-foot long, 7-foot-diameter wood stave pipe, a 29-foot long steel pipe, varying in diameter from 7 feet to 7.25 feet, and a 10-foot long, 7.25-foot-diameter steel pipe; (8) Tunnel No. 2, comprised of a 78-foot long, concrete and steel-lined, circular section, 7.25 feet in diameter and a 729-foot-long, concrete-lined, circular section, 7 to 7.25 feet in diameter; (9) an 8.1-foot-long, steel pipe section, tapering from 7.25 to 7 feet in diameter and connecting to a 359-foot long, 7-foot diameter, wood stave pipe bifurcating into two 62-inch diameter pipes that connect to two 60-inch diameter gate valves; (10) Penstock No. 1, a 1,793-foot long, riveted steel pipe, varying in diameter from 62 inches at the gate valve to 48 inches at the powerhouse; (11) Penstock No. 2, a 1,812-foot-long, riveted steel pipe, varying in diameter from 62 inches at the gate valve to 48 inches at the powerhouse; (12) a 30-inch diameter wye branch, supplying water from each penstock to the powerhouse Unit No. 3; (13) an indoor-type powerhouse, containing a 6,500-horsepower, single-runner, horizontal-reaction turbine, directly connected to a 4,400 kW generator and two 4,000-horsepower, single-runner, horizontal-reaction turbines, directly connected to a 2,000 kW and 2,640 kW generator, respectively; (14) an outdoor, 60 kV switchyard, adjacent to the powerhouse; and (15) 3 concrete tailrace channels joining together 50 feet downstream of the powerhouse and discharging into the East Fork Russian River.

The location, nature, and character of the project works are generally shown and described by the exhibits cited above and more specifically shown and described by certain other exhibits that are designated and described as:

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***61067 Exhibit M**—Entitled “General Description of Mechanical, Electrical, and Transmission Equipment” consisting of four typewritten pages and filed on May 1, 1970, as part of the application for **license**.

****15 Exhibit R**—Consisting of seventeen pages of typewritten text and Tables 1 through 5, filed on November 7, 1979, and the following drawings:

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(3) All of the structures, fixtures, equipment, or facilities used or useful in the operation or maintenance of the project and located within the project boundary, all portable property that may be employed in connection with the project, located within or outside the project boundary, as approved by the Commission, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) Exhibits J, K, L, M, and R designated in Ordering Paragraph (B) above, are approved and made part of the **license**.

(D) The **license** is also subject to Articles 1 through 37 set forth in Form L-5 (revised October 1975) [reported at 54 FPC 1832], entitled “Terms and Conditions of **License** for Constructed Major Project Affecting Navigable Waters and Lands of the United States,” hereby made part of the **license**. The **license** is also subject to the following additional articles:

Article 38. The Licensee shall for the protection and maintenance of fishery resources in the Eel River and the East Branch of the Russian River maintain the following releases from the Potter Valley Project:

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***61070 Article 39.** The Licensee shall, in consultation with the California Department of Fish and Game and the U.S. Fish and Wildlife Service develop a satisfactory study plan to determine the effects of the flow release schedule provided for in Article 38 on the salmonid fishery resources of the upper Eel River and the East Branch of the Russian River. The plan shall further provide for the monitoring of the temperature regime of the Eel River downstream of Scott Dam.

The monitoring shall commence within 6 months from the date of issuance of this **license** and shall continue for a period of 10 years. After completion of the monitoring program the Licensee shall, in consultation with the above agencies, review the results and file a report on the results of the monitoring program and for Commission approval recommendations for modifications in the flow release schedule or project structures and operations necessary to protect and maintain the fishery resources. Letters documenting consultation with the above agencies on the report and recommendations shall be in the filing.

Article 40. The Licensee shall, within 6 months from the date of issuance of this **license**, file for Commission approval functional design drawings of the modifications to the existing upstream fish passage facility at Cape Horn Dam, to include a construction schedule and cost estimates prepared in consultation with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and the California Department of Fish and Game. Letters of comment on the proposed modifications from the above agencies shall be attached to the filing. Further, Licensee shall file “as-built” drawings with the Commission within 6 months after completion of modifications to the fish passage facility.

****16 Article 41.** The Licensee shall, after consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Game, conduct a study to determine measures needed at Scott Dam to provide a temperature regime downstream needed to facilitate the timely migration of juvenile salmonids from the upper Eel River. Further, Licensee shall, within 1 year from the date of issuance of this **license**, file with copies to the agencies consulted, a report on the results of the study, and, for Commission approval, recommendations on measures for providing a temperature regime below Scott Dam to facilitate downstream movement of juvenile salmonids. Monitoring of the temperature regime is provided for in Article 39. Documentation of agency consultation on the report and recommendations shall be included in the filing.

Article 42. The Licensee shall, prior to the commencement of any construction at the project, cooperate with the California State Historic Preservation Officer (SHPO) to design and carry out a study for the identification and protection of cultural resources that may be affected by proposed construction or by project operations. The study should include: ethnographic,

ethnohistoric, and historic overviews of the project area; surveys to find and assess prehistoric and historic resources located on the *61071 perimeter of project reservoirs, at existing and proposed recreation areas, and at undeveloped areas known to be used for recreation; and, recommendations for the protection of significant cultural resources. The Licensee shall make available funds in a reasonable amount for any such work as required, and, prior to construction, shall file a report with the SHPO and the Commission summarizing the results of its study and its mitigative recommendations. If any previously unrecorded archeological sites are discovered during the course of construction or development of any project works or other facilities, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with the SHPO to develop a mitigation plan for the protection of significant resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological and historical work related to the project, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

Article 43. The Licensee, in the interest of public recreational use at the project, shall maintain Lake Pillsbury's surface elevation at the highest, most practicable level, commensurate with other project purposes during the summer recreation season. The Licensee shall, within 60 days from the date of issuance of this **license**, file with the Commission its operational plan for maintaining the elevation of Lake Pillsbury.

Article 44. Licensee shall, within 30 days from the issuance of this **license**, file for Commission approval, amended Exhibit K and Exhibit R-2 drawings (FERC No. 77-69), that conform to Section 4.42 of the Commission's regulations, to include, within the project boundary, all recreational areas approved herein.

****17 Article 45.** Licensee shall, within 60 days from the issuance of this **license**, submit a stability analysis of the Scott Dam under seismic loading to the Director, Office of Electric Power Regulation. If the Licensee's analysis shows Scott Dam to be unsafe, the Licensee shall also file at that time with the Commission a plan and schedule for strengthening the dam.

Article 46. The Licensee shall continue to consult and cooperate with appropriate Federal, state and other natural resources agencies for the protection and development of the environmental resources and values of the project area. The Commission reserves the right to require changes in the project works or operations that may be necessary to protect and enhance those resources and values.

Article 47. The Licensee shall pay the United States the following annual charges:

(a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 14,500 horsepower.

(b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of 1,045 acres of its lands other than for transmission line right-of-way, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

Article 48. (a) In accordance with the provisions of this article, the Licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval. The *61072 Licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the Licensee shall also have continuing responsibility to supervise and control the uses and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the Licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The types of use and occupancy of project lands and waters for which the Licensee may grant permission without prior

Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time where said facility is intended to serve single-family type dwellings; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable State and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the Licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program. The Commission reserves the right to require the Licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

****18** (c) The Licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary State and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the ***61073** location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The Licensee may convey fee titles to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary State and Federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary Federal and State water quality certificates or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and State approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any Federal or State agency official consulted, and any Federal or State approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the Licensee to file an application for prior approval, the Licensee may convey the intended interest at the end of that period.

****19** (e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the Licensee shall consult with Federal and State fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the Licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of *61074 this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

Article 49. Pursuant to Section 10(d) of the Act, the rate as computed below shall be the specified rate of return on the net investment in the project for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One-half of the project surplus earnings, if any, accumulated under the **license**, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account as of the end of each fiscal year. *Provided* that, if and to the extent there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year under the **license**, the amount of such deficiency shall be deducted from the amount of any surplus earnings accumulated thereafter until absorbed, and one-half of the remaining surplus earnings, if any, thus cumulatively computed, shall be set aside in the project amortization reserve account; and the amounts thus established in the project amortization reserve account shall be maintained until further order of the Commission.

****20** The annual specified reasonable rate of return shall be the sum of the weighted cost components of long-term debt, preferred stock, and the cost of common equity, as defined herein. The weighted cost component for each element of the reasonable rate of return is the product of its capital ratios and cost rate. The current capital ratios for each of the above elements of the rate of return shall be calculated annually based on an average of 13 monthly balances of amounts properly includable in the Licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for such ratios shall be the weighted average cost of long-term debt and preferred stock for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 50. Following the final disposition of any litigation involving the water and related contractual rights which are incident to Project No. **77**, and upon petition filed by any party or parties to that litigation, the Commission may modify or terminate this **license** in any manner considered appropriate in light of the final disposition of that litigation.

(E) The settlement filed in this docket on November 30, 1982, is approved in accordance with the terms of this order, to be made a part of the **license** issued to PG&E for the Potter Valley Project. Approval of the settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

***61075** (F) This order is final unless an application for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313 (a) of the Act. The filing of an application for rehearing does not operate as a stay of the effective date of this **license** or of any other date specified in this order, except as specifically ordered by the Commission. Failure of the Licensee to file an application for rehearing shall constitute acceptance of this **license**. In acknowledgment of acceptance of this **license**, the **license** shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

Federal Energy Regulatory Commission

Footnotes

* Flow releases in cubic feet per second (CFS).

¹ *Reserved Blocks of Water*

A 2,000 acre-feet are reserved for release at CDF&G's discretion each water year, subject to the following conditions:

i the block may not be drawn upon before the first Triggering Event of the water year, or December 1, whichever is earlier.

ii the reservation for this water expires at 12:01 a.m., January 1.

B 500 acre-feet are reserved for release at CDF&G's discretion each water year, subject to the following conditions:

i the block may not be drawn upon before the first Triggering Event of the water year, or January 1, whichever is earlier.

ii the reservation for this water expires at 12:01 a.m., June 16.

C Once actual cumulative inflow to Lake Pillsbury for the water year exceeds 55,000 acre-feet, as evaluated on the first of each month, 600 acre-feet are reserved for release at CDF&G's discretion subject to the following conditions:

i the block may not be drawn upon before March 16.

ii the reservation for 480 acre-feet of this water expires at 12:01 a.m., October 1.

iii the reservation for 120 acre-feet of this water may be carried over for use in October of the next water year; this reservation expires at 12:01 a.m., November 1.

D Once actual cumulative inflow to Lake Pillsbury for the water year exceeds 160,000 acre-feet, as evaluated on the first of each month, 900 acre-feet are reserved for release at CDF&G's discretion subject to the following conditions:

i the block may not be drawn upon before March 16.

ii the reservation for 720 acre-feet of this water expires at 12:01 a.m., October 1.

iii the reservation of 180 acre-feet of this water may be carried over for use in October of the next year; this reservation expires at 12:01 a.m., November 1.

² A "Triggering Event" is defined here as the occurrence, between November 1 and December 31 of any year, of an accretion flow between Scott and Cape Horn Dams of 75 cubic feet per second (cfs) mean daily flow. No Triggering Event shall occur within seven days of a previous Triggering Event.

³ *Determination of Flow Releases during November*

The November criteria are based upon the cumulative unimpaired inflow for the current water year to Van Arsdale Reservoir, to be reconstructed by PG&E.

Before the first Triggering Event in November, the "summer flow" release shall continue from the preceding October.

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⁴ *Determination of Flow Releases During December*

The December criteria are based upon the cumulative unimpaired inflow for the water year to Van Arsdale Reservoir, to be reconstructed by PG&E.

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⁵ *Determination of Flow Releases during January*

The January criteria are based upon the cumulative unimpaired inflow for the water year to Van Arsdale Reservoir, to be reconstructed by PG&E.

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If cumulative inflow to Van Arsdale Reservoir is less than 23,500 acre-feet, January shall be classified as “dry” for the purpose of footnote 12.

If cumulative inflow to Van Arsdale Reservoir is less than 4,000 acre-feet, January shall be classified as “critical” for the purposes of footnote 12.

⁶ “Dry” water year conditions are defined to exist when the actual cumulative inflow to Lake Pillsbury for the water year (beginning October 1 of each calendar year) is less than or equal to:

39,200 acre-feet as of February 1

65,700 acre-feet as of March 1

114,500 acre-feet as of April 1

145,600 acre-feet as of May 1

160,000 acre-feet as of June 1

Inflow greater than the above will constitute a “normal” water year.

“Critical” water year conditions are defined to exist when the actual cumulative inflow to Lake Pillsbury for the water year is less than or equal to:

19,500 acre-feet as of February 1

40,000 acre-feet as of March 1

45,000 acre-feet as of April 1

50,000 acre-feet as of May 1

55,000 acre-feet as of June 1

⁷ If the water year classification of the previous month was dry or critical, and the present month is February or March and is classified as normal, 85 cfs shall be released for that month.

If the water year classification of the previous months was dry or critical, and the present month is April and is classified as normal, the release on the first working day of April shall be 85 cfs; the flow will then decrease in uniform decrements to the 40 cfs figure listed in the schedule.

8 If as of February 1, the actual cumulative inflow to Lake Pillsbury for the water year is greater than 27,600 acre-feet but is less than or equal to 39,200 acre-feet, 55 cfs shall be the release for the month.

9 Flow to decrease in uniform decrements from the flow on the first of the month to the appropriate lower value through the indicated time period.

10 The water year classification of July through October shall be based upon the classification of the previous June.

11 Releases to exclude flows diverted to the Potter Valley Irrigation District.

12 The water year classification for January is determined in footnote 5.

The water year classification for February through June is determined in footnote 6.

The water year classification of July through December will be based upon the classification of the previous June.

13 The project includes two dams, a lake and a reservoir, tunnels, penstocks and a conduit, and a powerhouse. The project's capacity is 9,040 kW.

14 The project was first constructed in 1907. It was originally **licensed** by the Federal Power Commission for 50 years on April 15, 1922. It has been operating with annual **licenses** since 1972. A hearing order was issued in 1979, in order to determine appropriate measures for the enhancement of the Eel River fisheries.

15 Section 4(e) provides, among other things, that **licenses** "shall be issued within any reservation only after a finding by the Commission that the **license** will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." The Potter Valley Project is located 30-40 miles upstream of the Tribe's reservation.

1 See 18 C.F.R. §385.214(d) and *Northern States Power Co.*, Project No. 108, Order Denying Late-Filed Petitions to Intervene, issued May 17, 1983.

2 *Southern California Edison Co.*, Project No. 120, 57 FPC 690 (1977).

3 *Id.* at 702.

4 On July 15, 1983, the Tribe filed a letter asking the Commission to consider several court decisions, involving Indian rights, which were issued on or after the date the Tribe filed its appeal. We find the facts and/or issues in each of those cases distinguishable from the case before us.

5 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950).

6 In *Winters v. U.S.*, 207 U.S. 564 (1908), the Court established the principle of "reserved" water rights for Federal government lands. It held that in withdrawing Federal land from public domain and reserving it for a Federal purpose such as an Indian reservation, the government, by implication, reserves appurtenant water, then unappropriated, to the extent needed to accomplish the purpose of the reservation. See *Gila River Pima-Maricopa Indian Community, et al. v. U.S.*, 695 F.2d 559 (Fed. Cir. 1982).

7 Schedule A sets forth the flow release regime. Schedule C sets out the operational parameters by which Schedule A will be implemented. Schedule B deals with physical improvements, a monitoring program, and other measures to enhance and protect the fisheries.

8 As the judge observed, it would appear from the Tribe's filings that the project, when it commenced in 1907, had no impact on the Tribe's fishing rights. That would suggest that any damage to the Tribe's fishing rights was the result of uses of the river which occurred some years after the project started operations. Cf. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 968-69 (recent technological and regulatory developments concerning processing and taking of fish have been responsible for interference with Indians' fisheries). If that is the case, the appropriate remedy for the Tribe is to file a suit in Federal court. *Id.* at 669-70. Such a suit would evaluate the Tribe's rights vis-a-vis all other claimants to the river's fisheries. Cf. *Southern California Edison Company, Opinion No. 167*, 23 FERC P 61,240 (1983) (Federal courts, and not this Commission,

have jurisdiction to adjudicate and quantify Indians' water rights).

⁹ A "triggering event" is defined as the occurrence between November 1 and December 31 of any year, of an accretion flow between Scott and Cape Horn Dams of 75 cubic feet per second (cfs) mean daily flow.

¹⁰ We particularly note the extensive active participation in, and acceptance of, the settlement negotiations by the California Department of Fish and Game, a party who has long been involved in attempting to improve the Eel River fisheries. The Department, which has made continuous studies of the Eel River fish resources and participated in the design of the VTN studies, stated in its comments on the settlement that the settlement flow schedules are near enough to optimum flows to afford substantial protection and improvement in the size of the salmon and steelhead runs of the Eel.

¹¹ The original **license** for Potter Valley Project No. **77** was issued effective April 15, 1922, and expired on April 14, 1972. The project has been operating under annual **licenses** since expiration of the original **license**. On May 26, 1981, PG&E filed an application seeking authorization to construct, maintain, and operate a new powerhouse at the base of the Potter Valley Project's existing Scott Dam. That application is now being held in abeyance until issuance of a water quality certificate for the new powerhouse by the State of California.

¹² It is the Commission's policy to grant 30-year **licenses** in cases of relicensing. However, in this proceeding the 50-year term is a part of the settlement certified to the Commission and approved herein.

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