Date: 04/02/2003 02:17 pm -0500 (Wednesday)
From: Cumpston, Tom
To: JACK GIPSMAN
Subject: RE: EID Settlement - Water Rights Language

Thank you, Jack. Your message is received and it accurately relates the resolution we arrived at. I will give copies of the statement below to every Board member and include it in our files on the Project 184 relicensing.

Thomas D. Cumpston
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(530) 642-4144

-----Original Message-----
From: JACK GIPSMAN [mailto:Jack.GIPSMAN@usda.gov]
Sent: Wednesday, April 02, 2003 2:16 PM
To: Cumpston, Tom
Subject: EID Settlement - Water Rights Language

Tom, This will summarize our conversation of today's date regarding the last sentence of paragraph 2.6 in the draft settlement agreement. We agreed the language could remain the same as originally drafted provided EID clearly understands the meaning of that language to the Forest Service. I said I would provide you with a summary of the Forest Service's position on this issue. You agreed to convey that position to EID's board. The following is a summary of the Forest Service's position as I related it to you during our telephone call.

The law is well-settled in this area. The Supreme Court has addressed the question of federal control over water rights with respect to hydro projects in two cases: First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 323 U.S. 152 (1946) and California v. FERC, 495 U.S. 490 (1990). In summary, these cases hold that the Federal Power Act gives the federal government complete authority to set conditions in a federal hydropower license, including minimum bypass flow conditions, for the protection and utilization of federal reservations. While this authority does not grant or take away any water rights the licensee may have from the state, where there is any conflict with a state water right, FERC license conditions control.

Aside from the Federal Power Act, which makes Forest Service control even stronger in this instance, this is similar to the inherent authority of a landowner to regulate the use of its land when a water right holder requests access for a diversion to use a water right. As a landowner, the Forest Service has authority to deny access to its land or condition it, including setting minimum bypass flow conditions which reduces the amount of water that can be diverted from what is granted by the state in a water right. This is not a taking. It is merely setting the conditions for use of its land. The landowner's inherent authority is recognized by the State of California who warns everyone applying for a water right, that the granting of such a right does not convey permission to cross another person's land. It is also recognized by the courts, both state and federal, the most recent decision being a decision from the Federal Circuit Court of Appeals in Washoe County v. United States (Jan. 28, 2003), http://laws.lp.findlaw.com/fed/025039.html .

The court held that the denial of a permit by the federal government which deprived the permit applicant of accessing a water right does not interfere with a water right and it is not a taking. It is merely the exercise of a landowner's prerogative to control use on his own land.