

*Keith
Blean*

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Water Right)	ORDER:	WR 96-04
Permit 19352 (Application 27637))		
)	SOURCE:	Rock Creek
OWENS FAMILY TRUST,)		Tributary to Mud
)		Creek
Permittee.)	COUNTY:	Butte
)		

**ORDER AMENDING PERMIT,
APPROVING PETITION FOR EXTENSION OF TIME, AND
DIRECTING PERMITTEE TO CEASE AND DESIST FROM
VIOLATION OF TERMS AND CONDITIONS OF AMENDED PERMIT
(Preliminary Cease and Desist Order)**

1.0 INTRODUCTION

The Owens Family Trust (Owens/permittee) holds Water Right Permit 19352 authorizing diversion of water from Rock Creek in Butte County for irrigation and wildlife enhancement. The State Water Resources Control Board (SWRCB) held a hearing on February 28, 1996, to receive evidence regarding: (1) a proposed preliminary cease and desist order for violation of the terms and conditions of the permit, (2) possible revocation of the permit, and (3) the permittee's petition for an extension of time to complete beneficial use of water.

Based on review of the record and applicable law, the SWRCB finds: (1) the terms and conditions of Permit 19352 should be amended as specified in this order, (2) the permittee should be granted an extension of time for completion of the authorized project as revised by this order, and (3) the permittee should be directed to cease and desist any actions in conflict with the terms of the amended permit as set forth in this order. The SWRCB's findings regarding specific issues addressed at the hearing are set forth below. The amendments to Permit 19352 and the order to cease and desist actions in violation of the terms

of the amended permit are set forth in the final section of the order.

2.0 BACKGROUND

The SWRCB issued Permit 19352 on November 9, 1984. The permit authorizes direct diversion of three cubic feet per second (cfs) from Rock Creek from April 1 through October 31 of each year and diversion to offstream storage of 22 acre feet per annum (afa) from November 1 of each year to March 31 of the succeeding year. The permit limits the rate of diversion to offstream storage to three cfs and limits maximum annual diversions to 922 afa. In accordance with an order approving a new development schedule for the project entered on December 12, 1990, the authorized time to complete use of water under the permit was extended to December 31, 1994. The permittee filed a petition for a further extension of time with the SWRCB on June 19, 1995.¹

Following complaints by other water users, Division of Water Rights (Division) staff inspected the permittee's project in 1989, 1994, and 1995. The inspection reports state that permittee was not in compliance with terms 17, 19, and 23 of the permit.² The terms provide as follows:

"17. For the protection of fish and wildlife,
permittee shall provide for passage of fish over

¹ At the time permittee filed a petition for an extension of time to complete the project on June 19, 1995, possible violations of the terms of the permit and a proposed preliminary cease and desist order were pending before the SWRCB. The November 6, 1995, notice of the hearing on the proposed preliminary cease and desist order and possible revocation of the permit also provided notice to interested parties of the petition for an extension of time. The notice advised that any party who wished to protest the petition should appear at the hearing. The hearing was originally scheduled for December 6, 1995, but was postponed until February 28, 1996, in order to provide permittee an opportunity to negotiate with a competing water user.

² The conditions included as terms 17, 19, and 23 of Permit 19352 were agreed to by permittee in order to resolve protests which were filed against Water Right Application 27637.

the diversion structure and shall properly maintain and operate fish passage facilities.

"19. No water shall be diverted under this permit until permittee has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring the flow required by the conditions of this permit. Said measuring device shall be properly maintained by the permittee.

"23. Rights under this permit are and shall be subject to existing rights recorded in Butte County records, Judgment 10717 (Book 223, Page 8) insofar as said adjudicated rights are maintained and such other rights as may presently exist."

A proposed preliminary cease and desist order was sent to permittee on August 24, 1995, and permittee requested a hearing before the SWRCB on the proposed order. Permittee's violations of the terms of Permit 19352 are discussed in Section 3.0 below.

3.0 NONCOMPLIANCE WITH TERMS OF PERMIT

On April 14 and 17, 1989, Division staff conducted a field investigation of the diversion of water from Rock Creek to serve properties owned by permittee and by Emerald "C" Kiwi Fruit Corporation (Corporation). Although water was being diverted for irrigation of permittee's property, there was no evidence of construction or installation of fish passage facilities at the Keefer Ditch diversion dam as required by Condition 17 of Permit 19352. Also absent was the flow measurement device required by Condition 19 of the permit. (Division of Water Rights 1, pp. 2-4.)

Following a complaint by the Corporation, Division staff conducted a second field investigation of diversion and use of water under Permit 19352 in April 1994. Although permittee was diverting water for irrigation, neither the fish passage device required by term 17, nor the flow measurement device required by term 19 has been installed. In addition, permittee had obstructed the downstream flow of water in Keefer Ditch in order to apply more water to irrigation of permittee's property. Permittee's use of water for irrigation and obstruction of the flow in Keefer Ditch interfered with the exercise of the prior rights of the Corporation. (Division of Water Rights 1, pp. 4 and 5.)

Division staff conducted another field investigation of permittee's diversion and use of water on May 3, 1995. As with the April 1994 investigation, permittee was diverting water for irrigation although he had not complied with terms 17 and 19 of the permit. Permittee was diverting nearly the entire flow of water in Keefer Ditch for use on the Owens property and had obstructed the ditch causing reduced flow to reach the Corporation's property. (Division of Water Rights 4, pp. 4-6.)

Division staff's most recent field inspection of permittee's diversion and use of water was on November 13, 1995. At that time, permittee was diverting over 90 percent of the flow in Keefer Ditch for flood irrigation of pasture on the Owens property. Once again, permittee had obstructed Keefer Ditch blocking the flow of water to the Corporation's property. (Division of Water Rights 4, pp. 6-9.)

In addition to the evidence of permittee's violations reported by staff of the Division of Water Rights, written testimony submitted by the Corporation further supports the conclusion that permittee has a lengthy history of diverting water in violation

of the conditions of its water right permit. (Corporation Exh. A.)

In summary, there was extensive evidence presented that permittee repeatedly has diverted water from Rock Creek without complying with the terms of Permit 19352 regarding fish passage facilities, installation of an approved flow measurement device, and non-injury to the holders of prior water rights. In addition, permittee did not complete construction of the project in accordance with the revised development schedule approved on October 12, 1990.

4.0 AVAILABILITY OF WATER TO SERVE PERMITTEE

4.1 Description of Rock Creek

Rock Creek, located in Butte County, runs in a southwesterly direction from its headwaters in the Sierra Nevada foothills at an elevation of about 3700 feet. The creek runs from approximately 20 miles northeast of the City of Chico for about 32 miles to its confluence with a tributary of the Sacramento River. Historically, Rock Creek was tributary to Pine Creek thence the Sacramento River. The channel of Rock Creek was later realigned, and it is now tributary to Mud Creek, thence Big Chico Creek, and thence the Sacramento River.

The Rock Creek watershed is characterized by moderately steep, undeveloped terrain in its upper reaches, gradually flattening out as the creek enters the Sacramento Valley before joining Mud Creek. The watershed above the permittee's property consists of about 19 square miles. Rock Creek is a year-round, spring-fed stream whose flow is augmented in the winter months by seasonal precipitation. During the warm summer months, the flow can drop quite low, but in most years there is water flowing at the permittee's point of diversion into Keefer Ditch. Approximately one mile downstream, however, the surface flow usually disappears completely by June.

Average annual precipitation measured at Chico University Farm, the closest measuring station to the point of diversion, is about 26 inches. Assuming a 30 percent runoff rate, 19 square miles of watershed would yield approximately 26,387 acre-feet per annum, the majority of which would be expected during the winter and spring months.

4.2 Use of Water Diverted from Rock Creek at Keefer Ditch

Keefer Ditch begins at the Owens' point of diversion and roughly parallels Rock Creek for approximately three miles until it terminates at a regulatory reservoir on the Emerald "C" Kiwi Fruit Corporation's (Corporation) property. Diversions from the ditch are made by Jo Ellen Hall, Owens, and the Corporation. The estimated capacity of the ditch is between 2.7 and 3.0 cfs. (Owens 2-1, p. 4.) Ditch losses have been estimated by the parties at between 20 and 50 percent of the flow at the headworks of the ditch during the irrigation season. (Owens 2-1, p. 6; T 211:8-212:7.)

4.2.1 The Corporation's Use of Water

The Corporation's ranch consists of approximately 250 acres, of which almost 200 acres are irrigable. Presently, there are about 65 acres of kiwi fruit under cultivation, requiring up to five acre-feet of water per acre per irrigation season. The water is applied to the vines by overhead sprinklers and the growing season begins about the middle of March and ends in December. In addition to the kiwi vines, about 15 acres of permanent pasture are irrigated by sprinklers. Depending on the availability of water, another 100 to 120 acres of native range are flood irrigated to promote early fall growth and to extend growth into late spring. The pasture provides grazing for about 30 head of cattle that are maintained on the ranch year-round. (Corp. Exh. A, p. 2.)

In addition to a claim of riparian rights, the Corporation has rights under a 1921 superior court judgment, Water Right License 5783, and Water Right Permit 19351 as follows:

Decreed Rights: The Corporation is allotted 0.73 cfs from "Rock Creek continually and particularly during the irrigation season of each year, which season begins on the first day of June and ends on the thirtieth day of September of each and every year." (*Fidelity Savings and Loan Association v. W. M. Spesert and A. P. Martin*, Butte County, Superior Court No. 10717; Corp. Exh. E, p. 2.)

License 5783 (Application 14353): License 5783 grants a right for direct diversion of 1.7 cfs from about May 1 to about October 15 of each year for irrigation and throughout the remainder of the year as required for stockwatering.

Permits 19351A and 19351B (Applications 27636A and 27636B): Permits 19351A and 19351B grant rights for direct diversion of a total of three cfs from October 16 through April 30 of each year for frost protection and irrigation.

4.2.2 Jo Ellen Hall

Jo Ellen Hall diverts water from Keefer Ditch above Owens' turnout. She has a decreed water right for 0.36 cfs pursuant to the 1921 Superior Court judgment subject to the same conditions as the Corporation's right discussed above in Section 4.2.1. She also holds License 1457 (Application 5212) for direct diversion of 0.25 cfs from June 1 through September 30 for irrigation of 55 acres and year-round stockwatering. Division of Water Rights staff estimated Hall's use at 15 gallons per minute (gpm) during a field investigation conducted on August 14 and 17, 1989 and at 25 gpm in June 1990. (Water Rights Exh. 5, Attachment 1, p. 3; Report of June 13, 1990, License Inspection for Application 5212.)

4.2.3 Owens Family Trust

Owens irrigates approximately three to four acres of pasture by flood irrigation from Keefer Ditch. (T 25:10-25:16.) Mr. Owens testified that he has about 40 head of cattle during the summer months, about 100 head over the winter, and between 300 and 600 head during the spring and fall. Owens also irrigates about 160 acres of winter range during September, October, April and May. (Owens 1-1, p. 2.) Owens holds Permit 19352 (Application 27637) for direct diversion of three cfs from April 1 through October 31 and storage of 22 afa from November 1 through March 31.

4.3 Water Needed for Downstream Riparian Use

Division of Water Rights staff conducted an investigation on August 14 and 17, 1989, in response to a complaint filed by riparian owners downstream from the Keefer Ditch diversion dam on Rock Creek. The parties to the complaint agreed that a bypass flow of 0.5 cfs would satisfy the needs of riparian users between the diversion dam and the point where the streamflow goes underground. The bypass was accomplished by installation of a 3.5-inch orifice in the Keefer Ditch diversion dam. The agreement to a bypass flow of 0.5 cfs was not intended to provide water for fish habitat or fish passage requirements, but only to resolve the complaint of the downstream riparians. (T 156:10-157:6.) The subject of instream flow for protection of fish is addressed in Section 5.2 below.

4.4 Other Sources of Water Available to Serve Owens

Noel Owens testified that there is ground water available to serve a portion of his irrigation needs. An old well is located in the vicinity of Owens' turnout from Keefer Ditch and Mr. Owens testified that the output had been approximately 800 gpm.

Mr. Owens also testified that he has plans to renovate the well and that he anticipates an output of 1,800 to 2,000 gpm.

(T 133:25-134:4.)

In addition to ground water supplies, Mr. Owens also testified that he has three small reservoirs in which he collects a combination of water from Rock Creek and local run-off which has not yet reached a stream or watercourse. (T 130:12-131:16.) Capture of local sheetflow which originates on permittee's property and which has not yet reached a watercourse is not subject to the Water Code permitting requirements governing diversion of water from a natural channel. (Water Code section 1201 et seq.)

4.5 Discussion and Conclusions Regarding Water Available to Serve Owens

4.5.1 Availability of Water During the Irrigation Season

The Corporation's water rights under the 1921 court judgment, License 5783, and Permits 19351A and 19351B are summarized in Section 4.2.1 above. The Corporation's direct diversion rights under the 1921 court judgment and License 5783 have an earlier priority than Owens' right under Permit 19352.³ Thus, under its 1921 decreed right and License 5783, the Corporation has a prior right to a combined rate of diversion of 2.43 cfs from May 1 through September 30. The Corporation irrigates 15 acres of permanent pasture and between 100 and 120 acres of seasonal pasture which is irrigated when water is available from Keefer Ditch. (Corporation Exh. A, p. 2.)

Due to the limited availability of water from Keefer Ditch during the irrigation season, however, the Corporation has had to rely on ground water pumping to meet a substantial portion of its irrigation demand. (Corporation Exh. A, p. 5 and Corporation Exh. C.) David Dewey, manager of the Emerald "C" Kiwi Fruit Corporation ranch testified that, if Owens were not diverting

³ The water right applications which preceded issuance of the Corporation's Permits 19351A and 19351B and Owens' Permit 19352 were filed on the same day. This order does not address the subject of the relative priority among Permits 19351A, 19351B, and 19352.

water and water were allowed to continue to flow down the ditch to the Corporation's ranch, the Corporation would use that water to irrigate pasture.

The record establishes that satisfaction of the Corporation's prior rights during the period of May 1 through September 30 would require 2.43 cfs. In addition, diversion and use of water under Hall's 1921 decreed right has priority over Owens' diversion under Permit 19352. Owens Exhibit 2-11 assumes that 0.1 cfs is needed to satisfy Hall's demand under her 1921 decreed right. Thus, satisfaction of prior rights during most months of the irrigation season would require 2.53 cfs of the quantity of water available for diversion into Keefer Ditch after bypassing sufficient water for satisfaction of downstream riparian demands and fishery protection.

Owens Exhibit 2-11 estimates that 2.7 cfs is available for diversion into the Keefer Ditch during April and May, 2.5 cfs is available in June, 1.8 cfs is available in July and August, and 1.9 cfs is available in September and October. Exhibit 2-11 estimates that those quantities of water are reduced by conveyance losses and use of water by riparian vegetation by between 25 and 50 percent.⁴

Subtracting the 2.53 cfs needed for the Corporation's and Hall's prior rights from the 2.7 cfs which Owens estimates to be

⁴ The estimates of water availability from Keefer Ditch set forth in Owens Exhibits 2-11 and 2-12 appear to be based on the assumption that only 0.5 cfs must be bypassed to meet instream flow needs. Under Term 18 of Permit 19352, the minimum bypass requirement for instream flow needs would ordinarily be greater than 0.5 cfs unless the total flow in Rock Creek were less than 1.0 cfs. If the flow in Rock Creek were very low, then less water would be available for diversion than the amounts estimated in Owens' Exhibits 2-11 and 2-12. For example, at the time of a field inspection by Division of Water Rights staff in 1989, total flow in the creek was 1.1 cfs, an amount considerably less than the 1.8 cfs which was estimated to be available for diversion during August in Owens' Exhibits 2-11 and 2-12. (T 150:12-151:6; T 153:21-155:7.)

available in May would result in 0.17 cfs remaining for diversion by Owens in that month. During the months of June through September, the 2.53 cfs needed for diversion under the Corporation's and Hall's prior rights exceeds the total amounts which Owens estimates are available for diversion into Keefer Ditch during those months.

Based on the evidence in the record as summarized above, the SWRCB concludes that there is normally no water available for diversion under Permit 19352 during June through September. A small amount of water may be available for diversion under Permit 19352 during April and May depending upon the actual flow in Rock Creek.⁵

4.5.2 Availability of Water During the Storage Season

Based on the expected run-off in the Rock Creek watershed discussed in Section 4.1 above, there is more than sufficient precipitation runoff to supply 22 af to be diverted to storage under Permit 19352 during the November 1 to March 31 diversion season. Necessary measures to provide for fish passage during the winter diversion season are discussed in Section 5.3 below.

⁵ Prior to adoption of the present order, the SWRCB circulated a draft proposed order which concluded that there was "not sufficient water available for diversion under Permit 19352 during the irrigation season." By letter dated July 2, 1996, counsel for Owens contested the proposed order's finding regarding non-availability of water and correctly pointed out that the Corporation's rights should be measured at the point of diversion from Rock Creek into Keefer Ditch rather than at the Corporation's place of use. Owens' counsel requested that the proposed order be amended to allow Owens to divert 0.32 cfs by direct diversion during April and 0.40 cfs by direct diversion during May. Based on the revised analysis of water availability set forth above in this order, the SWRCB acknowledges that the quantity of water available during April and May may be sufficient to allow limited diversions by Owens in those months, although the quantities may be less than requested by Owens' counsel in the July 2, 1996 letter. The issue of whether Owens' permit should be amended to delete authorization for direct diversion entirely, or whether direct diversions of very limited amounts of water should be allowed during April and May is addressed in Section 6.1 of this order.

5.0 PROTECTION OF FISHERY RESOURCES

5.1 Rock Creek Fishery Resources

DFG presented testimony that the fishery resources of Rock Creek consist of warm-water species, native fish, and anadromous salmonids. Native fish species include California Roach, Riffle Sculpin, Sacramento Sucker, and Pacific Lamprey. Anadromous fish known to have resided in Rock Creek are Chinook salmon and steelhead trout. (DFG 96-2, p. 2; T 280:20-282:2.)

The Chinook salmon consist of a spring-run species and a winter-run species. The spring-run Chinook salmon spawn in Rock Creek while the winter-run salmon use the lower reach for nonnatal rearing. (DFG 96-2, p. 2; DFG 96-3; T 281:22-281:25.) Spring-run Chinook salmon move into the Sacramento River system between March and May and then move to the tributary streams in the project area between April and June. (T 288:10-289:8.)

Mr. Owens testified that salmon were present in Rock Creek in 1979 and 1983 or 1984. (T 126:17-127:10.)

The winter-run Chinook salmon utilize the lower reaches of Rock Creek, and the spring-run Chinook and steelhead utilize the entire length of the stream. (DFG 96-3; T 282:25-284:9.) Protection of fish in Rock Creek requires that there be sufficient flow to provide fish habitat. It is also important to provide for unobstructed fish passage in order to allow for upstream and downstream migration of salmonids and to allow native fish to move upstream when surface flow in the lower reaches becomes very low or terminates. (T 282:25-284:9.)

5.2 Fishery Protection Requirements Applicable to Permittee

5.2.1 Conditions Specified in Permit

DFG protested Application 27637 in 1983, prior to issuance of Permit 19352. The protest was based on possible injury to the fishery resources. DFG dismissed the protest when Owens agreed to: (1) provide passage for fish over the diversion structure,

and (2) limit his diversions to three cfs or 50 percent of the natural streamflow, whichever is less. Those conditions were included as terms 17 and 18 in Permit 19352. Additionally, term 19 requires permittee to install and maintain a device capable of measuring the flow required by the conditions of the permit. DFG has protested the petition for extension of time to complete the project based on permittee's past non-compliance with permit requirements.

5.2.2 Fish Passage Structure

Term 17 of Permit 19352 requires permittee to provide for the passage of fish over the diversion structure and to properly maintain and operate fish passage facilities. Testimony presented by Division of Water Rights staff and DFG establishes that Owens has not installed any type of facility specifically designed to provide for fish passage. (Division of Water Rights 1, pp. 3-5; Division of Water Rights 4, p. 5; DFG 96-2, p.2; T 280:17-280:19.) Owens suggests that fish passage could be achieved if flashboards are removed from the diversion dam. (Owens 1-1, p. 5; T 134:18-135:2.) DFG presented testimony that under certain hydrological conditions, fish passage could occur if there were no flashboards in the dam, but that if all the flashboards were in and there were no spillage over the top of the dam, then fish could not pass either upstream or downstream. (T 282:17-285:5.)

Fish passage for anadromous fish is most critical when hydraulic continuity exists between Rock Creek and the Sacramento River. However, in order to prevent stranding of anadromous and native fish below the diversion dam during periods of declining flow, fish passage should be provided throughout the requested diversion season. (T 282:13-285:15.) Therefore, the SWRCB concludes that unless and until the permittee has consulted with DFG and constructed a fish ladder, or other fish passage facilities approved by DFG, permittee should be required to

remove the flashboards from the Keefer Ditch diversion dam throughout the November 1 through March 31 diversion season allowed under the amended terms of Permit 19352.

5.2.3 Instream Flows and Flow Measurement Devices

Term 18 of Permit 19352 limits permittee's diversion rate to three cfs or one half of the natural flow, whichever is less. Permittee presented a proposal to amend Permit 19352 in various ways, including specification of a minimum bypass flow rate of 0.5 cfs. (Owens 1-1, p. 5.) As explained in Section 4.3 above, the agreement to provide 0.5 cfs bypass flow to satisfy the needs of downstream riparians was not based on evidence of fishery needs.

There is no evidence in the record that fishery studies were conducted in order to establish the bypass flow requirement specified in term 18 of Permit 19352, nor was sufficient evidence presented at the hearing from which the SWRCB can determine the quantity of flow needed for protection of a specific species of fish at a particular time. Having agreed to inclusion of the flow requirement set forth in term 18, however, Owens is obligated to comply with that requirement as a condition of diverting water under the permit.⁶ Permittee also remains subject to term 19 requiring installation of a flow measurement device satisfactory to the Chief of the Division of Water Rights.

⁶ In the absence of an agreement regarding instream flows between Owens and DFG prior to issuance of Permit 19352, it is reasonable to assume that the SWRCB would have established a procedure for independently determining appropriate instream flow requirements. Having agreed to the conditions proposed by DFG and having accepted a permit which included those conditions, however, permittee cannot now argue that his diversion of water under the permit is not subject to the stated conditions. (See Water Code section 1391.) In a properly noticed proceeding, and upon a sufficient evidentiary showing that some other bypass flow requirement is more appropriate, the SWRCB could amend the bypass flow requirement specified in the permit. Unless and until the specified bypass flow requirements are modified, however, the requirements presently in the permit remain in effect.

6.0 DETERMINATIONS REGARDING PERMIT REVOCATION AND PETITION FOR EXTENSION OF TIME

6.1 Direct Diversion of Water During Irrigation Season

As stated in Section 4.5.1 above, there is ordinarily not sufficient water to allow for continued diversion of water during June through September under Permit 19352. The evidence establishes that the Corporation has not been receiving the full amount of water to which it holds a prior right under a 1921 court judgment and License 5783, and that the Corporation would increase its use of water if more water were available. Although Noel Owens estimated that he diverted water for summer irrigation less than half of the years since 1984, the evidence establishes that Owens' diversions have repeatedly infringed upon the prior rights of the Corporation.

The record is unclear regarding the amount of water that may be available for direct diversion under Permit 19352 during April and May of each year. Depending upon the flow in Rock Creek and actual use of water by the Corporation and Hall, there may be sufficient water available in some years to allow diversion of 0.32 cfs in April and 0.40 cfs in May as Owens proposes. However, due to the lack of water available for diversion under Permit 19352 during most of the irrigation season, the permittee's infringement upon the prior rights of the Corporation during the irrigation season in the past, and permittee's past violation of permit terms regarding fish passage and fish bypass flows, the SWRCB concludes that the direct diversion season of April 1 through through October 31 should be deleted from Permit 19352. The record shows that there is ground water available to meet a portion of Owens' irrigation needs using existing wells, and that Owens has three small reservoirs which can capture local run-off. In addition, if Owens chooses to complete the storage portion of his project in accordance with applicable requirements, a portion of Owens' irrigation demand can be met

through use of water diverted to storage between November 1 and March 31 as discussed above.

6.2 Diversion of Water to Storage

The evidence discussed in Sections 4.1 and 4.5.2 establishes that there usually should be sufficient water available for diversion of 22 af to storage during the November 1 to March 31 diversion season without infringement on prior rights of other water users. The major concern about diversion of water to storage during the winter months is to avoid causing adverse impacts on fish passage. Based on the evidence in the record and the findings above, the SWRCB concludes that Permit 19352 should be amended to include the following provisions:

- (1) Prior to diverting any water under Permit 19352, permittee shall either remove the flashboards from the Keefer Ditch diversion dam or provide a means of passage around the diversion dam acceptable to the DFG.
- (2) The total diversion of water into Keefer Ditch (under all bases of right) at any time that water is diverted under this permit shall not exceed one-half of the flow of Rock Creek immediately upstream of the Keefer Ditch diversion.
- (3) No water shall be diverted under this permit until permittee has installed a flow measuring device approved by the Chief of the Division of Water Rights which allows for determining the flow immediately upstream of Keefer Ditch and the quantity of water diverted into Keefer Ditch."

6.3 Extension of Time for Completion of Project

The record indicates that Owens encountered uncertainty and delay in the development of the project authorized by Permit 19352 due to litigation regarding the easement for Keefer Ditch and questions regarding the availability of water for diversion under

Permit 19352. As explained in Sections 6.1 and 6.2 above, this order concludes that the direct diversion season should be deleted from Permit 19352 and that specified steps should be taken prior to diverting water to storage between November 1 and March 31. Because various uncertainties involving the project were not resolved previously, the SWRCB concludes that it is appropriate to approve an extension of time for development of the water storage project authorized by Permit 19352 as amended by this order. In view of past delays in development of the project and the statutory requirement for diligence in perfecting an appropriative water right, the SWRCB concludes that the time extension should be subject to the following conditions:

- (1) Permittee must submit plans for the reservoir and the required measuring devices to the Chief of the Division of Water Rights by November 1, 1996;
- (2) Construction of the permittee's reservoir and installation of the required flow measuring devices must be completed by December 31, 1997;
- (3) Permittee shall complete application of water to beneficial use by November 1, 1999.

7.0 IMPOSITION OF CIVIL LIABILITY AND PURSUIT OF INJUNCTIVE RELIEF

Based on evidence of violation of the terms and conditions of Permit 19352, the Chief of the Division of Water Rights sent a proposed preliminary cease and desist order to permittee on August 24, 1995. The February 28, 1996, hearing before the SWRCB was conducted in response to permittee's request for a hearing under Water Code section 1834. Among the issues considered at the hearing were issuance of the proposed cease and desist order, possible revocation of Permit 19352, and pursuit of injunctive

relief or civil liability for violation of the conditions of the permit.

As discussed in Section 3.0, the record shows that permittee repeatedly has been in violation of the conditions of Permit 19352. Water Code section 1052 authorizes imposition of administrative civil liability of up to \$500 per day for diversion or use of water in violation of applicable law. Imposition of administrative civil liability requires service of a complaint in accordance with the requirements of Water Code section 1053. Because the requisite complaint was not issued in this instance, administrative civil liability cannot be imposed by this order. In addition, in view of past uncertainty about the availability of water for diversion under Permit 19352, and permittee's cooperation with the Corporation in securing an easement for Keefer Ditch over neighboring property, the SWRCB does not believe that the interests of justice would be served by pursuit of sanctions for past violations.

This order clarifies the rights of the parties and the season and conditions under which permittee may divert water in the future. The order also directs permittee to cease and desist any diversion of water under Permit 19352 in violation of the conditions of the permit as amended. The SWRCB may issue a final cease and desist order at any time without further notice or opportunity for hearing. (Water Code section 1833.) Violation of the terms and conditions of Permit 19352 as amended by this order can result in administrative civil liability of \$500 per day under Water Code section 1052. Violation of a final cease and desist order can result in referral to the Attorney General for pursuit of injunctive relief and penalties of up to \$1,000 per day.

8.0 SUMMARY

The SWRCB concludes that Permit 19352 should be amended to delete authorization for direct diversion of water for irrigation from April 1 to October 31 of each year. Permittee's petition for a time extension to complete the water storage facilities authorized by Permit 19352 is approved subject to the conditions specified in the order below. Whether or not completion of the storage portion of the project remains financially feasible must be determined by permittee. Finally, this order directs permittee to cease and desist any diversion of water in violation of the terms of Permit 19352 as amended by this order.

ORDER AMENDING PERMIT

IT IS HEREBY ORDERED that Water Right Permit 19352 is amended to delete authorization to divert water from April 1 to October 31 of each year. Accordingly, Condition 5 of Permit 19352 is amended to read as follows:

"5. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 22 acre-feet per annum diverted to storage to be collected from November 1 of each year to March 31 of the succeeding year. This permit does not authorize collection of water to storage outside of the specified season whether to offset evaporation and seepage losses or for any other purpose. The maximum rate of diversion to offstream storage shall not exceed 3 cubic feet per second."

IT IS FURTHER ORDERED that time for completion of the project authorized by Permit 19352 is extended and that Conditions 8, 9, 17, 18, and 19 of Permit 19352 are amended to read as follows:

"8. Permittee must submit plans for the reservoir and the required measuring devices to the Chief of the Division of Water Rights by November 1, 1996. Permittee shall not make any diversion of water to storage under this permit prior to installation of flow measuring devices satisfactory to the Chief of the Division of Water Rights. Construction of the permittee's reservoir and installation of the required flow measuring devices must be completed by December 31, 1997.

"9. Permittee shall complete application of water to beneficial use by November 1, 1999.

"17. For protection of fish and wildlife, permittee shall provide for passage over or around the diversion structure and shall properly maintain and operate the fish passage facilities. Prior to diverting any water under Permit 19352, permittee shall either remove the flashboards from the Keefer Ditch diversion dam or provide a means of passage around the diversion dam acceptable to the Department of Fish and Game.

"18. For protection of fish and wildlife in Rock Creek, permittee's diversion under this permit shall be limited to the smaller of 3 cubic feet per second or 50 percent of the natural flow. The total diversion of water into Keefer Ditch (under all bases of right) at any time that water is diverted under this permit shall not exceed one-half of the flow of Rock Creek immediately upstream of the Keefer ditch diversion.

"19. No water shall be diverted under this permit until permittee has installed a flow measuring device approved by the Chief of the Division of Water Rights

which allows for determining the flow immediately upstream of Keefer Ditch and the quantity of water diverted into Keefer Ditch."

IT IS FURTHER ORDERED that if, in the opinion of the Chief of the Division of Water Rights, permittee does not comply with the dates specified in this order, then the Chief of the Division of Water Rights is directed to initiate revocation proceedings pursuant to Water Code section 1410.

PRELIMINARY CEASE AND DESIST ORDER

IT IS HEREBY ORDERED that permittee shall cease and desist from diverting water in violation of Permit 19352 as amended. If, after four years, permittee has continuously and diligently complied with all terms and conditions of Permit 19352 and all provisions of this order, the Chief of the Division of Water Rights may rescind the Preliminary Cease and Desist Order, and shall notify the permittee of cancellation of said order. If, in the opinion of the Chief of the Division of Water Rights, permittee fails to show reasonable diligence in complying with

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the provisions of this order, the Chief of the Division of Water Rights shall request the State Water Resources Control Board to adopt a final cease and desist order pursuant to Water Code section 1833. In accordance with Water Code section 1845(b), violation of a final cease and desist order may result in penalties of up to \$1,000 for each day in which a violation occurs.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 8, 1996.

AYE: John Caffrey
 John W. Brown
 Marc Del Piero
 James M. Stubchaer
 Mary Jane Forster

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board