121 FERC ¶ 61,154
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Southern California Edison Company — Project Nos. 1390-005
1390-007
1390-040

ORDER AMENDING LICENSE AND DISMISSING REQUESTS FOR REHEARING

(Issued November 15, 2007)

1. By order issued March 3, 1999, the Commission issued a new license to Southern California Edison Company (Edison) for the 3-megawatt (MW) Lundy Project, located on Mill Creek in Mono County, California.[1] Requests for rehearing of that order were filed. Subsequently, Edison filed for Commission approval of an offer of settlement that it had entered into with certain stakeholders in the proceeding. Under the terms of that settlement, the license would be amended in such a way as to satisfy the concerns of the parties that filed the rehearing requests. In this order, we approve the settlement in part, amend the license, and dismiss the requests for rehearing.

Background

2. Lundy Dam impounds Lundy Lake on Mill Creek, 7 miles upstream of where the creek enters Mono Lake. Water diverted from Mill Creek at the dam is transported through a 12,000-foot-long pipeline and a 3,000-foot-long penstock to the project powerhouse. Water discharged from the powerhouse tailrace can enter the 7,735-foot-long Mill Creek return ditch, essentially an extension of the tailrace, and return to Mill Creek at a point some 3 miles downstream of the dam and 4 miles upstream of Mono Lake. However, historically, flows have been directed into the Mill Creek return ditch only when necessary to satisfy senior water rights on Mill Creek. Otherwise, most of the tailrace water has instead been diverted into Wilson Creek at the Wilson Creek headgate (also known as the tailrace splitter box), located on the return ditch about 1,500 feet

[1] *Southern California Edison Company*, 86 FERC ¶ 61,230 (1999).

below the powerhouse, to satisfy Mill Creek water rights held by entities owning Wilson Creek area lands, principally the former Conway and DeChambeau Ranches. Wilson Creek, like Mill Creek, empties into Mono Lake.

3. Water rights for predecessors of the current water rights holders were established by the California Superior Court in the 1914 Mill Creek Judgment and Decree (the 1914 Decree). Currently, Mono County and the U.S. Department of the Interior's Bureau of Land Management (BLM) own the Conway Ranch lands, with the exception of a private residential development, and the associated Mill Creek water rights. These entities manage their lands for wildlife protection and use the diverted water for irrigation; Mono County also uses it for fish rearing.[2] The U.S. Forest Service (Forest Service) owns the DeChambeau Ranch lands and their associated water rights. The Forest Service manages these and adjacent lands for waterfowl habitat and irrigation.[3] Several ditches leading from Wilson Creek enable Mono County, BLM, and the Forest Service to divert this water from Wilson Creek for their uses. Rights in Mill Creek water are also held by the Los Angeles Department of Water and Power (Los Angeles DWP) and Jan Simis, an individual, but these rights do not attach to lands in the Wilson Creek drainage.

4. The original project license imposed no required minimum instream flow for the bypassed reach of Mill Creek, but, except in winter, Edison voluntarily released 2 cubic feet per second (cfs) into Mill Creek at a point one-quarter mile below the dam, from a release point in the flowline called the sand trap. Edison has used this flowline for releases because a conduit called Farmer's Gate, through which water can be released directly from the dam into Mill Creek, is usable only when the lake level is above 7,779 feet mean sea level, generally during the wetter spring and summer months.[4] In its application for the new license, Edison proposed to release 2 cfs year-round.

5. Roughly half of the project reservoir, about one third of the combined pipeline/penstock, two segments of Mill Creek between Lundy Dam and Mono Lake, and a section of the Mill Creek return ditch are in the Inyo National Forest. The rest of the

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[2] Conway Ranch Homeowners Association comments on settlement agreement, filed May 11, 2005, at 1.

[3] Offer of settlement explanatory statement, filed February 4, 2005, at 3; Environmental Assessment for Amendment of License, issued May 19, 2006, at 20 and 34.

[4] The first 1,000 feet of the Mill Creek bed below the dam and above the sand trap are therefore usually dry.

return ditch is on land administered by BLM, while the remaining project facilities, including the dam and powerhouse, are on non-federal land. Commission staff, the Forest Service, and BLM jointly prepared the 1992 environmental assessment (EA) for the new license application.

6. Pursuant to section 4(e) of the Federal Power Act (FPA),[5] the Forest Service submitted conditions for inclusion in the new license. Among these was a condition requiring Edison to release into Mill Creek a continuous minimum flow of 7 cfs or natural inflow into Lundy Lake, whichever is less. Because the condition would require a flow release at Lundy Dam, which is not on Forest Service land, we determined that this was not a mandatory section 4(e) condition and that we would consider this condition under the broad public interest standard of section 10(a)(1) of the FPA.[6] We also did not include Forest Service conditions that would have required a special use authorization for the project's use and occupancy of Forest Service lands and the monitoring of riparian and aquatic habitat at a location outside the project boundary.

7. Pursuant to section 10(j)(1) of the FPA,[7] the California Department of Fish and Game (Cal Fish and Game) recommended that Edison release into Mill Creek a continuous minimum instream flow of 12 cfs or the natural inflow to Lundy Lake, whichever is less, on behalf of the aquatic and riparian ecosystem in Mill Creek from Lundy Dam to Mono Lake. In the EA, Commission staff found that habitat gains for adult and juvenile brown trout, the only species resident in Mill Creek, would be incrementally small above 4 cfs. Staff concluded that Cal Fish and Game's 12-cfs minimum flow would have a significant adverse effect on project economics and would therefore be inconsistent with the balancing of developmental and environmental values

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[5] Section 4(e), 16 U.S.C. § 797(e) (2000), provides that a license issued for a project that occupies a reservation, such as a national forest, must include any conditions that the Secretary of the department under whose supervision the reservation falls shall deem necessary for the adequate protection and utilization of the reservation.

[6] Section 10(a)(1), 16 U.S.C. § 803(a)(1) (2000), provides that all licenses issued shall be such as will, in the Commission's judgment, be best adapted to a comprehensive plan for developing or improving the waterway for a variety of beneficial public uses.

[7] Section 10(j)(1), 16 U.S.C. § 803(j)(1) (2000), provides that a license is to include conditions based on recommendations of federal and state fish and wildlife agencies submitted under the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq*. (2000), to "adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat)" affected by the project.

under the FPA. Cal Fish and Game then revised its recommendation to call for flows ranging from 13 to 27 cfs. Staff was unable to resolve the inconsistency between this recommendation and the purposes of Part I of the FPA, and therefore did not adopt the recommendation.[8]

8. In the license order, we concluded that both the Cal Fish and Game revised flows and the Forest Service's 7-cfs minimum flow would cost Edison substantially in lost power benefits. We also concluded that staff's recommended 4-cfs minimum flow would provide adequate habitat for all life stages of brown trout while costing the project considerably less in annual lost power benefits than the flows recommended by either of the agencies. Accordingly, Article 404 of the new license required a continuous minimum instream flow of 4 cfs or inflow to the project reservoir, whichever is less.[9] Article 404 provided for the release of this flow after Commission approval of a plan required by Article 403 for providing the minimum flow.

9. Several commenters on the 1992 EA had raised concerns that the imposition of minimum flows in Mill Creek and any redirection of project discharge water from Wilson Creek into Mill Creek could infringe on water rights exercised in Wilson Creek. Further, in an August 19, 1997 letter, the California State Water Resources Board (Water Board) furnished background as to current water rights concerns. The Water Board explained that, in 1994, it issued Mono Lake Water Right Decision 1631, which addressed the goal of restoring the Mono Lake Basin after years of water diversions. In that decision, the Water Board noted the historical diversion of Mill Creek water through the project not only for power generation but also for the satisfaction of court-decreed water rights at the Conway Ranch and in the Wilson Creek drainage. The Water Board indicated that it would be addressing how to allocate water between Mill and Wilson Creeks in connection with evaluating resource issues.

10. In light of this ongoing water rights proceeding, we did not impose any requirement in the license order as to where water discharged into the project tailrace

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[8] Under section 10(j)(2), 16 U.S.C. § 803(j)(2) (2000), if the Commission finds that a recommendation may be inconsistent with the purposes and requirements of Part I of the FPA, it shall attempt to resolve the inconsistency with the recommending agency, but if such resolution is unsuccessful, the Commission must find that its own conditions will comply with the requirements of section 10(j)(1).

[9] These flows were to be released at the downstream base of Lundy Dam whenever water levels in Lundy Lake are above the elevation of the Farmer's Gate and from the penstock tap at the sand trap when the lake level drops below that level.

should be directed. However, we stated that we would modify the license as needed if we were informed that project operations were infringing on any quantified, adjudicated water right. Article 414 reserved our right to modify the license if any final adjudication of water rights were to affect whether water discharged from the tailrace should enter Wilson Creek or the Mill Creek return ditch. Article 411 reserved our right to require the licensee to release back into Mill Creek, through existing project facilities or facilities constructed to achieve this purpose, tailrace flows not subject to appropriation by or allocation to holders of water rights.

11. The Forest Service filed a late motion to intervene in the proceeding and a request for rehearing of the license order. In the rehearing request, the Forest Service objected to our failure to include all of its section 4(e) conditions.[10] A request for rehearing was also filed by Mono Lake Committee.[11] Mono Lake Committee objected to the omission from the license of some of the section 4(e) conditions and of a requirement that Edison maintain the Mill Creek return ditch at the capacity at which it was originally licensed.

12. By letter filed April 23, 1999, People for Mono Basin Preservation (Mono Basin Preservation), a local community group that had earlier provided comments, notified the Commission that the 4-cfs minimum flow release would infringe on the water rights of the property owners of Conway Ranch and would cause Wilson Creek to become dewatered during dry year winter months, eliminating the brown trout fishery. On May 24, 1999, a letter expressing similar concerns was filed by the Board of Supervisors of Mono County, which claimed that its adjudicated water rights on Conway Ranch would be affected by the minimum flow requirement. By letter filed October 21, 1999, the Trust for Public Land also urged modification of the flow regime to avoid

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[10] By notice issued April 30, 1999, we granted late intervention. Edison sought rehearing of that notice, and no action has yet been taken on its rehearing request. In light of the subsequently-filed settlement, to which both Edison and the Forest Service are signatories, we will dismiss Edison's request for rehearing as moot.

In the relicense order, we also granted motions for late intervention filed by California Sportfishing Protection Alliance and Mono Lake Committee. The only other intervenor in the relicensing proceeding was Joseph M. Keating.

[11] The request for rehearing was actually filed jointly by American Rivers, California Trout, and Mono Lake Committee and was accompanied by American Rivers' and California Trout's motion for late intervention. By notice issued April 30, 1999, we denied that motion. However, because Mono Lake Committee had been granted intervention, the request for rehearing remains valid and pending as to that party.

interference with the Conway Ranch water rights. None of these entities had intervened in the proceeding, and these filings did not purport to be requests for rehearing. Rather, they were responses to our license order statement that we would modify the license if we were informed that project operations were infringing on quantified, adjudicated water rights.

13. Edison filed the minimum flow plan required by Article 403 on September 27, 1999. By letter of November 10, 1999, to Edison, Commission staff stated that Mono County had informed it of Edison's initiation of the release of the 4-cfs minimum flow specified by Article 404. Staff advised Edison that it should not be releasing that flow until the minimum flow plan was approved.[12] By letter of August 16, 2000, the Inyo National Forest and Mono County asked that the Commission make no decision on the minimum flow plan until at least June 1, 2001, to permit discussions that would involve other agencies and entities.

14. Subsequently, in an October 29, 2001, letter, Inyo National Forest submitted a progress report of discussions that had been taking place among it, Edison, and other specified entities, indicated that the participants intended to begin settlement negotiations in December 2001 to resolve the rehearing requests and related disputes, and requested that the Commission not act on the rehearing requests until after the deadline for conclusion of negotiations. In a November 8, 2001 letter to Edison, staff noted that the minimum flow requirement was being challenged on rehearing and indicated that it did not intend to act on the minimum flow plan until negotiations regarding the minimum flow requirement and action on the rehearing requests were completed. Consequently, since issuance of the new license, the project has not been operating with a minimum flow requirement.

15. On February 4, 2005, Edison filed with the Commission an offer of settlement on behalf of itself and the Forest Service, BLM, Cal Fish and Game, American Rivers, California Trout, and the Mono Lake Committee, all signatories to a settlement agreement attached to the settlement offer. Edison stated that the settlement was developed after more than three years of discussions, meetings, studies, and negotiations. Edison requested the Commission to accept the offer of settlement without material modification, in which case the pending requests for rehearing would be withdrawn.

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[12] On January 14, 2000, Cal Fish and Game filed a motion to intervene in the "apparently informal proceeding" concerning the water rights correspondence submitted by Mono County and the Trust for Public Land. No action was ever taken on this motion. Because there was at that time no ongoing proceeding in which to intervene, we will deny the motion.

16. Notice of the settlement agreement soliciting comments was issued February 11, 2005. Comments were filed by Inyo-Mono Preservation and Culture of Trout, Mono Basin Preservation, Mono County, Lundy Mutual Water Company (Lundy Mutual), Mono Lake Committee, United Anglers of Southern California (United Anglers), Conway Ranch Homeowners Association (Conway Homeowners), Ducks Unlimited, Audubon California, Los Angeles DWP, Cal Fish and Game, the Forest Service, and over 100 individuals.[13]

17. By notice issued May 18, 2005, we extended the deadline for filing reply comments and solicited motions to intervene for entities that were not already intervenors in the relicensing proceeding. On May 17 and June 10, 2005, Mono County and Mono Basin Preservation, respectively, filed motions for late intervention. These motions are timely under the deadline set by the May 18 notice and require no action. Comments in reply to previously filed comments were filed by Edison on behalf of all the settlement signatories and jointly by Mono Lake Committee, California Trout, and American Rivers.[14]

18. On May 19, 2006, Commission staff issued an EA for the license amendment proposed by the settlement.[15] Comments on this EA were filed by Edison, Los Angeles DWP, Conway Homeowners, Lundy Mutual, Mono County, Mono Basin Preservation, John E. Boynton, and Tom Crowe, and jointly by Cal Fish and Game, Mono Lake Committee, California Trout, and American Rivers (the settlement party commenters).[16]

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[13] In addition, Mono Lake Committee's comments included a petition in support of the settlement signed by over 1,000 individuals.

[14] By letter of August 24, 2005, Commission staff requested additional information from Edison, which submitted the information on September 26 and November 2, 2005. Mono Basin Preservation filed comments on these submissions on November 28, 2005. On January 19, 2006, Edison filed further additional information, pursuant to a December 20, 2005 staff request.

[15] Previous references in this order to an EA have been to the EA prepared for the relicense application. For the remainder of this order, references to an EA will be to the EA prepared for the settlement-proposed amendment application, except when otherwise noted.

[16] The settlement party commenters argue that, because Mono County and Mono Basin Preservation have been permitted late intervention, late intervention should also be granted to American Rivers and California Trout. As noted earlier, we issued a notice

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Settlement Issues

Summary of the settlement proposal

19. According to section 1.2.6 of the settlement agreement, the settlement is intended to resolve outstanding issues raised in the requests for rehearing and the contentions of Mono Basin Preservation and Mono County that the Article 404 minimum flow schedule would interfere with Wilson Creek water rights. In the explanatory statement to the settlement, Edison states that the objectives of the settlement agreement are to prevent infringement on non-project water rights, to provide adequate minimum flows in upper Mill Creek for protection and maintenance of aquatic resources, and to enhance flow below the return ditch to increase water flows in lower Mill Creek for the improvement of aquatic and riparian conditions.

20. To accomplish the purposes of the settlement, the settlement signatories propose that the Commission amend the project license to include articles requiring Edison to establish a 1-cfs minimum flow below Lundy Dam, develop an annual water management plan in consultation with the water rights holders, and redevelop the return ditch as a conveyance facility with a carrying capacity of no less than 40 cfs. Edison states that these articles may result in changes in the current flow volumes to Wilson and Mill Creek. Edison explains that, under the settlement, the allocation of powerhouse flows for non-project uses along Mill and Wilson Creek would be directed by the annual water management plan, in a manner consistent with state water rights law. According to Edison, the agreement does not purport to modify non-project uses of water and does not modify the rights to or uses of powerhouse flows diverted from the tailrace to Mill or Wilson Creek.

21. The explanatory statement of the settlement agreement contains an analysis of the expected effects of the settlement proposals on Wilson Creek water rights, flows in upper and lower Mill Creek, fish and riparian habitat in upper Mill, lower Mill, and Wilson Creeks, and groundwater and wells. The analysis uses two different flow scenarios that

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denying American Rivers's and Trout Unlimited's motion for late intervention in the relicensing proceeding. These entities filed a request for rehearing of that notice, but no action has yet been taken on their request. Although American Rivers and Trout Unlimited failed to seek intervention in the period allowed by the May 18, 2005 notice soliciting interventions in response to the offer of settlement, we will grant late intervention here since we have not issued an order on the settlement before these entities sought intervention. Therefore, we will dismiss their request for rehearing of the April 30, 1999 motion as moot.

are based on an interpretation of Mill Creek water rights priorities. A table representing these priorities appears in the North Mono Basin Watershed/Landscape Analysis, prepared by the Forest Service and included as part of the settlement agreement submission.[17] According to this table, Los Angeles DWP has a right to the first 1.0 cfs of Mill Creek water, with Mono County and BLM having rights to the next 12.0 cfs. Of the next 25.0 cfs, Los Angeles DWP has a right to all but 1.8 cfs (belonging to Simis). Finally, in order of priority, Mono County, the Forest Service, Los Angeles DWP, and Mono County have rights to 5.0, 12.6, 18.0, and 1.0 cfs, respectively.

22. Underlying the settlement's analysis is the premise that water is available for return to Mill Creek when powerhouse flows exceed the water needs on Wilson Creek or when water is requested by a water right holder for rights pursuant to diversions on Mill Creek. Edison states that returning water to Mill Creek after its use to generate power depends on the availability of water, the capacity of the return system, and the type of return system. Edison believes that, in its current condition, the return ditch can reliably carry about 12 to 16 cfs.[18]

Proposed license amendments

23. The settlement includes, as Appendix A, proposed amended license conditions in the form of revised license articles that the settlement signatories ask us to adopt. The following is a summary of the proposed articles.[19]

24. As noted above, Article 404 of the new license provides for the release of a 4-cfs minimum flow from Mill Creek Dam into Mill Creek. The settlement would revise Article 404 to provide for a minimum flow release into Mill Creek of 1 cfs on an average monthly basis but not less than 0.75 cfs on an average daily basis, or inflow to the reservoir, whichever is less. In addition, the minimum flow requirement would be reduced to the extent that the seepage and accretion flow in Mill Creek is greater than 3 cfs, in which case the licensee would have to release only that amount of water necessary to result in a 4-cfs flow at the existing Mill Creek gage just upstream of the mouth of Deer Creek, located immediately below Lundy Dam. The licensee would be required to monitor flows quarterly on Mill Creek above the return ditch to determine if the combination of minimum flows and accretion provides 7 cfs of flow in Mill Creek.

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[17] North Mono Basin Watershed/Landscape Analysis (Forest Service 2001).

[18] Explanatory statement at 32.

[19] A fuller description of these provisions is found in the May 2006 EA.

At the end of an 8-year monitoring period, the licensee would prepare a report documenting the monitoring results. Finally, if the confluence of Deer Creek with Mill Creek shifts above Lundy Dam, the Commission would have reserved authority to reopen the license to determine if an additional flow release is necessary for the protection of resources in the bypassed reach of Mill Creek.[20]

25. The settlement would revise Article 403 to add specific provisions to the minimum flow plan. These would include allowing greater flexibility in the release location of the minimum flow, requiring a schedule for implementing the minimum flow, and requiring operation of the water-release facility year round, if feasible.

26. As noted above, Article 411 of the new license currently reserves our authority to require releases back into Mill Creek of tailrace flows that are not subject to use by holders of water rights. The settlement would revise Article 411 to replace this reservation of authority with more specific water release provisions. To the extent that the licensee would divert water from Lundy Dam through the powerhouse, the licensee, in cooperation with the water rights holders,[21] would be required to release that water into Wilson Creek (including Upper Conway Ranch)[22] and/or Mill Creek through a powerhouse tailrace diversion structure in a manner consistent with the water rights of Wilson Creek and Mill Creek and a water management plan required by Article 417, as the settlement would revise that article.

27. The revised Article 411 would also require the licensee to file a plan for Commission approval for "engineering, permitting, construction, and operation" of a modified powerhouse tailrace diversion structure and a Mill Creek return water conveyance facility. The return water conveyance facility would generally follow the path of the existing return ditch and would be designed to convey at least 40 cfs, but no

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[20] Lundy Dam originally impounded Deer Creek as well as Mill Creek, but, between 1956 and 1968, Deer Creek shifted eastward on its alluvial fan and now enters Mill Creek below the dam. North Mono Basin Watershed/Landscape Analysis at 12 (Forest Service 2001).

[21] These are identified as the Forest Service, Mono County, BLM, Los Angeles DWP, and Jan Simis.

[22] While most water passing to the Wilson Creek drainage is directed through the tailrace and splitter box, water for lands of Upper Conway Ranch is diverted through Upper Conway Ditch at the powerhouse, above the tailrace and splitter box.

more than 52 cfs, of water. Although the settlement does not specify the form of the facility, Edison subsequently indicated that it anticipates constructing either an open concrete lined channel or a buried pipeline.[23]

28. Article 417 of the new license requires the licensee to file annually, for Commission approval, a water management plan for streamflow and lake levels based on the annual snowpack forecast. The settlement proposes to amend Article 417 by including power diversions and Mill Creek return water conveyance facility flows in the water management plan. The settlement would also revise Article 417 to require the licensee to meet annually with the Forest Service to discuss a draft water management plan before receiving comments on the plan and submitting it to the Commission. Unlike existing Article 417, however, the proposed amended article does not provide for Commission approval of the plan. In addition, the settlement proposes to add Mono County, Los Angeles DWP, California Trout, American Rivers, and Mono Lake Committee to the entities with which existing Article 417 requires the licensee to consult on the draft plan.[24]

29. Existing license Article 412 requires the licensee to file for Commission approval a plan to install, operate, and maintain streamflow gages to monitor the minimum flow release required by Article 404, but it does not require gages at any specific locations. As revised by the settlement, Article 412 would have the plan cover monitoring of the revised Article 404 flow releases from Lundy Dam into Mill Creek, the revised Article 411 flow releases from the tailrace diversion structure into both creeks, and the elevations of Lundy Lake. The revised article would also specify that flow monitoring gages be located at Mill Creek below Lundy Dam, the Lundy powerhouse tailrace, Upper Conway Ditch, either the Wilson Creek diversion or the Mill Creek return water conveyance facility below the Wilson Creek diversion, and at Lundy Reservoir (for lake elevation). In addition, the plan would encompass the revised Article 404 quarterly measurements at Mill Creek above the confluence with the Mill Creek return water conveyance facility.

30. Finally, the settlement would delete from the license Article 414 reserving the Commission's right to modify the license based on any final adjudication of water rights.

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[23] Response to request for additional information, filed September 26, 2005.

[24] Article 417 requires consultation with Interior's Fish and Wildlife Service, BLM, Cal Fish and Game, and the Forest Service.

31. Section 1.2.7 of the settlement provides that, simultaneously with the settlement, the Forest Service will submit modified section 4(e) conditions that address the issues resolved by the settlement. Similarly, in section 3.2 of the settlement, the Forest Service promises to propose as conditions the measures contained in Appendix A of the settlement. However, although the Forest Service filed a comment in support of the settlement agreement, it has not filed any revised section 4(e) conditions with the Commission.

Comments on the settlement

32. Most comments were in favor of the settlement, generally on the grounds that it would promote the restoration of Mill Creek and improve conditions in Mono Lake. However, some commenters opposed the settlement or expressed concerns about some of its potential effects. These commenters included Mono County, Mono Basin Preservation, Lundy Mutual, United Anglers, Conway Homeowners, and several individuals.

33. Mono Basin Preservation and John Boynton, a property owner on Mono Lake, opposed the settlement. Boynton claimed that the settlement represents an attempt to use the relicensing process to reapportion long-established water rights to powerhouse flows, contrary to a 1998 Water Board ruling that no such reapportionment was to be effected without a detailed environmental impact analysis. Mono Basin Preservation similarly argued that this proceeding is not the proper forum for resolving water rights issues and reallocating water between the two creeks. Mono Basin Preservation added that, before the Lundy powerhouse was constructed in 1911, water from Mill Creek had already been diverted to the Wilson Creek drainage in multiple earthen ditches for agricultural water needs. Mono Basin Preservation stated that construction of the hydropower project did not cause water to be removed from Mill Creek; rather, the powerhouse was placed where it is to avoid interfering with the existing irrigation water rights and uses.

34. Mono Basin Preservation disputed the settlement parties' interpretation of the existing water rights priorities. To demonstrate the complicated and contested nature of those water rights, Mono Basin Preservation included attachments showing five different versions of water allocations that have been used in various proceedings, each version purporting to be based on the 1914 Decree and subsequent conveyances. Mono Basin Preservation questioned how, in light of this uncertainty, the settlement would implement allocation of water through an annual water management planning process "in a manner consistent with water rights." Mono County objected to the proposed elimination of Article 414, reserving Commission jurisdiction to modify the license, since there has not yet been a resolution of disputes among Mono County and other parties regarding water usage and water rights. Boynton and Mono County objected to the settlement proposal to

allocate water according to an annual decision-making process that would include environmental groups that supported the settlement but not local residents and property owners.

35. Several commenters objected that implementation of the settlement would reduce flows in Wilson Creek, with unknown or adverse consequences to the uses and resources there. Boynton claimed that the settlement was written to satisfy environmental groups seeking to restore 19th Century conditions in the basin by diverting all or most of the Lundy tailrace water down Mill Creek, to the detriment of valuable habitat that has developed along Wilson Creek. Mono Basin Preservation presented evidence to show the importance of waterfowl habitat at the mouth of Wilson Creek and the potential loss of the Wilson Creek delta marshes, with their capacity to maintain migratory and breeding waterfowl, if flows in lower Wilson Creek are reduced. Lundy Mutual feared that the anticipated water reallocation between the creeks could affect its ability to provide water to its shareholders from its existing well, since the contribution to the aquifer of surface water flows in the upper reach of Mill Creek and in the existing unlined return ditch is unknown. Conway Homeowners, composed of seven homeowners in the Conway Ranch subdivision of Mono County, asserted that a reduction of flows in Wilson Creek could affect recharge of domestic and fire protection wells, surface water rights, and the Wilson Creek wildlife habitat and fishery. Some individual commenters expressed similar concerns about resources and argued that attempting to improve Mill Creek at the expense of jeopardizing Wilson Creek resources would be unjustifiable.

36. Several commenters objected to the proposal to replace the existing return ditch. Mono Basin Preservation and United Anglers argued that the settlement provided no reason for the return ditch to be enlarged to accommodate water rights, for which the ditch had apparently been adequate in the past, and that enlargement of the return ditch should not be a requirement of Edison's license. Mono County argued that construction of an enhanced Mill Creek return water conveyance capable of diverting up to 52 cfs of tailrace flow to Mill Creek might significantly affect the Wilson Creek environment, notably riparian habitat and well recharge. Mono County stated that it strongly supported a lined ditch for a replacement, since a pipeline would be able to divert more winter flows from Wilson to Mill Creek, triggering water rights disputes during that season, when powerhouse flows are frequently not high enough to satisfy all Wilson Creek needs. Mono County urged considering the construction of a new conveyance facility from lower Wilson Creek to Mill Creek, rather than enhancement of the return ditch, so that additional flows could be diverted to Mill Creek without adversely affecting Wilson Creek or its water rights holders.

37. Boynton questioned the soundness of the environmental data on which the settlement was based. United Anglers argued that the settlement cannot be viewed as

settling the minimum flow and water rights issues raised by Mono County and Mono Basin Preservation, since those entities are not signatories. Mono County advocated preparation of an environmental impact statement (EIS) to address potential consequences of the proposals. Mono Basin Preservation urged that the offer of settlement be denied and that the license be modified to provide for no alteration of the existing return ditch and for no minimum flow into Mill Creek at Lundy Dam, to avoid creating a conflict with California water law.

Staff's analysis and recommendations

38. In preparing its EA on the settlement, staff updated information presented in the 1992 EA for the license application, as well as in a 1992 EA prepared for the Paoha Project No. 3259 on Wilson Creek, which was licensed in 1992 but never constructed.[25] In the settlement EA, Commission staff assessed the effects of operating the project under the terms of the settlement, under the existing terms of the new license, as the project is being operated now (with no minimum flow release), and under the settlement as modified by staff recommendations. The principal issues addressed in the EA were the effects on groundwater recharge, the reliability of domestic and municipal wells, and minimum flows for fish, wildlife, riparian resources, and aesthetics in Mill and Wilson Creeks. Based on its analysis, which we summarize here, staff recommended amending the license in accordance with the settlement, with the modifications indicated below.

39. In discussing its conclusions in the EA, staff noted that the settlement did not include a provision for any flows to be distributed to Wilson Creek above the quantities allocated to water rights holders according to the 1914 Decree. The settlement also did not specify how powerhouse flows would be allocated between Wilson Creek and Mill Creek, except that the allocation would be made according to the annual water management plan so as not to interfere with existing water rights.[26]

40. Wilson Creek supports a self-reproducing population of brown trout. Staff evaluated the effect of the settlement on flows and trout habitat in Wilson and Mill

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[25] *Joseph M. Keating*, 60 FERC ¶ 62,061 (1992).

[26] In undertaking its analysis, staff noted the settlement parties' understanding of the existing water rights priorities but acknowledged Mono Preservation's claim that there have been other interpretations. Therefore, staff did not accept the settlement's representation of the water rights priorities as definitive but rather as useful to evaluating the potential effects of the settlement proposal. Staff reproduced the settlement water rights priority table as Table 3 of the EA.

Creeks for dry, normal, and wet years, subject to the potential redistribution of flows between the two creeks made possible by either a 40-cfs or 52-cfs upgraded return water conveyance facility. Staff found that, under some possible water allocation scenarios,[27] outstanding or optimum conditions for brown trout in Wilson Creek would persist. However, under other scenarios, all powerhouse flows could be directed through the upgraded return water conveyance facility to Mill Creek, in which case, without any permanent source of inflow, a year-round brown trout fishery would be unlikely to persist in Wilson Creek. Staff concluded that this situation would be more likely to occur during low-flow fall and winter months and if the replacement facility were an underground pipe, since flows could be diverted through such a pipe during the winter without the risk of freezing that would limit use of an open, lined channel.

41. To protect the brown trout fishery in Wilson Creek, staff recommended establishing a year-round flow in Wilson Creek of 5 cfs or inflow to Lundy Lake, whichever is less, as measured at the downstream end of the Conway Ranch property boundary near Upper DeChambeau Ditch.[28] Staff determined that this minimum flow would be similar to fall and winter low flows that exit Conway Ranch during a typical dry year, and, although it would ensure only slightly better than poor habitat conditions during spring and summer, it would likely be supplemented with irrigation return flows and accretion flows during the irrigation season. Staff concluded that gaging the minimum flow at the designated location would ensure protection of the most suitable brown trout habitat (a reach of about 4 miles) in Wilson Creek to a level that currently exists during typical dry years.

42. Between Deer Creek and the lower end of the Mill Creek return ditch, Mill Creek also supports a self-reproducing population of brown trout, while both brown and

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[27] In determining flows that would be available under the settlement, staff considered two flow scenarios set out in the settlement that assumed Wilson Creek water rights holders would call for up to 18 cfs (the total water rights of Mono County and BLM) and 30.6 cfs (the total rights of those entities and the Forest Service) of water, respectively. Under both of these scenarios, the balance of the powerhouse flows would remain in the upgraded water conveyance facility for return to Mill Creek. Staff also analyzed a third scenario, in which flows would be distributed to Wilson Creek according to the priorities of the 1914 decree, as represented by the settlement parties.

[28] Upper DeChambeau Ditch apparently is no longer used for diversions from Wilson Creek. This flow measurement point would be downstream of the Conway Ranch diversions but upstream of Lower DeChambeau Ditch, used by the Forest Service for diversion of the water to which it is entitled.

rainbow trout may occur as far downstream on Mill Creek as Cemetery Road, less than a mile upstream of Mono Lake. Staff found that the settlement flow release from Lundy Dam of 1 cfs would provide habitat conditions for brown trout similar to the 4-cfs release required by the license during summer months but would provide about 24 percent less habitat than the license-required flow during the other three seasons of a typical year. Staff concluded that the return of powerhouse flows to Mill Creek through the upgraded water return conveyance facility would likely provide some additional enhancement to the brown trout fishery, but, even without those return flows, the 1-cfs flow release would maintain the Mill Creek brown trout fishery at or slightly above existing conditions. Therefore, for the protection of brown trout in Mill Creek, staff recommended amending Article 404 to include the minimum flow provisions proposed by the settlement. Staff also recommended amending Article 403 to include the settlement's proposed revisions relating to the minimum flow plan.

43. Staff also considered the settlement proposal's potential effects on groundwater. The central area of the Mono Basin is a major storage area for groundwater, and the groundwater aquifers are recharged through infiltration of water from streams, rainfall, snowmelt, and irrigation of lands. There are six known wells in the project area: a Mono City water supply well, a BLM fire station well, and four wells on Conway Ranch, only two of which (a domestic well and a fire pump well) are in use. Staff concluded that Wilson Creek likely contributes to recharge of the two Conway Ranch wells, although the extent of that contribution is unclear. The Mono City well, operated by Lundy Mutual, serves approximately 80 houses. Sources cited in the EA identified surface water - - probably Mill Creek - - and groundwater from the irrigated lands of Conway Ranch as possible sources of recharge for this well. Information was not available for the aquifer underlying the BLM fire station well.

44. Staff reasoned that, under the settlement, the allocation of annual flows between Mill and Wilson Creeks might vary considerably from year to year, since the settlement provides for an annual water management plan to be developed in consultation with the water rights holders. Staff concluded that the extent of the effects on groundwater would depend on how the water is divided in any given year. Because of this uncertainty, staff recommended that Edison obtain better information about the effects on groundwater by monitoring the active Conway Ranch and Lundy Mutual wells. Staff recommended that Edison prepare a groundwater monitoring plan and that the Commission reserve authority

to direct the licensee to modify project structures or operations if the monitoring results indicate that these wells are adversely affected by flow changes due to implementation of the settlement provisions.[29]

45. Staff considered riparian habitat along Mill and Wilson Creeks. Along Mill Creek, staff found that vegetation between Lundy Dam and U.S. Route 395 (about 1/3 mile below the return ditch outlet) is relatively intact and vigorous but that riparian habitat is increasingly degraded by channel incision and dewatering below U.S. 395 proceeding to Mono Lake. However, periodic high flows and the removal of grazing since the mid-1980s have increased water availability and allowed for reestablishment of some riparian vegetation in parts of lower Mill Creek.

46. Staff found that Wilson Creek, from the Lundy tailrace downstream to about State Route 167 (about halfway between Upper and Lower DeChambeau Ditches) supports small to locally large patches of willow scrub, but that these patches are few and widely scattered as streamflows diminish in the increasingly permeable substrates between Route 167 and Cemetery Road. However, much of the habitat on BLM lands, which are located upstream of Route 167, is in good or excellent functioning condition. Staff found that riparian vegetation becomes sparser until it disappears almost entirely in the usually dry, deeply incised segment of Wilson Creek below Cemetery Road. However, lake-fringing wetlands near the mouth of Wilson Creek support one of the richest assortments of plant species around Mono Lake. These wetlands are largely supported by groundwater that originated as surface flow in Wilson Creek.

47. Staff found that diverting flows from Wilson Creek to Mill Creek, as could occur under the settlement proposal, would be a tradeoff in benefits to riparian habitat. Increasing flows to lower Mill Creek, in particular, would eventually lead to a continuous mosaic of different riparian, wetland, and open water habitat types from Mono City to Mono Lake. However, while the riparian corridor in upper Wilson Creek would persist, it would likely be reduced in extent, while minimal adverse effects would occur in lower Wilson Creek due to the paucity of riparian vegetation in that stretch. Staff concluded that the expected benefits to Mill Creek would substantially outweigh any losses to riparian habitat value in Wilson Creek. It also concluded that, in comparison to possible conditions under the settlement scenario, its recommended 5-cfs minimum flow might slightly replenish the water table and associated marsh habitat at the mouth of Wilson Creek, at the expense of the wetland complex along Mill Creek.

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[29] Staff also made specific recommendations for well monitoring measures to be included in the plan. EA at 78-79.

48. Staff recommended adoption of the settlement proposal to include in Article 404 a requirement that the licensee monitor flows on Mill Creek above the return ditch to determine if the minimum flows and accretion would provide 7 cfs of flow in Mill Creek. Staff also recommended that Article 412 be amended to include the streamflow gaging plan provisions of the settlement, but it recommended that an additional gaging station be established on Wilson Creek in the vicinity of Upper DeChambeau Ditch to monitor staff's recommended minimum flow. In addition, staff agreed that it would be appropriate to include in Article 404, as proposed in the settlement, a reservation of the Commission's authority to reopen the license to determine if an additional minimum flow release is necessary for the protection and enhancement of resources in Mill Creek if the confluence of Mill and Deer Creeks shifts in the future.

49. Staff recommended that the licensee develop and implement an erosion control plan containing measures to address possible effects on aquatic resources of constructing the modified powerhouse tailrace and upgraded Mill Creek return water conveyance facility. Because construction of an open, lined channel for the new return ditch could result in entrapment and mortality of mule deer and other wildlife species, staff recommended that Edison develop and implement a monitoring plan for at least the first two years of project operation to determine whether protective measures are necessary. Because construction of the pipeline or channel and of an access road would necessitate the clearing of vegetation, staff recommended that Edison prepare a plan for revegetating disturbed areas. Staff found that the existing, Commission-approved Threatened, Endangered, and Sensitive Species Management Plan[30] would be sufficient to protect sensitive species on Forest Service lands from construction activities but that the provisions of the plan should be extended to non-Forest Service lands.

50. Staff did not recommend the settlement's proposed amendments of the Article 417 water management plan provisions. Staff noted that the purpose of Article 417 in the new license is to ensure oversight of a plan required by a Forest Service section 4(e) condition by requiring the plan's submission for Commission approval. Staff concluded that Commission monitoring of the use of the upgraded water return facility to allocate water among water users would not be related to the environmental effects of the

[30] Forest Service Condition No. 11 required the licensee to file with the Commission a detailed implementation plan approved by the Forest Service for the mitigation of impacts to sensitive, threatened, and endangered plant and animal species located in the area where activities of a land-disturbing nature would occur. By letter of January 4, 2000, Commission staff found that the licensee had complied with this condition.

settlement proposal. Therefore, modifying Article 417 to expand the water management plan to cover use of the water conveyance facility, to add other consulting parties, and to specify consultation and submission dates would expand the article to address issues for which it was not intended.

51. Staff did not recommend deleting Article 414, as proposed by the settlement. Staff noted that certain details with respect to water rights in the Mill Creek Basin appeared still to be in dispute and that potential disputes over water rights could arise during the term of the new license. Staff concluded that Article 414 should remain in the license to address any project-related effects on resources that could occur if a final adjudication of water rights were to result in changes to the flows of Wilson and Mill Creeks.

Comments on the settlement EA

52. Comments on the EA focus in particular on staff's recommendation for a 5-cfs minimum flow in Wilson Creek, as measured at the downstream end of the Conway Ranch property. Edison, Los Angeles DWP, and the settlement party commenters (Cal Fish and Game, Mono Lake Committee, California Trout, and American Rivers) collectively assert that this minimum flow requirement would be unworkable, would interfere with adjudicated and other rights to Mill Creek water, and would be unnecessary in view of settlement provisions that should adequately protect Wilson Creek resources.

53. Edison contends that maintaining the required minimum flow would be difficult to achieve, because it has no control over the diversions and uses of water by water rights holders between the powerhouse and staff's recommended measurement point. Because it cannot dictate the timing and amount of water withdrawals by Mono County, BLM, and the Forest Service, whose combined total water rights are about 30 cfs, Edison claims that it would need to release as much as 35 cfs into Wilson Creek to ensure that at least 5 cfs remains in Wilson Creek at the Conway Ranch property boundary. However, Edison is concerned that such a release would likely infringe upon the water rights of other entities.[31] Similarly, if inflow into Lundy Lake were less than 5 cfs, Edison could not guarantee the maintenance of this flow at the downstream boundary of Conway Ranch, since, again, it has no control over consumption downstream of the powerhouse. Edison recommends that, if we require a minimum flow release for Wilson Creek, the point of measurement be at the project tailrace and be based on a daily average flow. In addition,

[31] Although Edison is not specific, the only other such water rights holders are Los Angeles DWP and Simis.

Edison requests that any such instream flow requirement provide an exception for emergencies or maintenance situations when it would not be able to release water from the powerhouse into Wilson Creek.

54. Los Angeles DWP emphasizes that it owns approximately one-half of the decreed water rights from Mill Creek, as detailed by the 1914 Decree and a subsequent 1940 interpretation by the Water Board in Decision 455.[32] It also claims riparian rights to all non-decreed and unallocated Mill Creek water under the 1914 Decree.[33] Los Angeles DWP states that it wants to ensure the return of the full allotment of its water rights to Mill Creek after the water flows through the powerhouse. According to Los Angeles DWP, the settlement reflected the signatories' understanding that California water law forecloses a demand for releases of Mill Creek water into Wilson Creek over and above that needed to satisfy the decreed Mill Creek water rights of the water rights holders on Wilson Creek.

55. Los Angeles DWP argues that, in recommending a Wilson Creek 5-cfs minimum flow, the settlement EA fails to ensure that Los Angeles will receive its full entitlement of half the creek's flow at the tailrace below the project. It asserts that maintenance of such a minimum flow below Conway Ranch and the diversion points of Mono County and BLM will require more than one third of all the water produced in the Mill Creek drainage in normal years and much more than that in drier than normal years.

56. The settlement party commenters likewise claim that operating the splitter box both to accommodate consumptive uses on Conway Ranch and to ensure maintenance of staff's proposed minimum flow downstream in Wilson Creek would interfere with Los Angeles DWP's water rights, particularly if Mono County and BLM make maximum consumptive use of their senior rights under the 1914 Decree. They also assert

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[32] More specifically, Decision 455 states that "[t]he sum of the decreed rights, other than for power (Priorities 1 to 15 inclusive) amounts to . . . 74.6 cubic feet per second, of which the City [of Los Angeles] has acquired approximately half by purchase." Los Angeles DWP comments at 3. This is consistent with the settlement signatories' representation of adjudicated water rights, discussed earlier, in which Los Angeles DWP is shown to hold 42.2 cfs of the total 74.6 cfs of adjudicated rights. EA at Table 3.

[33] Although Los Angeles DWP does not provide the basis for this claim, the settlement party commenters (comments on EA at n.3) explain that, under the 1914 Decree, if Mono County and BLM do not call for some or all of their water, that water is available to Los Angeles for non-project uses on lands riparian to Mill Creek.

that staff's minimum flow would require Edison to operate the splitter box in a manner that exercises existing water rights held by Mono County, BLM, and other entities, without the permission of those entities.

57. The settlement party commenters contend that the minimum flow requirement would necessitate expansion of the project boundary to include that part of Conway Ranch traversed by Wilson Creek. They argue that this would unjustifiably involve the Commission in asserting authority over environmental conditions well below the most downstream project work. In this regard, they state that the settlement did not propose minimum flow schedules for Mill and Wilson Creeks below the splitter box, in part because such schedules would have entangled the Commission in the allocation of water for non-project uses by non-licensees on non-project lands.

58. The settlement party commenters and Los Angeles DWP do not believe that the minimum flow requirement recommended by staff is necessary for protection of the Wilson Creek fishery. They attribute staff's recommendation in part to the use of what they consider incorrect methodology and to unjustified reliance on a draft study, as will be discussed in more detail later in this order. In any event, the settlement party commenters claim, Edison has almost always released 5 cfs or more at the headgate of Wilson Creek whenever it operates the power plant, and it is reasonable to expect that water rights holders on Wilson Creek will call for at least 5 cfs to be released for their use, particularly if they are concerned about sufficient water to maintain the environmental quality of the stream. In addition, during much of the year, flows will likely be augmented by irrigation return flows and accretion. Therefore, the settlement party commenters assert, in most instances a release of 5 cfs from the Wilson Creek headgate would achieve the EA's fishery goal at the base of Conway Ranch. Los Angeles DWP adds that fishery requirements along both creeks, as well as power, irrigation, riparian, wetland, and other interests, should be satisfied by the annual water management plan being negotiated among the major water rights holders on the basis of the settlement's proposed modification of Article 417.

59. The settlement party commenters and Los Angeles DWP recommend that, if the Commission decides to address flows for Wilson Creek, it establish a monitoring point at the Wilson Creek headgate, to ensure that flow data is collected and reported. The settlement party commenters disagree with staff's recommendation not to amend Article 417 to include consultation with them on the water management plan and not to expand the plan to include operation of the splitter box to allocate flows between Mill and Wilson Creeks. They assert that this settlement proposal reflects Edison's future operation of the splitter box as a project work to allocate flow for non-project uses after powerhouse discharge. The settlement party commenters argue that it is customary for a

license to include a reporting obligation for a project work and that this condition would enable stakeholders to track the performance of the affected measure for all beneficial non-project uses, including water supply and protection of environmental quality.

60. Los Angeles DWP asks that, if not modified entirely as provided by the settlement, Article 417 at least be modified to include it and Mono County, the two largest water rights holders, as consulting entities for the plan. To ensure that it receives the water to which it claims entitlement, Los Angeles DWP also asks that the license authorize construction of the 52-cfs-capacity pipeline as an upgrade for the return ditch and thereby enable the project to run water in winter, to provide the greatest flexibility in managing tailrace flows.

61. Mono County, Mono Basin Preservation, Conway Homeowners, Boynton, and Crowe express concern that the settlement proposal will have a harmful effect on Wilson Creek resources, even with staff's recommendations for a minimum flow and groundwater monitoring in Wilson Creek. Collectively, they question the thoroughness and accuracy of staff's analysis and the sufficiency of the recommended minimum flow and groundwater monitoring provisions.

62. Mono County, Mono Basin Preservation, Boynton, and Crowe (of Mono Lake Boat Tours) contend that staff should have prepared an EIS for the settlement proposal. Mono County asserts that the uncertainty of the environmental effects, in conjunction with the controversial nature of the proposal, warrants preparation of an EIS. Mono Basin Preservation argues that amending the license as proposed by the settlement would constitute a major federal action affecting the quality of the human environment, since it would bring about the reallocation of the majority of the water in the largest drainage area in the north end of the Mono Basin, with an extremely broad range of significant effects. Mono Basin Preservation adds that an EIS is needed to study the potential adverse effects to waterfowl at Mono Lake under the settlement as modified by staff's minimum flow recommendation.

63. Several commenters assert that the staff's recommendations are not supported by adequate data. Mono County argues that staff proposed its minimum flow regime and groundwater monitoring measures without sufficient data or an analysis of the measures' effects or adequacy. It notes that, in a number of areas, the EA stated that data for determining environmental impacts of the settlement proposal were insufficient or unavailable, but that staff nevertheless proposed to address these deficiencies through the collection of additional data in conjunction with monitoring instead of obtaining data before Commission action on the proposal. Boynton emphasizes that the EA does not resolve the uncertainty as to whether Wilson Creek surface flows infiltrate groundwater that supports the wetland at the creek's mouth. Boynton argues that the Commission

must either provide sufficient surface flow in Wilson Creek to mitigate any possible damage to the wetland or conduct an EIS to establish definitively the sources supporting the wetland.

64. Mono Basin Preservation and Boynton assert that the EA did not accurately reflect riparian habitat conditions on Mill and Wilson Creeks and in adjacent areas. They argue that staff did not have accurate, up-to-date information on key aspects of the environment and relied on studies that do not reflect current conditions. Therefore, staff did not correctly consider such relevant factors as the present condition of riparian habitat along all stretches of Mill Creek, the extensive vegetation at the Mill Creek delta, the wetland habitat formed by the Mill and Wilson Creek deltas and the lands between them, and the presence or absence of soil on various stretches of the two creeks. Mono Basin Preservation argues that there are many gaps in the available information about effects on resources.

65. Mono Basin Preservation and Boynton dispute the EA's conclusion that additional flows in Mill Creek could improve the creek's limited riparian habitat. These commenters conclude that diverting additional flows into Mill Creek would not measurably improve riparian habitat there as staff believed, since existing riparian habitat in Mill Creek is better than staff assumed. Whereas the EA concluded that restoration of flows to lower Mill Creek would create a complex of habitats characterized by a high water table, dense riparian vegetation, multiple channels, and ponds, Mono Basin Preservation argues that Mill and Wilson Creeks already form a complex of such habitats.

66. Mono Basin Preservation attaches numerous photographs to support its claim that the environment and riparian habitat along Mill Creek do not conform to the EA's description. According to Mono Basin Preservation, the photos demonstrate that, contrary to staff's findings, Mill Creek between the return ditch and Mono City is not characterized by declining riparian community, riparian habitat in Mill Creek from U.S. Route 395 to the east end of Mono City is not degraded by channel incision and dewatering, Mill Creek between Mono City and Cemetery Road is in a state of natural restoration, and vegetation on Mill Creek between Cemetery Road and Mono Lake actually increases nearer the lake. Boynton claims that, in the past 10 to 15 years, the riparian vegetation in the middle and lower reaches of Mill Creek has begun to restore itself, probably due to reductions in diversions by Los Angeles DWP. Boynton adds that, according to studies more recent than those relied on by staff, Mill Creek does not have the capacity to form a delta wetland comparable to that found at the mouth of Wilson Creek in response to increased flows. This suggests that adding flows to Mill Creek would not improve habitat conditions in that delta.

67. According to Mono Basin Preservation, the photos also document an extensive wetlands/marsh area between Mill and Wilson Creeks near Mono Lake that staff did not

address in the EA and that could be significantly affected by the proposed flow changes. Boynton criticizes the EA for not emphasizing the importance of maintaining the existing irrigated meadow habitats on the former Conway, DeChambeau, and Thompson Ranches as an important use of project tailrace water.

68. Mono Basin Preservation and Boynton argue that the staff's recommended 5-cfs minimum flow will not be enough to prevent significant adverse impacts on resources along all reaches of Wilson Creek, as well as at the delta and wetlands. Boynton argues that this minimum flow will not be adequate during the summer months to ensure the maintenance of a high quality brown trout fishery in Wilson Creek and to protect the waterfowl/shorebird wetland habitat at the creek's delta. He asserts that a minimum flow of 5 cfs in the winter and 15 cfs in the summer would be necessary to mitigate the negative effects of the settlement proposal on the Wilson Creek brown trout fishery, while further information is needed to determine what flow would be necessary to maintain the wetlands at the mouth of the creek.

69. Boynton contends that, because a 52-cfs-capacity upgraded return facility could divert more water than a 40-cfs-capacity facility, the size of this facility must be limited to prevent diversions of flows necessary to sustain habitat on Wilson Creek. Mono Basin Preservation and Boynton insist that any required minimum flow in Wilson Creek must be measured at a point below the Forest Service's DeChambeau Ranch diversion point (the lower DeChambeau Ditch) rather than below Conway Ranch, as recommended by staff, to avoid the possibility that the Forest Service, in exercising its water right, could deplete Wilson Creek flow needed to sustain the delta.

70. Mono County criticizes the EA for not considering the option of a 15-cfs minimum flow, which had been found necessary for aesthetics in the EA prepared for the unconstructed Paoha Project. Mono County also asserts that the EA should have analyzed, as an alternative to enhancing the existing return ditch, the option of a new return conveyance pipeline between the lower reach of Wilson Creek and the lower reach of Mill Creek, since this option would allow water to continue flowing through the most critical reaches of Wilson Creek.

71. Conway Homeowners and Mono Basin Preservation consider staff's proposed groundwater monitoring provisions inadequate. Conway Homeowners complains that, although the EA recommends monitoring to determine if local wells are being adversely affected, it provides no guidelines for how adverse effects will be identified. Conway Homeowners recommends that whether the Conway Ranch and Lundy Mutual wells are "adversely affected" by the settlement's flow changes should be defined, under the groundwater monitoring plan, by a specific percentage in well fluctuation, so that the homeowners will not have the burden of establishing that such an effect has occurred.

Conway Homeowners argues that the development of baseline data, which the EA recommended prior to implementation of the settlement, must continue for several years to ensure that adverse impacts on the wells are properly identified.

72. Conway Homeowners also complains that the EA does not specify any steps that Edison would be required to take to reverse any harm that might be caused by implementation of the settlement. It urges identification of the project structures and operations that could be modified to reverse any harm to the wells, as well as analysis of whether such modifications could actually reverse those adverse effects. Similarly, Mono Basin Preservation argues that specific triggers for remedial action, as well as the actions themselves, must be identified. Conway Homeowners and Mono Basin Preservation argue that Edison must be required to provide an alternate water source if it is not possible to restore the wells to their current performance.

73. Conway Homeowners and Mono Basin Preservation argue that the EA did not address the full range of consequences of reducing groundwater recharge, since it focused only on the recharge of wells and did not address wet meadow habitat and general groundwater issues. Conway Homeowners contends that Edison should be required to monitor changes in groundwater on Conway Ranch lands, not just changes to the wells.

74. Edison and Lundy Mutual approve of staff's recommendation for addressing the effects on groundwater by monitoring the Lundy Mutual and Conway Ranch wells. However, Edison requests that it be given sufficient flexibility to address potential groundwater impacts at the Conway Ranch wells without constructing additional or unnecessary monitoring wells. It also objects to a staff recommendation that the Lundy Mutual well cease operating for a six- to eight-hour period prior to monitoring, since Edison has no control over the well's operation and such a condition might cause a hardship to Lundy Mutual. To ensure sufficient flexibility in the well monitoring, Edison suggests a license article requiring it to develop a plan, in consultation with Lundy Mutual and Conway Homeowners, to monitor water well levels and determine any project impacts on them. Lundy Mutual requests that monitoring of its well be conducted through a separate monitoring well drilled in an appropriate location, rather than directly through its own well, because it would be unable to obtain a static water measurement in its well during the summer months.

Discussion

75. We have before us requests for rehearing of our 1999 relicense order and an offer of settlement that, if approved, would amend the new license and satisfy the parties that sought rehearing. We also have filings by parties alleging that the new license, as issued, would interfere with established water rights. Thus, although staff's EA was undertaken in response to the license amendments proposed by the offer of settlement, what we are

considering here is essentially the resolution of the relicensing proceeding and the finalization of the conditions under which the project is to be operated under the new license.

76. The physical layout and operation of the Lundy Project is unusual. Typically, if a project diverts water from a stream for generation, it returns water to the same stream somewhere below the powerhouse. In those cases, we may be concerned with protecting or mitigating effects on a stream's bypassed reach. We may also be concerned with conditions in a project's tailrace or even further downstream if, for example, a project's operation affects downstream resources through flow regulation or changes in water quality.

77. Here, however, the water used for generation is diverted from one stream, Mill Creek, and returned primarily to another, Wilson Creek. This arrangement has been in effect for nearly a century. Under the circumstances, it was appropriate that staff did not limit its analysis to effects of the settlement proposal on Mill Creek. Because the passage of powerhouse flows into Wilson Creek represents existing conditions, any change to this distribution of flows resulting from the proposed amendments could affect the existing environment of Wilson Creek. It is clear that both the settlement parties and those entities concerned about the settlement's effects anticipate that the settlement will result in the direction of more water into Mill Creek (particularly into lower Mill Creek through the return ditch) and less into Wilson Creek than under historical conditions.

78. There are essentially three elements of the settlement proposal that could change the existing flow patterns in Mill and Wilson Creeks, with possible effects on environmental resources and water supply: establishment of a 1-cfs minimum flow at Lundy Dam; distribution of flows below the project powerhouse in accordance with an annual water management plan; and redevelopment of the return ditch to increase its capacity and effectiveness. In terms of its effects, the most straightforward of these is the minimum flow requirement at Lundy Dam. If this settlement provision were adopted, the flows to be released at the dam would no longer pass down the pipeline and penstock to the powerhouse and into Wilson Creek at the tailrace splitter box. However, the settlement's 1-cfs minimum flow proposal would redirect less water into upper Mill Creek than would the present license requirement for a 4-cfs minimum flow and considerably less than the 7-cfs minimum flow of the Forest Service's section 4(e) condition.

79. The EA evaluated the settlement's minimum flow requirement for Lundy Dam and found that it would be adequate to maintain the brown trout fishery in Mill Creek at or slightly above existing conditions, even if it would not be as beneficial as the 4-cfs minimum flow requirement that we included in the license subject to approval of the Article 403 minimum flow plan. The adequacy of this flow to sustain Mill Creek

resources above the return ditch does not appear to be at issue at this point in this proceeding, and staff found this flow would also maintain the brown trout in Mill Creek below the return ditch at or slightly above existing conditions even without additional flows through the proposed upgraded return conveyance facility. Therefore, we adopt the settlement's minimum flow proposal for Lundy Dam and will modify Article 404 accordingly.

80. The other settlement proposals, which address the allocation of flows below the powerhouse, are more problematic. Neither the provisions for distribution of flows in accordance with an annual water management plan nor those for redevelopment of the return ditch would actually impose a license requirement for the release of specific flows through the upgraded Mill Creek return ditch into lower Mill Creek. There is, rather, an understanding by virtually all entities in this proceeding that modification of the license to incorporate these provisions will lead to a redistribution of flows from Wilson Creek to lower Mill Creek.

81. Acting on that assumption, staff analyzed the effects of such a redistribution on resources in both creeks. It found, in essence, that such a redistribution could have some benefits for lower Mill Creek resources and should not have serious harmful environmental consequences as long as a minimum flow of 5 cfs was maintained in Wilson Creek and measures were taken to monitor possible changes in groundwater. A number of entities challenge the adequacy of staff's analysis and recommended measures. While we will address their arguments below in this discussion, we think that the appropriate disposition of these settlement provisions rests on other factors.

82. Proposed Article 411 would have the Commission require the licensee to file a plan for a modified powerhouse tailrace diversion structure and Mill Creek return water conveyance facility. Subject to the construction of the revised water conveyance facility, proposed Article 411 would have the Commission require the licensee to release powerhouse flows into Wilson and Mill Creeks in a manner consistent with the water rights on those creeks and the annual water management plan of proposed Article 417. Proposed Article 417 would require the licensee to prepare the annual plan in consultation with the water rights holders and the other entities mentioned earlier in this order and to file the plan with the Commission by June 1st of each year, but it would not give the Commission authority to approve the plan or require the consent of the consulted entities to the allocation of flows between the creeks.

83. The effect of these provisions, in combination with the settlement's proposed deletion of the Article 414 reservation of Commission authority, would be to remove the Commission entirely from any role over the licensee's distribution of powerhouse flows between Mill and Wilson Creeks. As such, the provisions would interfere with the exercise of our authority to require flow releases for the enhancement or protection of

resources on those creeks below the powerhouse, such as by implementing staff's recommended maintenance of a 5-cfs flow in Wilson Creek. Apart from these environmental considerations, however, there should be no reason, from the Commission's standpoint, to object to Edison's allocation of flows in accordance with the settlement agreement. Edison would have to respect the water rights priorities of water rights holders under California water law in making any such allocation, as Edison in fact has stated it would do. To the extent that water rights holders or users might dispute these priorities or contend that Edison's water allocation is not following them, this would be a matter for the state of California to address. Enforcing Edison's distribution of water in accordance with established water rights is not within the Commission's jurisdiction.

84. This leads to a more fundamental problem with these settlement provisions. Their incorporation as license articles would not merely leave powerhouse flow allocation to the discretion of Edison in consultation with the water rights holders and other entities. Rather, submission of a plan for an upgraded return conveyance, preparation of an annual water management plan, and release of flows in accordance with that plan would be made requirements of the license. We see no basis for adopting as license requirements provisions whose purpose is to implement an agreement reached by the licensee and some (but not all) of the water rights holders for the distribution of water.[34] While, under section 27 of the FPA, the Commission may not take actions that interfere with state water rights,[35] it is quite another thing for the Commission to compel a licensee to adhere to privately-reached arrangements for supplying water to satisfy those rights. To incorporate these settlement provisions as license articles would make us responsible for enforcing the licensee's compliance with this private scheme of water distribution. No project purpose would be served by such license requirements.

85. Our interest in the allocation of tailrace flows between Wilson and Mill Creeks is limited to ensuring that resources such as fisheries, groundwater, and riparian habitat will be enhanced, or at least sustained, by the release of those flows. But, although both the settlement signatories and other entities in this proceeding expect diversions of more

[34] Los Angeles DWP and Simis are not settlement signatories and, perhaps more important, neither is Mono County, which has concerns about the settlement's effects.

[35] Section 27 of the FPA, 16 U.S.C. § 821 (2000), provides that nothing in Part I of the FPA "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

water to lower Mill Creek, the settlement proposals for revising Articles 411 and 417 guarantee no particular flow in either creek for those resources. The settlement proposals simply establish a mechanism for the licensee to allocate powerhouse flows based on consultation with the specified entities, without Commission approval of specific flow releases, and mandate modifications to the Mill Creek conveyance facility that would make greater diversions to lower Mill Creek possible. In effect, we are being asked to leave the allocation of flows to the licensee, with the hope that all environmental concerns will be satisfied.

86. As noted earlier, in the settlement EA staff recommended that we not adopt the settlement's proposed revision of Article 417, concluding, among other things, that Commission monitoring of the use of the upgraded water return facility to allocate water among water users would not be related to the environmental effects of the settlement proposal. As staff noted, the settlement signatories themselves contended that the allocation of tailrace flows under the annual water management plan would not be within the Commission's jurisdiction, so that the plan should not be submitted for Commission approval.[36] We agree with staff's conclusions and the settlement signatories' argument. However, the rationale behind these positions extends to the proposed Article 411 revisions as well, since the procedures and project changes that would be established collectively by revised Articles 411 and 417 have, as their underlying purpose, the implementation of a particular allocation of powerhouse flows among water users, a purpose that is not within the Commission's province to advance or enforce. Moreover, proposed Article 411 would require the licensee to release powerhouse flows consistent with the Article 417 water management plan. If, as staff recommends, we do not modify Article 417 to include powerhouse and return water conveyance flows in the water management plan, adopting this flow release requirement would make no sense.

87. It is apparent that the proposed revisions to Articles 411 and 417 have been designed principally to address the allocation of powerhouse flows pursuant to water rights. Although environmental groups are among the settlement signatories, any environmental benefits that might derive from these settlement provisions would be mainly incidental. While the settlement signatories anticipate some environmental benefits for lower Mill Creek, in the form of increased fish habitat in the summer months and additional riparian vegetation,[37] the proposed revised license articles would not require any specific flow diversion into the return conveyance to ensure that those

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[36] EA at 82; offer of settlement, section 3.6.3.

[37] Explanatory statement at 23.

benefits would occur. Similarly, while staff concluded that additional flows diverted to lower Mill Creek would enhance riparian habitat, it did not recommend that the license be modified to include any required minimum flow release for that purpose.

88. For these reasons, we will not modify Articles 411 and 417 as proposed by the settlement. However, the exclusion of these provisions does not necessarily preclude the allocation of powerhouse flows as the settlement anticipates. Although the tailrace splitter box has been a project work under both the original and the new license, we have not exercised control over the licensee's use of it to allocate flows between the two creek systems. Subject only to any flow release requirements we might impose here for environmental reasons, we would have no reason to begin exercising control over the powerhouse flows now, since the allocation of flows to satisfy water rights is not a valid basis for the exercise of our regulatory authority. In the absence of any conflicting license requirements, Edison could develop an annual water management plan for the tailrace flows, in conjunction with the water rights holders and any other appropriate entities, and could distribute flows accordingly. It does not need our authority, let alone our enforcement powers, to do so.

89. Edison and the other settlement signatories consider a modified return water conveyance facility to be important for implementing the goals of the settlement. While some entities in this proceeding have argued that the existing return ditch is sufficient to convey all the water necessary to satisfy water rights, Edison states that the ditch, in its current condition, can reliably carry about 12 to 16 cfs of water, which is not sufficient when powerhouse flows exceed the water needs on Wilson Creek.[38] Again, the allocation of water to satisfy water rights is not a project purpose, so there is no reason for us to require the licensee to file a plan for reconstructing the tailrace diversion structure and water conveyance facility, as the settlement signatories request.

90. The return ditch remains a project work under the new license, as it was under the old license.[39] This is appropriate even though there is no present requirement in the license that the licensee actually use this facility, because the return ditch is the only means of returning water to the creek from which the project diverts it. Moreover,

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[38] Explanatory statement at 32.

[39] Ordering paragraph (B)(2) of the order issuing the new license lists, among existing project works, "(f) a tailrace discharging flows into Wilson Creek and bypassing approximately 7 miles of Mill Creek, (g) a water return ditch known as the Mill Creek Return Ditch extending from the powerhouse and tailrace to Mill Creek." 86 FERC ¶ 61,230 at 61,839.

Article 411 of the new license reserves the Commission's authority to release back into Mill Creek those tailrace flows not subject to appropriation or allocation to holders of water rights, and Article 414 reserves the Commission's authority to modify the license to reflect any final adjudication of water rights that might require tailrace flows to be directed into the return ditch or Wilson Creek. Because the return ditch is a project work, the licensee would have to seek an amendment of the license to upgrade or replace it. While we will not require the licensee to take such an action, nothing prevents the licensee from filing an application for such an amendment to improve its ability to divert water for non-project uses. Any such application would, of course, have to specify the size and type of the replacement facility and would be subject to public notice and comment.

91. Several entities argue that we should not adopt the settlement provision for filing a return conveyance upgrade plan or that we should, at most, approve a replacement return conveyance that would be least capable of diverting additional water to Mill Creek. While we are not modifying Article 411 to require the filing of such a plan, we would point out that approving the construction of a new return water conveyance facility is not equivalent to requiring the diversion of tailrace flows through it into Mill Creek. Any such diversion that might occur if the return water conveyance were reconstructed would not be the result of our amending the license to approve the construction but rather of a decision by Edison, as owner and operator of the modified powerhouse tailrace diversion structure, to divert additional water into the return conveyance to satisfy calls for water pursuant to water rights and priorities, a matter not within our regulatory oversight. Approving the modification or replacement of the existing return ditch and diversion structure would only make such a diversion possible; the flow diversion would be neither required nor authorized by our action.

92. As we stated above, our interest in requiring the release of specific tailrace flows is confined to addressing environmental impacts of the settlement. Staff recommended a 5-cfs maintenance flow for Wilson Creek to ensure that a year-round brown trout fishery there will persist under all conditions. Edison and other commenters assert that Edison could not guarantee maintenance of such a minimum flow without interfering with adjudicated water rights. In particular, Edison, in its comments on the EA, states:

> SCE [Edison] only has the right to divert the water for nonconsumptive hydro generation purposes at the Lundy Reservoir dam and intake. SCE does *not* have the right to divert the water into ditches for nonhydropower purposes along Wilson Creek or the Conway Ranch. This type of a restriction on flows to the Project powerhouse has been in place since the Project began operation.

93. Section 3(11) of the FPA[40] defines a project as a complete unit of improvement or development, including all water rights necessary or appropriate in the maintenance and operation of that unit. Standard Article 5 of every license issued by this Commission requires a licensee to retain, during the period of the license, possession of all project property covered by the license, including water rights. We could, therefore, require Edison to obtain the water rights necessary to fulfill staff's recommended minimum flow condition. However, considering that, under the 1914 Decree and the subsequent Water Board interpretation, the rights to the first 74.6 cfs of Mill Creek water have been adjudicated and priorities have been assigned to the entities identified earlier, this approach promises to be disruptive at best. Whether to adopt staff's recommended minimum flow for Wilson Creek as a license requirement must be evaluated in this context.

94. Although staff concluded that a 5-cfs minimum flow might slightly replenish the water table and associated marsh habitat at the mouth of Wilson Creek, this benefit would be incidental to staff's recommendation, the basis for which was entirely the protection of the brown trout fishery. Staff found that a year-round brown trout fishery would be unlikely to persist in Wilson Creek under certain flow scenarios presented by the settlement, specifically those under which all powerhouse flows could be directed into the return water conveyance facility to Mill Creek. Edison and other settlement proponents argue that, in most situations, Wilson Creek would receive sufficient water for brown trout through the exercise of water rights by water rights holders on Wilson Creek. They also criticize staff's reliance on a draft report, which was never finalized, favoring flows for Wilson Creek resources and on a methodology that they claim is inapplicable to Wilson Creek.

95. Los Angeles DWP and the settlement party commenters emphasize that a 1998 Cal Fish and Game report on which the EA relied was only a draft, which nevertheless concluded that no instream flow was necessary for Wilson Creek, since flows for irrigation and from local runoff would be sufficient to support a put-and-take trout fishery.[41] In fact, the report concluded that this fishery could be supported with water diverted from Mill Creek, but Cal Fish and Game, in its management recommendation, did recommend against managing Wilson Creek for the production of a self-perpetuating population of trout out of concern that doing so would unacceptably reduce or eliminate brown trout habitat and population in Mill Creek. Cal Fish and Game based this recommendation at least in part on the premise that Wilson Creek would lack

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[40] 16 U.S.C. § 796(11) (2000).

[41] Cal Fish and Game Stream Evaluation Report, Number 98-1, Volume 1, 1998.

powerhouse flows in its natural condition. Staff, on the other hand, focused on changes to Wilson Creek resources from adoption of the settlement proposal, and it was not bound to follow Cal Fish and Game's management goals in determining whether to recommend a minimum flow for Wilson Creek brown trout.

96. The settlement party commenters argue that staff overstated the minimum flows needed for the Wilson Creek fishery by using inappropriate methodology. They criticize staff's use of the Tennant method to analyze Wilson Creek habitat on the grounds that the method was intended for natural streams, not artificial conveyances. Moreover, they claim, staff did not apply the method to incorporate specific information about field conditions, and staff favored allocation of water in Wilson Creek because it applied the method to Wilson Creek and not to Mill Creek.

97. The Tennant method is a methodology for determining the relationship between habitat conditions for aquatic resources and a stream's average annual flow. Although Wilson Creek's flows have been artificially enhanced by powerhouse flows, this condition has continued for nearly 100 years and the channel morphology likely reflects the higher flow regime. Staff used Instream Flow Incremental Methodology (IFIM) studies conducted for both Mill and Wilson Creeks but, because the Wilson Creek IFIM study lacked information on certain reaches of Wilson Creek, staff also used results from application of the Tennant method in the 1992 EA for the Paoha Project that had been licensed, but never constructed, on Wilson Creek. Staff's flow recommendation for Wilson Creek was based not only on these Tennant method results and the IFIM study but also on consideration of such Wilson Creek field conditions as withdrawals, irrigation return flows, and accretion flows. As to each creek, staff used the best available information to evaluate the potential effects of water allocation scenarios on brown trout.[42]

98. The settlement party commenters also assert that staff's calculation of the mean annual historical flow in Wilson Creek was overestimated because it did not account for the diversion of flow from the tailrace into Upper Conway ditch or the Mill Creek return ditch. The 25-cfs mean annual flow used by staff was that reported in the 1992 Paoha Project EA, but it is not clear whether these diversions had been factored into that flow

[42] If staff had relied solely on the Tennant method to determine a Wilson Creek minimum flow, its recommended flow likely would have been higher, since use of the method in the Paoha EA had resulted in a 15-cfs recommendation as providing optimum brown trout habitat. We also note that, despite their criticisms, the settlement parties themselves used the Tennant method to illustrate the effects of alternative water allocation scenarios on Wilson Creek brown trout habitat.

calculation. However, even if the mean annual flow into Wilson Creek below these diversions is actually lower, as the settlement party commenters contend, this does not necessarily lead to the conclusion that a minimum flow of less than 5 cfs would be sufficient to sustain a year-round brown trout fishery.[43]

99. Although the settlement party commenters argue that there would be sufficient water for Wilson Creek brown trout if Wilson Creek water rights holders exercised their water rights, there is no essential dispute between this position and staff's findings. Staff recognized that there would be sufficient flow for brown trout under many situations, while the settlement party commenters assert that there would be sufficient water to sustain brown trout at the base of Conway Ranch in most instances. However, staff's concern was directed to the maintenance of a year-round brown trout fishery. Protection for brown trout is not assured if Mono County, the holder of the highest priority water rights on Wilson Creek, does not call for its water rights in low flow situations during the non-irrigation season. The settlement party commenters do not convince us that those water rights would always be exercised in those situations, and Mono County has not given us any indication to the contrary.

100. Although we are confident that staff's 5-cfs minimum flow recommendation can withstand these technical and other criticisms, whether it is appropriate to require that minimum flow rests not on these factors but on our decision not to modify Articles 411 and 417 as proposed by the settlement. Staff's determination that a minimum flow requirement should be imposed to protect brown trout in Wilson Creek implicitly assumed that we would adopt the settlement's replacement Article 411, which staff did not recommend rejecting. However, because we are not adopting any settlement provisions that would require adherence to the settlement's annual flow management plan, the distribution by Edison of flows between the two creeks would not be an action taken pursuant to this license, and any resulting reduction in flows to Wilson Creek would not be the environmental consequence of any action we are taking here. While it would be appropriate to require a minimum flow to address environmental consequences of issuing or modifying the Lundy Project license, we are not obliged to redress the environmental consequences of anticipated private actions. When the new license was issued in 1999, we did not find that a requirement for the maintenance of a minimum

[43] The settlement party commenters estimate that the mean annual flow in Wilson Creek is actually 18 to 19 cfs and assert that a minimum flow of 3.6 cfs would provide habitat in the "good" range for October to March in relation to this mean annual flow, according to the Tennant method. However, staff did not rely solely on the Tennant method in determining the necessary minimum flow.

flow in Wilson Creek was necessary to protect or enhance resources. Our action in this order does not trigger the need for such a requirement now, since we are neither requiring nor authorizing the diversion of powerhouse flows into Mill Creek.[44]

101. This analysis also governs our approach to Wilson Creek resources other than brown trout. Staff recommended that the licensee prepare a groundwater monitoring plan and that the Commission reserve its authority to require changes in project structures and operations if the monitoring should show that wells were being affected by changes in groundwater. This recommendation was based on staff's conclusion that the settlement's effects on groundwater would depend on how the powerhouse flows were allocated in any given year under the proposed water management plan. Since we are not requiring that the licensee allocate powerhouse flows in accordance with this proposed plan, any effects on groundwater from a reallocation of flows would result from the licensee's independent action, not from any action taken pursuant to the license. Therefore, we will not adopt staff's groundwater monitoring recommendations.

102. Various commenters criticize staff's analysis of the effects of the settlement on Wilson Creek resources. As noted in greater detail earlier, these criticisms include failure to prepare an EIS, basing conclusions on inadequate data, inaccurate characterization of riparian conditions on the two creeks and in adjacent areas, recommendation of a minimum flow that is insufficient to protect resources, failure to consider other minimum flow and diversion pipeline options, inadequate groundwater monitoring provisions, and insufficient identification of remedial actions if the flow changes are found to affect groundwater. Again, because we are not requiring Edison to release powerhouse flows in accordance with the proposed water management plan or to allocate those flows in any way between the two creek systems, any effect on Wilson Creek resources of a changed powerhouse flow allocation would be attributable to action taken by Edison outside of its license and not subject to our oversight. Although the commenters' criticisms would therefore not affect our determination of the appropriate conditions for this license, we will address them here briefly for the sake of completeness.

103. The Commission staff's EA analyzed the proposed settlement and several alternatives to it, in respect to all of the resources that might be affected. In form and extent, the EA was virtually equivalent to an EIS, and there is no basis to expect that an EIS would have been more thorough or would have reached different conclusions. Staff

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[44] Moreover, adopting the settlement's proposal for a 1-cfs minimum flow release at Lundy dam into Mill Creek should, by itself, generally provide better brown trout habitat conditions in Wilson Creek than the 1999 license requirement for a 4-cfs release, since additional flow would be available for Wilson Creek. *See* EA at 35.

used the best data available, but where sufficient data was unavailable, to delay analysis of, or Commission action on, the settlement proposal would not have been warranted, since collection of adequate data on groundwater changes or the relationship between groundwater and riparian habitat could take years or might not be obtainable or verifiable in the abstract.

104. Therefore, it was justifiable for staff to recommend monitoring of groundwater over time, with a reservation of Commission authority to require changes in project operations if the flow changes proved to be adversely affecting area wells. Some commenters complain that the EA provides no guidelines for determining how wells might be adversely affected. They argue that the triggers for taking remedial action, the remedial actions themselves, and the project structures and operations that could be modified to reverse harm to the wells should be specifically identified. The absence of specifics on these matters is not a flaw in staff's recommendation. The appropriate place for addressing these issues would be during development of the groundwater monitoring plan.

105. The commenters argue that staff did not acknowledge or address the extensive wetland/marsh area between the two creeks at Mono Lake, did not consider the importance of maintaining the existing irrigated meadow habitats on the former ranches, did not resolve the uncertainty of whether Wilson Creek surface flows contribute to groundwater at the wetlands at the creek's mouth, and did not recommend sufficient minimum flow to protect waterfowl and shorebird habitat at the delta. They assert that staff should have addressed the potential effects of reducing groundwater recharge on all resources, not just on wells, and should have recommended groundwater monitoring on Conway Ranch lands as well as at the wells.

106. It may not be possible to determine definitively the relationship between groundwater and wetlands in the absence of actual flow changes. However, although no studies have been conducted, there is evidence to suggest that the source of water for the wetland habitat at the mouth of Wilson Creek is the numerous springs located in the vicinity of the mouths of Wilson and Mill Creeks, not Wilson Creek's surface flow or contribution to groundwater resources.[45] Further, as discussed in the EA,[46] there is

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[45] Lee, K. 1969. Infrared exploration for shoreline springs at Mono Lake, California, Test Site. Final Report. Contract No. 14-08-0001-11217. Remote Sensing Laboratory, School of Earth Sciences, Stanford University, California. Stanford RSL Technical Report 69-7. This document was among the literature cited by the EA.

[46] EA at 62.

evidence to suggest that the existence of the marsh predates diversions from Wilson Creek, providing further indication of the importance of springs for the existence of the wetland habitat. Since the habitat at the mouth of Wilson Creek is predominantly, if not totally, spring-fed, this wetland habitat would continue to provide habitat for migratory shorebirds and ducks, even in the absence of Wilson Creek flows. In any event, staff's recommendation of a 5-cfs minimum flow measured below the Mono County diversions would ensure that flow remained throughout Wilson Creek at all times, so that surface flows in Wilson Creek could still contribute to groundwater, and thus, indirectly, to wetland habitat, even if at a reduced level.

107. Staff did not analyze Mono County's proposal that a second conveyance facility be constructed from lower Wilson Creek to Mill Creek, so that water uses and needs on Wilson Creek could be satisfied before directing flows to Mill Creek. In response to staff's explanation that Mono County had not provided sufficient detail about this proposal, Mono County asserts that it would have provided detail on request. However, even if staff had entertained such a proposal, its adoption would have required the licensee to construct an extensive new facility, with environmental consequences of its own, outside of the project boundary on land that does not belong to the licensee, in contrast to the settlement proposal, under which construction would not significantly expand the project boundary. It was not necessary to analyze such an alternative.

108. Mono Basin Preservation and Boynton argue that staff underestimated the condition of riparian habitat in portions of Mill Creek below the return ditch. They claim that this habitat is already extensive and diverse and therefore would not be measurably improved by receiving additional flows at the expense of Wilson Creek resources.

109. Staff's characterization of the habitat in Mill Creek below the return ditch is not wholly inconsistent with the commenters' description. Mono Basin Preservation claims that the habitat downstream of the return ditch to Mono City is well-developed, with thickets of trees and bushes, similar to the habitat above the return ditch. Staff agreed that this habitat is fairly well-developed, with dense riparian growth, although the habitat on the larger, downstream portion of this reach, below route 395, clearly has less amount and diversity than the portion above route 395.[47] Further down Mill Creek, Mono Basin Preservation disagrees with staff that riparian vegetation in the reach between Mono City and Cemetery Road is degraded, arguing that it has been undergoing natural restoration as a result of more steady flow in recent years. Staff agreed that the vegetation in this reach may have improved in recent years,[48] but it found that the area is still characterized

[47] *Id*. at 48.

[48] *Id*. at 49.

by decreased width and species diversity compared to upstream reaches. Mono Basin Preservation claims that riparian vegetation actually increases as Mill Creek approaches Mono Lake, rather than declines, as staff concluded. While the commenters' evidence may show that riparian vegetation increases in the immediate vicinity of Mono Lake, staff found that the majority of the reach between Mono City and Mono Lake is characterized by a narrow band of riparian vegetation, notably reduced compared to upstream reaches.

110. Regardless of any differences between staff's and the commenters' characterizations of the habitat in Mill Creek below the return ditch, habitat in this portion of Mill Creek should benefit from additional flows diverted through the return ditch, especially in those reaches with the least developed or diverse habitat. The extent of that habitat improvement may be difficult to predict, and the appropriate balancing of improvement to Mill Creek habitat against the possible adverse effect on Wilson Creek resources may be subject to disagreement, but staff's findings are not inconsistent with the evidence. In any event, we are not requiring or authorizing any allocation of powerhouse flows to increase the flows into the lower portion of Mill Creek.

Conclusions

111. In light of the above analysis, we will approve the settlement only in part and will modify only certain of the license articles as Edison requests. We will modify Article 404 to substitute the settlement's provisions for minimum flow releases from Lundy Dam, as well as the related flow provisions and the proposed reservation of Commission authority to revise the minimum flow requirement if the confluence of Mill and Deer Creeks shifts in the future.[49] We will also revise Article 403 to adopt the settlement's proposed additions to the minimum flow plan, discussed earlier in this order. We will modify Article 412, which requires a streamflow gage plan, to include the settlement's more specific provisions for the location of gages, but only to the extent that

[49] Article 404 provides that the licensee shall release a minimum flow of 1.0 cfs on an average monthly basis. We are excluding a further settlement provision that the licensee is not required to release more than 1.0 cfs, since the licensee may find it necessary to do so to meet the average monthly minimum flow requirement.

these gages would measure Lundy Lake elevations and the flows released from Lundy Dam and present in Mill Creek above the return ditch.[50] These modifications were recommended by staff.

112. We will not adopt the proposed revisions to Articles 411 and 417, because those provisions would have the Commission require the licensee to allocate flows in accordance with a water management plan over which the Commission would have no control, principally to further a private water allocation arrangement that serves no project purpose. Further, proposed Article 411 would have the Commission require the reconstruction of project facilities that would serve no project purpose. We will not modify Article 412 to include the settlement's specific provisions for the location of gages that would monitor the flow releases required by proposed modified Article 411, which we are not adopting. We will not delete existing Article 414, which reserves the Commission's right to modify the license based on any final adjudication of water rights, because it is important that we retain our ability to alter license requirements if necessitated by such an adjudication.

113. Our analysis also affects our response to certain staff recommendations. We will not adopt staff's recommendation for a 5-cfs minimum flow for Wilson Creek, because we are not adopting any settlement provisions that would require the licensee's adherence to a water management plan that could reallocate powerhouse flows to the disadvantage of Wilson Creek. For the same reason, we will not require a plan for monitoring groundwater at the Conway Ranch and Lundy Mutual wells or for an additional gaging station on Wilson Creek near the Upper DeChambeau Ditch to monitor staff's recommended minimum flow.

114. Staff's recommendations for plans for erosion control, monitoring entrapment and mortality of wildlife, and revegetation of disturbed areas would address environmental effects related to constructing a modified powerhouse tailrace and an upgraded return ditch, which we are not requiring here. The same is true as to staff's recommendation that the existing, Commission-approved Threatened, Endangered, and Sensitive Species Management Plan be extended to non-Forest Service lands to protect sensitive species from construction activities. If Edison files an application to amend the license to construct these facilities, staff's recommendations would become appropriate conditions for approval of such an application.

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[50] We are requiring that the plan also explain the method of collecting flow data, including how the average monthly and daily flow values will be calculated and how the flow requirements will be modified when seepage and accretion below Lundy Dam is greater than 3 cfs.

115. Because we believe that our disposition of the settlement agreement, and in particular our approval of its minimum flow release provisions for Lundy dam, would satisfy the concerns raised in the rehearing requests, we will dismiss them.

116. As noted earlier, after issuance of the new license, we received several letters claiming that the required minimum flow release from Lundy Dam would interfere with water rights on Wilson Creek. These comments were filed in response to our statement in the relicense order that we would modify the license as needed if we were informed that project operations were infringing on any quantified, adjudicated water right. Because we are now modifying that minimum flow requirement, we believe that we have responded adequately to the concerns raised by those letters.

The Commission orders:

(A) Article 403 of the new license issued March 3, 1999, for the Lundy Project No. 1390 is modified to read as follows:

> Within six months of the date of this order, the licensee shall file for Commission approval a plan for providing the minimum flow required by Article 404 of this license. The plan shall include detailed drawings of the system to release flow to Mill Creek at the downstream base of Lundy dam, at the sand trap, or at any other appropriate location upstream of the existing stream gage that will measure the minimum flow. The plan shall also include a schedule for implementing the instream flow release, the point(s) where the minimum flow will be measured for compliance purposes, limits on the maximum rate of change in stream flow during any shifting of release points for the minimum flows, and any necessary provisions for promptly rescuing and releasing any stranded fish. A primary design consideration for the water release facility will be the dependability of the facility to operate on a year-round basis, if feasible.
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> The licensee shall prepare the plan after consultation with the U.S. Forest Service, the California Department of Fish and Game, the U.S. Fish and Wildlife Service, California Trout, Mono Lake Committee, and American Rivers. The licensee shall include with the plan documentation of consultation and copies of comments and recommendations on the completed plan after it has been prepared and provided to the entities named above in this article, and specific descriptions of how the plan accommodates the entities' comments. The licensee shall allow a minimum of 30 days for the entities to comment and to make recommendations before the licensee files the plan with the Commission.

If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons based on project-specific information.

The Commission reserves the right to require changes to the plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

(B) Article 404 of the new license issued March 3, 1999, for the Lundy Project No. 1390 is modified to read as follows:

(a) After implementation of the plan required in Article 403 is completed, the licensee shall release a minimum flow of: (A) 1.0 cubic feet per second (cfs) on an average monthly basis, but not less than 0.75 cfs on an average daily basis, or (B) the inflow to the project reservoir, whichever is less, as measured at either the existing Mill Creek gage located just upstream of the mouth of Deer Creek (USGS Station #10287069) and/or the release point on the project flowline, as described in the Article 403 plan. The release is for the protection and enhancement of fish and wildlife resources, riparian vegetation, and aesthetic resources in the bypassed reach of Mill Creek.

The licensee's minimum flow requirement below Lundy dam will be reduced to the extent that the seepage and accretion flow is greater than 3 cfs. If seepage and accretion flows are above 3 cfs, the licensee must only release that amount of water necessary to result in a 4-cfs flow at the gage. The water may be released from the existing penstock tap located at the sand trap just upstream of the existing stream gage on Mill Creek or from a new release facility between the stream gage and Lundy dam, as described in the Article 403 plan. The licensee is not required to operate the existing Mill Creek stream gage during the winter season if (i) the water turns to ice, (ii) the gage is covered in snow, or (iii) other factors beyond the licensee's control preclude accurate stream flow measurements. The licensee is not required to extend electrical power to the stream gage.

The minimum flow release may be intentionally, temporarily modified if required for safety reasons, by operating

emergencies beyond the control of the licensee, or upon agreement between the licensee, the Forest Service, and the California Department of Fish and Game (CDFG), for short periods. The minimum flow is not required if malfunctions or other circumstances beyond the licensee's feasible control cause the flow release to be unintentionally discontinued or reduced. If the flow is so modified or discontinued, the licensee shall notify the Commission as soon as feasible, but no later than 10 days after the licensee discovers each such intentional or unintentional incident.

(b) The licensee shall monitor flows on Mill Creek above the return ditch to determine if the combination of minimum flows and accretion provide 7 cfs of flow in Mill Creek. The licensee will measure the streamflow once each March, June, September, and December for an eight-year period beginning the first March after this article is effective. The licensee need not install a permanent stream gage to measure these flows. The licensee may use a handheld current meter, portable weir, or such other suitable device to obtain an accurate stream flow measurement. At the end of the monitoring period, the licensee shall prepare and send a report documenting the monitoring results to the Commission, the Forest Service, CDFG, California Trout, Mono Lake Committee, and American Rivers.

(c) If the Deer Creek confluence with Mill Creek shifts above Lundy dam, the Commission may reopen the license to determine if an additional minimum flow release is necessary and appropriate for the protection and enhancement of fish and wildlife resources, riparian vegetation, and aesthetic resources in the bypassed reach of Mill Creek. The Commission shall consider whether: (i) an entity other than the licensee is diverting flow from Mill Creek below Lundy dam and upstream of the confluence with the return water conveyance facility and (ii) there is a reasonable potential to shift Deer Creek back to its current location, and the licensee has had a reasonable opportunity to accomplish this relocation.

(C) Article 412 of the new license issued March 3, 1999, for the Lundy Project No. 1390 is modified to read as follows:

> Within six months, the licensee shall file for Commission approval a plan to install, operate, and maintain streamflow gages or devices necessary to monitor the flow releases required in Article 404 of this license and to measure the elevation of Lundy reservoir. The plan shall include the location and design of gages or other flow measuring devices that will be used to monitor compliance with the average monthly and average daily flows requirements specified in Article 404, a schedule for installation, the method of collecting flow data including an explanation of how the average monthly and average daily flow values will be calculated, an explanation of how the average monthly and average daily flow requirements in Article 404 will be modified when seepage and accretion below Lundy dam is greater than 3 cubic feet per second, and a provision for providing the data to the entities specified below. Except as otherwise provided below, streamflows and reservoir water elevations will be measured to USGS standards and reported on an annual basis. The plan may make use of the project's existing gages. At a minimum, the plan will include flow monitoring and lake elevation gages at the following general locations, unless otherwise provided: (1) Mill Creek below Lundy dam; (2) Mill Creek above confluence with Mill Creek return water conveyance facility (quarterly water current meter measurements only; a gage and meeting USGS standards are not required for measurements at this location); and (3) Lundy reservoir (elevation).
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> The licensee shall prepare the plan after consultation with the Forest Service, Mono County, U.S. Bureau of Land Management, U.S. Fish and Wildlife Service, California Department of Fish and Game, Los Angeles Department of Water and Power, California Trout, American Rivers, and Mono Lake Committee. The licensee shall include in the plan documentation of consultation and copies of comments and recommendations on the completed plan after it has been prepared and provided to the entities named above in this article, and specific descriptions of how the entities' comments are accommodated by the plan. The licensee shall allow a minimum of 60 days for the entities to comment and to make recommendations prior to filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

(D) The requests filed by the U.S. Forest Service and Mono Lake Committee for rehearing of the Commission's March 3, 1999 Order issuing a new license for the Lundy Project No. 1390 are dismissed.

(E) The request filed June 1, 1999, by Southern California Edison Company for rehearing of the April 30, 1999, notice granting the U.S. Forest Service's motion for late intervention is dismissed.

(F) Late intervention in this proceeding is granted to American Rivers and California Trout, and the request filed by these entities on June 1, 1999, for rehearing of the April 30, 1999, notice denying their motion for late intervention is dismissed.

(G) The motion to intervene filed January 14, 2000, by California Department of Fish and Game is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.