

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SECRETARY  
Washington 25, D.C.

Certified Mail  
Return Receipt Requested

April 27, 1961

Dear Mr. Holm:

This refers to the appeal of the City and County of San Francisco (hereinafter sometimes referred to as the City or the Grantee) from the decision of the Land Office at Sacramento, California, dated July 9, 1959, which required the City to execute certain stipulations (relating among other things, to minimum releases of water) as a condition to the granting of its application for a change of location of a right-of-way in the Stanislaus National Forest and the Yosemite National Park. The City appealed to the Director, Bureau of Land Management. The Secretary of the Interior assumed direct jurisdiction over this appeal.

The United States Forest Service, the National Park Service, the Fish and Wildlife Service and the California Department of Fish and Game have recommended revised stipulations as to minimum releases of water into the Tuolumne River from O'Shaughnessy Dam (Hetch Hetchy Reservoir). The revised stipulations would require minimum releases of 75 cfs for the period May 1 through September 15 and 35 cfs for the period September 16 through April 30. In addition, the stipulations call for a study to determine whether increases should be required in these minima with final decision as to any recommended increases to be made by the Secretary after notice and hearing.

In accordance with the provisions of the Raker Act, 38 Stat. 242 (1913), the Department of Agriculture has indicated approval of the new right-of-way location, insofar as it relates to the national forest lands.

I have concluded that the City's application should be granted, subject to conditions hereinafter referred to. My reasons follow.

This case is another chapter in the long history of the City's Hetch Hetchy developments under the Raker Act. Specifically, it concerns the City's proposed Canyon power project. The principal features consist of a tunnel about 12 miles long generally following the course of the Tuolumne River from O'Shaughnessy Dam to Early Intake and a power plant at Early Intake with a planned installed capacity of 66,000 kw. For about one-half its length the tunnel would be located in Yosemite National Park. The balance of the tunnel and the power plant itself will be constructed in Stanislaus National Forest.

The existing right-of-way was approved and amended in 1914 and 1917, respectively, pursuant to the Raker Act. This original right-of-way location follows a meandering course on the south side of the Tuolumne River. By its current application, the City seeks to relocate the route of the tunnel to a straight line on the north side of the river.

It is the fact that the City has not proceeded with the project since it received the amended right-of-way in 1917 that has given rise to the principal issue before me.

In brief, the questions for decision are whether there should be a conclusion that the City has not been diligent in prosecuting the work and, if so, whether the City's right-of-way should be declared forfeited.

The reason for the City's delay is conceded. As the Department's Special Hearing Officer found, it is because of lack of earlier need for the Canyon project's power potential due to the refusal of the electorate to approve the City's acquisition of the San Francisco electric utility operations of Pacific Gas and Electric Company.

In his finding No. 21, on diligence, the Special Hearing Officer, while attempting to preserve the issue as a legal question, concluded that the City had no responsibility for the decisions of its electorate. On the other hand, it is argued that under the charter of San Francisco the elections were essential elements in the City's decision-making process and, therefore, the decision of the electorate is perforce the decision of the City.

The Solicitor of the Department has recommended that proposed finding No. 21 be stricken since it involves conclusions of law rather than findings of fact. I accept the Solicitor's recommendation.

The Raker Act forfeiture provision is not mandatory whatever might be the conclusion as to diligence. Section 5 provides that "in the event" the Secretary determines that work has not been diligently prosecuted, the Secretary "may declare forfeited" the City's rights to the unconstructed works and refer the matter to the Attorney General, whose duty upon such referral "shall be" to commence suit to secure a judgment of forfeiture. The juxtaposition of the imperative expression "shall" with "may" in Section 5 makes it clear that the Congress intended by the latter term that the Secretary of the Interior should exercise discretion to determine whether, though lack of diligence be found, the circumstances are such as to call forth a forfeiture.

Such a reading of Section 5 accords with the ordinary meaning of the word "may", particularly when found in juxtaposition with expressions of command; it is also in accord with the traditional gravity with which the courts approach forfeitures.

A forfeiture is harsh. Before considering it, an official should be certain that the public interest can be satisfied in no other way. After most careful judgement, I have concluded that, under the terms and conditions to which the approval will be subject, the public interest can be protected. Therefore, I do not at this time and in the circumstances under which the change in location will be approved, deem it necessary to determine the question of diligence.

At the same time, I must observe in all candor that the argument that the City must take responsibility for the decisions of its electorate is a compelling one and, consequently, the grantee would have a heavy burden to overcome were the diligence question to be in issue.

I am persuaded that the north side location can be approved consistent with the public interest for the following reasons:

(1) The interests of sport fishery and recreation can be protected by requiring continuing releases of water from O'Shaughnessy Dam to maintain the Tuolumne as a live stream between the dam and Early Intake. This will be of great importance as there is no requirement for release of water to maintain a live stream under the original, south side right-of-way. With this requirement added to the stipulations, the National Park Service and the Fish and Wildlife Service, together with the Forest Service and the California Department of Fish and Game, are agreeable to approval of the change in location.

(2) The north side straight line right-of-way, with provision for weathering of rocks and spoil, and considering the location of spoil banks, is a marked improvement aesthetically over the south side route.

(3) The major incursion in Yosemite Park came with the construction of the storage facilities, that is with O'Shaughnessy Dam itself. The tunnel, if constructed in the north side location, will have but minor additional effect on Yosemite Park. On the other hand, forfeiture would have a major impact upon the City's realization of benefits from the large investment already made in constructed works and would result in total loss of the substantial money, time and effort that has been expended in connection with the Canyon project.

(4) The power plant--the principal new external feature to be added by the development--will be outside the boundaries of Yosemite Park, as will the tunnel for one-half of its length. The Federal Power Act, enacted subsequent to the

Raker Act, does not exclude the use of national forest lands for power development under proper safeguards. This suggests a less rigid approach to the policy question than would be the case were the principal impact to be on the Park.

(5) Finally, we deal here with a public not a private body.

I am cognizant of the earnestness and force of the argument that this application should be made the occasion to put an end to the City's further construction of projects under the Raker Act. As in any matter involving judgment and discretion, however, the conflicting factors must be balanced and a decision reached.

Taking collectively all the factors into account, the balance favors approval of the change in location under proper conditions as set out in the stipulations annexed hereto.

Under other circumstances and conditions, I am not prepared to say that the approval of this Department could be forthcoming. I must and shall look with jaundiced eye upon any further initiation of construction activities under the Raker Act grants. It is only the special circumstances here present and above outlined, together with the remedial stipulations, that have impelled me to conclude that the public interest does not in this instance require a present determination as to diligence or a forfeiture.

The application to change the right-of-way location is hereby conditionally approved as shown by endorsement of Map R-527, Revision 1, dated September 15, 1958, which delineates in red the amended right-of-way location, subject to the execution in quadruplicate by the proper officials of the City and County of San Francisco of the revised stipulations enclosed herewith and the filing thereof in the office of the Director, Bureau of Land Management, Washington 25, D.C., within 30 days from receipt of this letter. This conditional approval and grant is null and void if the enclosed stipulations are not executed and filed as herein required. The approval of Map R-527, Revision 1, operates, as you know, as an abandonment of all theretofore approved rights-of-way of the City and County of San Francisco situated south of the Tuolumne River from O'Shaughnessy Dam to Early Intake for a tunnel aqueduct, penstocks, power plant, etc., in the Yosemite National Park and the Stanislaus National Forest, as delineated in green on said drawing.

Sincerely yours,

(signed) STEWART L. UDALL

Secretary of the Interior

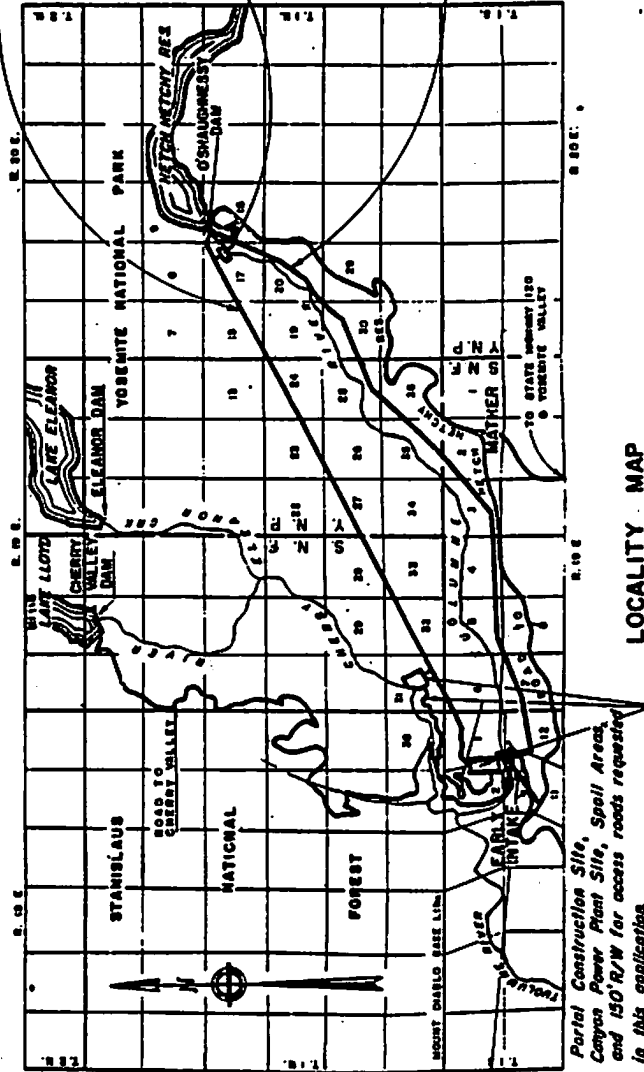
Dion R. Holm, Esquire  
City Attorney  
City Hall  
San Francisco 2, California

Enclosures

100' R/W for Canyon Tunnel aqueduct requested in this application.

Spill area and 150' R/W for access roads requested in this application.

100' R/W for tunnel aqueduct granted to City and County of San Francisco under applications Sacramento Serial Number 07187, approved by the Secretary of the Interior on June 9, 1914 and Serial No. 07259, approved by the Secretary of the Interior on July 29, 1914, subsequently amended Sept. 12, 1916, Sept. 22, 1917 and Nov. 6, 1917, are to be amended by this application and abandoned by the City and County of San Francisco upon approval of this application.



250' R/W for electric transmission line and 250' R/W for pressure pipe & tunnel line and Power Plant Site granted to City & County of San Francisco under application Sacramento Serial Number 010130 approved by Secretary of Interior Sept. 22, 1917 to be abandoned upon approval of this application.

Portal Construction Site, Canyon Power Plant Site, Spill Area, and 150' R/W for access roads requested in this application

STIPULATIONS FOR RELOCATION AND AMENDMENT OF RIGHTS-OF-WAY  
FOR TUNNEL AQUEDUCT, STEEL PENSTOCK, POWER PLANT SITE,  
SPOIL AREAS AND ACCESS ROADS AS APPROVED PURSUANT TO MAPS  
FILED APRIL 10, 1914, JULY 3, 1916 AND DECEMBER 13, 1916  
IN UNITED STATES LAND OFFICE AT SACRAMENTO, CALIFORNIA  
MAP R-527, REVISION NO. 1, FILED OCTOBER 2, 1958.

(Amended Sacramento Serial No. 010130)

Pursuant to the act of December 19, 1913 (38 Stat. 242), and in consideration of relocation and installation of its facilities and the granting to it by the United States of amended rights-of-way applied for, the City and County of San Francisco, a municipal corporation of the State of California, hereinafter referred to as Applicant, does hereby stipulate and agree and does hereby bind itself, its successors and assigns, as follows:

General

1. These stipulations apply to the right-of-way requested by Applicant across national park and national forest land as shown on that map entitled "Hetch Hetchy Water Supply. Canyon Power Project, Amended location of Tunnel Aqueduct, Steel Penstock, Power Plant Site, Spoil Areas and Access Roads. Yosemite National Park and Stanislaus National Forest, California" Drawing No. R-527 revision No. 1, signed by H. E. Lloyd, Manager and Chief Engineer, on February 17, 1958, and revised on September 15, 1958, as filed with the land office at Sacramento, California, on October 2, 1958, as an amendment to the City and County of San Francisco's previous applications for rights-of-way for tunnel aqueduct, pressure pipe, power plant site, and diversion dam site filed under Serial Numbers 07259, 09719, 010128 and 010130.

2. The Applicant shall take all reasonable precautions to avoid and prevent damage to property and resources of the United States. Applicant will pay to the United States Treasury, on demand, for all damage to the said property and resources resulting from the breaking or overflowing,

leaking or seepage, of water from the conduit and for all damage to such property and resources caused by the negligence of the Applicant, its employees, contractors or employees of contractors.

3. All containers of explosives shall be disposed of by the Applicant in such manner that they shall not be accessible to the public, livestock, or wild game.

4. The applicant will not infringe upon the rights of the public to enjoy free access to the Tuolumne River between O'Shaughnessy Dam and Early Intake.

5. The Applicant will prevent its employees, agents, and contractors from releasing debris or fines arising from excavation, deposit of spoil, mining, conveyance, refining, or washing of materials into the Tuolumne River or its tributaries.

6. The Applicant will release water to stream flow from O'Shaughnessy Dam according to the following schedule:

<u>Period</u>	<u>Release from O'Shaughnessy Dam in Sec. Ft.</u>
May 1 through September 15	Minimum of 75 cfs
September 16 through April 30	Minimum of 35 cfs

PROVIDED THAT, in addition to the releases provided for above, Applicant interposes no objection to the Government diverting not to exceed 0.5 cfs for the Federal consumptive use of water in Yosemite National Park and not to exceed 5.0 cfs for the Federal consumptive use of water in Stanislaus National Forest, all within the watershed of the branch of the Tuolumne River above Early Intake. To the extent any portion of such 5.5 cfs of water is diverted from the Tuolumne River between O'Shaughnessy Dam and Early Intake for use by the Government, the releases provided for above shall be increased to the extent of such diversions or uses. This paragraph shall not be construed to add to or to limit any rights of the Government to the use of the water of the Tuolumne River System; and

PROVIDED FURTHER, that the releases shall be measured at the existing gauging station located approximately 3/4 mile below O'Shaughnessy Dam; and

PROVIDED FURTHER, that during two years, not necessarily consecutive, each beginning April 1 and extending through March 31 of the following year, a fishery and recreational (including aesthetic) study shall be made

to determine whether or not the above schedule is adequate and, if not, to determine the magnitudes of the minimum flows required. This study shall be made jointly by the National Park Service, United States Forest Service, and the United States Fish and Wildlife Service during two years when the desired regulated minimum release can be maintained for more than half the period of May 1 through September 15, to assure sound testing for the purposes indicated. The Applicant and the California Department of Fish and Game may participate in this study, if they desire to do so. The two such years shall be selected by the Secretary of the Interior after consultation with the Secretary of Agriculture. During the course of such study the Applicant shall make such adjustments of flows as may be requested as a basis for making observations; and

PROVIDED FURTHER, that if it is found during the study that the September 16 to April 30 schedule is inadequate for the spawning of trout, a modified schedule of releases between 35 cfs and 75 cfs may be recommended for all or part of March and April; and

PROVIDED FURTHER, that at the conclusion of the aforesaid two years of study and based upon such study, the agencies participating in the study shall make recommendations to the Secretary of the Interior as to the required flows. Such recommendations shall become part of these conditions, unless the Applicant, within 30 days from receipt of notice of the recommendations, shall file with the Secretary of the Interior its objections thereto. In such event, at its request, the Applicant shall be afforded a hearing regarding these objections before a special hearing officer who will render proposed findings of fact. The Secretary, after considering the proposed findings of fact and the record, shall determine what additional flows, if any, shall be required over those specified above.

7. Changes in magnitude of water releases into the Tuolumne River from O'Shaughnessy Dam shall be gradual and minimal and shall be restricted to those having a fairly constant rate of change producing not more than double nor less than one-half the previous release over a one-hour period, except as may be required by emergency operations resulting from mechanical failure or other conditions beyond the control of the Applicant.



As to Yosemite National Park

8. The Applicant shall take all reasonable precautions to prevent forest fires and shall assist the Superintendent of Yosemite National Park to extinguish forest fires in the vicinity of any tract which may be used hereunder, and in the preservation of good order within the metes and bounds of the area. Applicant will reimburse the National Park Service for fire suppression costs due to any fires resulting from operations of the Applicant. The cutting or destruction of vegetation shall be held to a minimum. All slash and debris resulting therefrom shall be disposed of as directed by the Superintendent.

9. The Applicant shall allow the National Park Service, without charge, to construct or permit to be constructed in, through or across the land covered by said right-of-way, roads, trails, conduits and other means of transportation or communication not inconsistent with the enjoyment of said right-of-way by the Applicant.

10. The Applicant shall take adequate measures, as directed and approved by the Superintendent of Yosemite National Park, to arrest and prevent soil erosion on the lands covered hereby and shall so utilize such lands as not to contribute to erosion on adjoining lands.

11. The boundaries of the spoil area immediately below O'Shaughnessy Dam are to be adjusted as designated by the Superintendent of Yosemite National Park, to save the screen of trees along the river bank.

12. When required by the Superintendent, the Applicant will have the rock spoil area sprayed, to reduce its conspicuousness. The Superintendent will specify the liquid mixture to be used for this artificial weathering purpose.

13. Within one year after completion of the project, all buildings and other facilities of a temporary character erected within Yosemite National Park, not required for the continued operation and maintenance of the project, will be removed and the sites restored to as near a natural condition as possible.

14. Within one year after completion of the project, the structures on the access roads (trestles, viaducts, bridges, etc.) toward the base of the Dam will be removed and the area occupied by same will be restored to as near a natural condition as possible. All other access roads will be kept locked by the Applicant.

15. In order for the Superintendent to provide for the adequate protection of Park values during the construction and development phases of the Canyon Power Project, the Applicant will reimburse the National Park Service for the salary and expenses of one full time Park Ranger to be assigned to the Hetch Hetchy area from the beginning of construction activities until the close of the cleanup work following the completion of construction. The liability of the Applicant to reimburse the National Park Service under this stipulation will terminate at the time the Applicant has fully complied with stipulation No. 14.

16. The location, design and standard of any road or trail, and the location of any structures or other improvements to be constructed within Yosemite National Park by the Applicant in connection with the Canyon Power Project must be approved by the Superintendent of Yosemite National Park before construction is started.

17. The Applicant shall conform to all regulations now or hereafter adopted and prescribed by the Secretary of the Interior governing Yosemite National Park.

As to Stanislaus National Forest

18. The value of all timber cut or destroyed by the Applicant or its agents which is merchantable in accordance with specifications contained in timber sales current at the time of such cutting or destruction shall be paid at standard stumpage rates then in force for the Stanislaus National Forest, and all slash and debris resulting from the cutting or destruction of such timber shall be disposed of as the Officer-in-Charge may direct.

19. The Applicant will protect the scenic and aesthetic values of the right-of-way and the adjacent land including spoil areas consistent with the authorized use and as prescribed by the Forest Service.

20. The Applicant will construct access roads to standards and specifications approved by the Forest Supervisor in advance of construction.

21. The Applicant will join with the Forest Service in preparing and actively participating in a fire plan which shall set forth in detail their respective responsibilities for the prevention, control and extinguishment of fires on the project areas and on adjacent areas.

22. The Applicant will allow officers of the Forest Service free and unrestricted access to, through, and across all lands covered by said rights-of-way in the performance of their official duties, and will allow the Forest Service without charge to construct, or permit to be constructed in, through, across or under the land covered by said rights-of-way, roads, trails, conduits, ditches, and other means of transportation or communication, not inconsistent with the enjoyment of said rights-of-way by the Applicant.

23. The Applicant will locate and construct all roads and spoil areas to reduce to a minimum the disfigurement of the landscape and erosion of the soil. Such special measures to prevent erosion, as may be required by the Forest Supervisor in writing, shall be installed by the Applicant. Material from slides that occur after construction work is completed shall be disposed of by the Applicant, at locations where not destructive to or in prevention of revegetation, and in such manner as not to be susceptible to erosion or harmful to scenic values.

24. The Applicant will dispose of brush and debris as directed by the Officer-in-Charge. Any brush and debris to be burned will be disposed of in accordance with the fire plan approved by the Forest Supervisor. The Applicant will avoid damage to young growth and will fall all snags over 25 feet in height and within 100 feet of the center line of all roads.

25. The Applicant shall conform to all regulations now or hereafter adopted and prescribed by the Secretary of Agriculture governing Stanislaus National Forest.

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AND FURTHER, the City and County of San Francisco agrees to observe the nondiscrimination provisions prescribed by section 301 of Executive Order 10925, dated March 6, 1961 (26 F. R. 1977), which are incorporated herein by reference, and as used therein "contractor" means the grantee of the right-of-way (Exhibit A).

IN WITNESS WHEREOF, the said City and County of San Francisco has caused this instrument to be executed in the City of San Francisco, California, this 3 day of May, 1961.

CITY AND COUNTY OF SAN FRANCISCO

C O P Y

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

In reply refer to:

Sacramento 010130  
L:GAC

LAND OFFICE  
4201 U.S. Courthouse and Federal Bldg.  
650 Capitol Mall  
Sacramento, California  
95814

February 9, 1965

DECISION

Your reference:  
Hetch Hetchy Water  
Supply - Canyon -  
Cherry Power Develop-  
ment - Canyon Power  
Project  
Early Intake Resvr  
Bypass and Tunnel  
Aqueduct

City and County of San Francisco :  
c/o O.L. Moore, General Manager :  
Power and Utilities Engineering : Right-of-Way  
Bureau :  
425 Mason Street :  
San Francisco, California 94101 :

Amended Location Approved

On May 26, 1964, the City and County of San Francisco filed amended right-of-way application, Sacramento 010130, pursuant to the Act of December 19, 1913 (38 Stat. 242). The right-of-way was originally approved on September 22, 1917, and amended approval granted on April 27, 1961.

The present amendment pertains to the Canyon Power Project approved by Drawing No. 527, Revision 1, for the installation of the proposed reservoir bypass. The application involves a small triangular area, 2.53 acres, to be added to the power plant site, as delineated on Drawing C-3148, in sec. 11, T. 1 S., R. 18 E., M.D.M.

The application also covered an amendment for a tunnel aqueduct right-of-way 100 feet wide as shown in red on Drawing No. C-3148. The applicant stated that they discovered that the section of the Mountain Tunnel was not covered by a Raker Act application. The City and County of San Francisco had an approved right-of-way 250 feet wide for a canal or aqueduct extending from the Early Intake Diversion Dam to the Mountain Tunnel. This right-of-way was approved by the Secretary of the Interior on September 22, 1917 under Serial No. 010130, however, the City constructed a tunnel aqueduct instead of a canal and apparently neglected to file for an amended location. Accordingly, the application, as amended for the tunnel aqueduct right-of-way 100 feet wide as shown in red on said Drawing No. C-3148, is to correct this situation.

Reports have been received from all of the interested agencies, indicating that there would be no objection to the amendment of the right-of-way subject to certain stipulations. The execution of the stipulations by the City was authorized by Resolution No. 28-65 of the Board of Supervisors of the City and County of San Francisco on January 11, 1965, and the set of stipulations were executed by Mayor John F. Shelley on January 26, 1965.

Accordingly, the application for the amendment of the right-of-way for the additional area to be added to the power plant site and the tunnel aqueduct as delineated in red on Map No. C-3148 is hereby approved. The approval is subject to all valid existing rights, and to the stipulations signed by the permittee and made a part hereof, and to the provisions, limitations, terms and conditions of the Act of December 19, 1913 (38 Stat. 242).

The request for the amended location stated that upon approval thereof that the City will abandon the right-of-way granted in 1917, which was outlined in green on Drawing No. C-3148. Relinquishment Forms 4-621a are enclosed for execution by the permittee and to be returned to this office for further appropriate action.

signed: Jesse H. Johnson

Jesse H. Johnson  
Assistant Manager  
Adjudication Branch

Enclosures 2  
Form 4-621a

STIPULATIONS FOR AMENDMENT OF RIGHTS-OF-WAY  
FOR CANYON POWER PROJECT APPROVED BY  
SECRETARY OF THE INTERIOR ON MAY 26, 1961  
TO ADD ADDITIONAL AREA FOR EARLY INTAKE  
RESERVOIR BYPASS  
MAP C-3148 FILED MAY 26, 1964 IN UNITED STATES  
LAND OFFICE AT SACRAMENTO, CALIFORNIA

(Amended Sacramento Serial No. 010130)

Pursuant to the act of December 19, 1913 (38 Stat. 242), and in consideration of the granting to it by the United States of amended rights-of-way applied for, the City and County of San Francisco, a municipal corporation of the State of California, hereinafter referred to as Applicant, does hereby stipulate and agree and does hereby bind itself, its successors and assigns, as follows:

1. The amendment applied for is subject to the set of stipulations executed by Applicant on May 23, 1961 relative to application for amendment of necessary rights-of-way for its Canyon Power Project. (Amended Sacramento Serial No. 010130).
2. Construction will not start until plans for disposal of tunnel spoil and stabilization of same in place are submitted by Applicant and approved by the United States Forest Service.
3. The amendment applied for is also subject to provision that water diversions by Applicant below Early Intake Dam do not decrease the magnitude of water releases from O'Shaughnessy Dam for fish, and provided these releases in addition to accretional runoff be permitted to enter and continue in the Tuolumne River below Early Intake.

C O P Y

IN WITNESS WHEREOF, the said City and County of San Francisco has caused this instrument to be executed in the City of San Francisco, California, this 26th day of January, 1965.

CITY AND COUNTY OF SAN FRANCISCO

ATTEST:

/s/ John F. Shelley  
Mayor

/s/ Robert J. Dolan  
Clerk of the Board of Supervisors  
of the City and County of San Francisco  
State of California

/s/ James J. Finn  
Acting General Manager of Public Utilities  
City and County of San Francisco

FORM APPROVED:

Subscribed and sworn to before me  
this 26th day of Jan., 1965

/s/ Thomas M. O'Connor  
City Attorney  
City and County of San Francisco

/s/ Martin Mongan  
County Clerk  
in and for the City and County of  
San Francisco, State of California

By /s/ William F. Bourne  
Public Utilities Counsel