

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

_____)	
Turlock Irrigation District and)	Docket No. UL11-1-000
Modesto Irrigation District)	Project No. 2299-078
_____)	

CONSERVATION GROUPS’ MOTION TO INTERVENE AND REQUEST FOR
PARTIAL REHEARING OF ORDER FINDING LICENSING OF HYDROELECTRIC
PROJECT REQUIRED

American Rivers, American Whitewater, the California Sportfishing Protection Alliance, California Trout, Central Sierra Environmental Resource Center, Friends of the River, Golden West Women Flyfishers, Northern California Council Federation of Fly Fishers, Trout Unlimited, and Tuolumne River Preservation Trust (collectively, Conservation Groups) hereby request partial rehearing of the Division of Hydropower Administration and Compliance (DHAC) Staff’s “Order Finding Licensing of Hydroelectric Project Required,” 141 FERC ¶ 62,211 (Dec. 19, 2012) (Order). The Commission has not previously noticed this proceeding for intervention, so we concurrently file a Motion to Intervene.

We support the Order’s finding that La Grange is subject to the Commission’s mandatory licensing jurisdiction based on its location on a navigable waterway and occupation of federal lands. However, we disagree with the Order’s finding that La Grange is not used by the Modesto and Turlock Irrigation Districts (Districts) to re-regulate flows from the Don Pedro Project.

We also disagree with the Staff’s deferral of the “determination whether the La Grange Project might also require licensing as part of a complete unit of development with the Don Pedro Project.” Order, p. 19. How the Commission intends to regulate La Grange is integral to the Don Pedro relicensing which is underway. For example, to date Office of Energy Projects staff has rejected requests for fish passage studies at Don Pedro Dam because La Grange Dam is the terminal barrier to fish passage. As a result of the Order, La Grange Dam is now subject to compliance with whatever fish passage requirements may apply under the Federal Power Act (FPA), and the possibility of fish passage at La Grange raises the issue of whether the new license for Don Pedro should require fish passage. The Districts have just filed their Initial Study Report for the Don Pedro relicensing (*see* eLibrary no. 20130117-5086 *et seq.*), and are due to file the final license application in April 2014, so it is important that the Commission provide clarity as to the future of La Grange as soon as possible.

BACKGROUND

The La Grange Complex was completed in 1893. Turlock Irrigation District (TID) installed a powerhouse at the project in 1924. In 1989 TID replaced the turbine generating units at the powerhouse. The powerhouse has a capacity of approximately 5 megawatts and is connected to the interstate grid. The La Grange Dam does not have any fish passage facilities and is the terminal barrier to fish passage on the Tuolumne River.

On June 10, 2011, the National Marine Fisheries Service (NMFS) requested that Commission Staff review whether La Grange was subject to the Commission's mandatory licensing jurisdiction under Part I of the Federal Power Act (FPA). *See* eLibrary no. 20110610-5160.

On July 26, 2011, DHAC Staff requested that TID provide information for purposes of the Commission's jurisdictional review. *See* eLibrary no. 20110728-0006. TID responded on October 11, 2011. *See* eLibrary nos. 20111012-0038, -0039 and -0040.

Between October 2011 and December 2012, DHAC Staff conducted the jurisdictional review. It requested and obtained additional information from TID regarding the operations of La Grange and the Don Pedro Project. On May 29, 2012, DHAC issued a memo that found that the Tuolumne River is navigable at La Grange. *See* eLibrary nos. 20120529-3031, 20120529-0020 (Navigability Report).

Several stakeholders contributed to the record in this proceeding. NMFS supplemented the record with information regarding the La Grange Reservoir's occupation of lands administered by the Bureau of Land Management, and other matters. *See* eLibrary nos. 20111018-5030; 20111103-0005; 20111215-5253; 20120413-5048 and 20121004-5020. The California Department of Fish and Game¹ supplemented the record with information regarding navigability. *See* eLibrary no. 20120924-5012. The Conservation Groups supplemented the record with information regarding the Districts' use of La Grange to re-regulate flow releases from and make required instream flows for the Don Pedro Project. *See* Conservation Groups' Comments, eLibrary no. 20111118-517. Tuolumne River Preservation Trust and California Sportfishing Protection Alliance commented on the Navigability Report, and Tuolumne River Preservation Trust supplemented the record on navigability of the Tuolumne River at La Grange. *See* eLibrary nos. 20120802-5071 and 20121003-5015.

On December 19, 2012, DHAC Staff issued the Order, which found that La Grange is subject to the Commission's mandatory licensing jurisdiction based on the navigability of the Tuolumne River at La Grange and La Grange Reservoir's occupation of federal lands.

¹ The Department of Fish and Game has since been re-named the Department of Fish and Wildlife.
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MOTION TO INTERVENE

Pursuant to 18 C.F.R. §385.214, American Rivers, American Whitewater, the California Sportfishing Protection Alliance, California Trout, Central Sierra Environmental Resource Center, Friends of the River, Golden West Women Flyfishers, Northern California Council Federation of Fly Fishers, Trout Unlimited, and Tuolumne River Preservation Trust each moves to intervene in this proceeding. This motion is timely because the Commission has not yet issued a public notice soliciting motions to intervene in this proceeding. As described below, each of the Conservation Groups has significant interests that will be affected by the outcome of this proceeding.

The Conservation Groups have been involved in this proceeding to date, as well as the related Don Pedro relicensing. We raised the issue of La Grange's jurisdiction and how it would affect the Don Pedro relicensing in our comments on the Proposed Study Plan (PSP) for the Don Pedro Relicensing. We argued that La Grange should be included in the Don Pedro license as part of the complete unit of development because it is used and useful in the operation of the Don Pedro Project, both for making minimum flow releases and re-regulating Don Pedro releases. *See* Conservation Groups' PSP Comments, eLibrary nos. 20111024-5102 (Oct. 24, 2011) (Don Pedro docket), 20111118-5171 (Nov. 11, 2011) (La Grange docket), pp. 9-13. We argued that a finding of jurisdiction would affect the environmental analysis and development of protection, mitigation, and enhancement measures for the Don Pedro license. *See id.*, p. 4. As such, we argued that the approved study plan should provide study results that were consistent with the jurisdictional determination, whatever it turned out to be. *See id.*

In addition, the Conservation Groups have entered evidence into the record for the jurisdictional proceeding. For example, the Order cited the Tuolumne River Preservation Trust's use of the Tuolumne River through La Grange for its Paddle to the Sea event as evidence of the navigability of this reach. *See* Order, ¶ 18.

As shown in the descriptions of the individual groups, the groups have similar, but not identical interests. Inclusion of each group as a party will ensure that the public's interest in the non-development uses of the Tuolumne and San Joaquin watersheds, e.g., fish and wildlife and recreation, are represented. The Conservation Groups have coordinated their strategies and filings to the maximum extent possible in the Don Pedro relicensing and will endeavor to do the same in this proceeding. Thus, the inclusion of all the Conservation Groups as parties will not interfere with the efficient conduct of this proceeding.

American Rivers is a national non-profit organization working to protect and restore rivers and streams for the benefit of people, fish, and wildlife. Since 1973, American Rivers has helped protect and restore more than 150,000 miles of rivers through advocacy, science, and on-the-ground projects with local partners. American Rivers has offices across the country, including Berkeley and Nevada City, and more than 100,000 supporters, members, and volunteers nationwide. Members of American Rivers enjoy the Tuolumne and San Joaquin Rivers for angling, boating, swimming, and hiking.

American Whitewater is a national non-profit organization with a mission “to conserve and restore America’s whitewater resources and to enhance opportunities to enjoy them safely.” American Whitewater represents a broad diversity of individual whitewater enthusiasts, river conservationists, and more than 5,000 members and 100 local paddling club affiliates across America. The organization is the primary advocate for the preservation and protection of whitewater resources throughout the United States. Members of American Whitewater boat in river reaches affected by La Grange and the Don Pedro Project.

California Sportfishing Protection Alliance (CSPA) is a non-profit, public benefit fishery conservation organization incorporated in 1983 to protect, restore, and enhance the state’s fishery resources and its aquatic ecosystems. CSPA works to ensure that public fishery resources are conserved to enable public sportfishing activity. As an alliance, CSPA represents over 1,000 members that reside in California. Since its inception, CSPA has aggressively advocated for the conservation of the fishery resources throughout the state in proceedings before local, state, and federal government entities. CSPA is concerned about the prolonged and extensive decline of the state’s fish species and works with many government agencies to reverse these declines.

California Trout is a statewide conservation organization whose purpose is to protect and restore California’s wild trout and steelhead waters. California Trout’s home office is located in San Francisco with field offices in Mt. Shasta, McKinleyville, Mammoth Lakes, South Lake Tahoe, and San Diego. Founded in 1970, California Trout is supported by recreational anglers and other citizens concerned about the health of California’s rivers. California Trout has approximately 7,500 individual members and fifty affiliate local angling clubs representing approximately another 10,000 persons.

The Central Sierra Environmental Resource Center (CSERC) is a local region conservation organization with a mission to protect water, wildlife, and wild places. CSERC’s home office is located in Twain Harte, California, northwest of Yosemite National Park. CSERC was founded in 1990 and has been deeply involved in FERC relicensing projects, watershed collaboratives, water quality testing of forest streams, and a wide range of water projects. CSERC has 700 members, primarily from Northern California.

Friends of the River is a nonprofit 501(c)3 organization headquartered in Sacramento, California, working to protect, preserve, and restore California rivers and streams for both environmental and recreational purposes. Friends of the River has approximately 3,500 members in the State of California.

Golden West Women Flyfishers (GWWF) is a thirty-year-old angling club with approximately 135 members throughout Northern and Central California. GWWF has been very active in conservation projects throughout California over the past several years and is affiliated with the Conservation Network of the Northern California Council, Federation of Fly Fishers.

The Northern California Council, Federation of Fly Fishers (Council), is a large regional chapter of the national organization known as Federation of Fly Fishers which supports

Conservation, Education, and Restoration. There are 30 clubs within the Council and approximately 1,200 individual members.

Trout Unlimited (TU) is a national non-profit conservation organization with California offices in Berkeley, Fort Bragg, Salinas, and Truckee. TU is the nation's largest coldwater fisheries conservation organization. It has approximately 150,000 members nationwide and is dedicated to protecting, conserving, and restoring North America's coldwater salmonid and trout fisheries and their watersheds. In California alone, TU has more than 10,000 members. TU members and the general public use and enjoy the Tuolumne River for recreational and aesthetic purposes including, but not limited to, fishing, viewing, and enjoyment of the outdoors. TU members, along with the general public, have significant recreational interests attached to healthy trout populations and habitat in the Tuolumne and San Joaquin Rivers.

The Tuolumne River Preservation Trust (Trust) is a non-profit organization that works to promote the stewardship of the Tuolumne River and its tributaries to ensure a healthy watershed. The Trust was a party signatory to the 1995 Agreement and has actively participated thereafter in Tuolumne River Technical Advisory Committee. The Trust is currently implementing projects to improve fisheries and habitat on the lower Tuolumne River. As noted above, the Trust also is host to the annual "Paddle to the Sea" paddling event on the Tuolumne River. The Trust has members throughout the Tuolumne watershed and offices in Sonora, Modesto, and San Francisco, California.

REQUEST FOR REHEARING

I. STATEMENT OF ISSUES

Issue 1. Is the Order's Finding that La Grange Is Not Used to Re-Regulate Releases from the Don Pedro Project Based on Substantial Evidence?

We intend to rely on the following legal authorities for this issue.

Statutes

5 U.S.C. § 556(d)

5 U.S.C. § 557

5 U.S.C. § 706(2)(A)

16 U.S.C. § 825l

Regulations

Fed. Rules Evid. 702

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U.S. Supreme Court Cases

Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156 (1962)

Daubert v. Merrell Dow Pharmaceuticals, 113 S.Ct. 2786 (1993)

Motor Vehicle Manufacturers Association v. State Farm Insurance, 463 U.S. 29 (1983)

Circuit Court Cases

Consolidated Hydro, Inc. v. FERC, 968 F.2d 1258 (D.C. Cir.1992)

FPL Energy Me. Hydro LLC v. FERC, 287 F.3d 1151 (D.C. Cir. 2002)

Mills v. FERC, 976 F.2d 1381 (11th Cir. 1992)

Northeast Utils. Serv. Co. v. FERC, 993 F.2d 937 (1st Cir.1993)

United Steelworkers of America et al. v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980)

U.S. Dept. of Interior v. FERC, 952 F.2d 538 (D.C. Cir. 1992)

Issue 2. Should La Grange be included in the New License for the Don Pedro Project as part of the complete unit of development?

We intend to rely on the following legal authorities for this issue.

Statutes

16 U.S.C. § 796(11)

16 U.S.C. § 797(e)

16 U.S.C. § 803(a)(1)

Circuit Court Cases

Chippewa and Flambeau Improvement Company v. FERC, 325 F.3d 353 (D.C. Cir. 2003)

FERC Orders

Big Bear Area Regional Wastewater Agency, 33 FERC ¶ 61,115 (1985)

Hudson River-Black River Regulating District, 100 FERC ¶ 61,319 (2002)

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N.Y. State Elec. & Gas Corp., 56 FERC ¶ 61,144 (1991)

Orange and Rockland Utilities, 44 FERC ¶ 61,869 (1988)

Pyramid Lake Paiute Tribe of Indians, 12 FERC ¶ 61,150 (1980)

Union Water Power Co., 73 FERC ¶ 62,296 (1995)

II. ARGUMENT

A. The Order's Finding that La Grange Is Not Used to Re-Regulate Releases from the Don Pedro Project Is Not Based on Substantial Evidence.

The Order finds that “the amount of available storage in La Grange Reservoir is not sufficient to re-regulate releases from the Don Pedro Project reservoir. Therefore, the La Grange Project does not require licensing as a re-regulating reservoir for the Don Pedro Project.” Order, p. 20.

This finding is not based on substantial evidence as required by FPA section 313(b), 16 U.S.C. § 825l(b).

The Commission's findings of fact are conclusive only if supported by substantial evidence. See 16 U.S.C. § 825l; *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002) (citing *Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C.Cir.1992); *Mills v. FERC*, 976 F.2d 1381, 1383 (11th Cir. 1992). The courts will “defer to the agency's expertise ... so long as its decision is supported by ‘substantial evidence’ in the record and reached by ‘reasoned decisionmaking,’ including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made.” *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 944 (1st Cir.1993) (citation omitted); *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 167 (1962); *U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 543 (D.C. Cir. 1992); see also 5 U.S.C. § 706(2)(A).

As required by FPA section 313(b) and Administrative Procedures Act (APA) sections 556(d), 557, and 706(2), substantial evidence is record evidence which is expressly found to be (A) reliable and probative for the purpose of supporting a finding and (B) superior substantial evidence is record evidence which is expressly found to be: (A) reliable and probative for the purpose of supporting a finding and (B) superior to competing evidence with respect to a given finding. See Fed. Rules Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993); *Motor Vehicle Manufacturers Association v. State Farm Insurance*, 463 U.S. 29 (1983); *Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962). Thus:

We noted in [a prior case] that we do not pretend to have the competence or the jurisdiction to resolve technical controversies in the record, or ... to second-guess an agency decision that falls within a ‘zone of reasonableness.’ Rather, our task is to

‘ensure public accountability,’ by requiring the agency to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument.

United Steelworkers of America et al. v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980) (internal citations omitted).

Under APA section 706(2), 5 U.S.C. § 706(2), a court will “hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;... (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute....” While the scope of judicial review is “narrow and a court is not to substitute its judgment for that of the agency,” the agency “...must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choices made.’” *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Insurance*, 463 U.S. 29, 43 (1983), citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

As stated in our comments on the PSP for the Don Pedro relicensing, the flow discharge data for the District’s respective canals and the Tuolumne River at La Grange shows that the Districts operate the canal gates and use La Grange Reservoir to regulate peaking flows. See Conservation Groups’ PSP Comments, *supra*, pp. 11-13.

TID has stated, “[t]he limited volume of the La Grange pool only allows it to be used in the role of balancing the minute-to-minute allocation of flows between the two Districts for water supply purposes.” See, e.g., TID, “Response to Request for Information on Don Pedro (FERC No. 2299) and La Grange Operations,” (Sept. 5, 2012). But TID subsequently provided additional information that shows the Districts time daily releases from the Don Pedro Powerhouse to coincide as much as possible with on-peak periods:

The amount of water to be released from Don Pedro is based on the amounts needed for irrigation and M&I use. Once this water supply demand is established, those releases may be shaped over a 24-hour period to provide somewhat higher flows during the peak-demand period than during the off-peak period.

TID, “Response to Request for Information on Don Pedro (FERC No. 2299) and La Grange Operations,” eLibrary no. 20121203-0022 (Dec. 3, 2012), p. 5. TID stated further: “[o]nce the amount of water for the next day is determined, the releases are scheduled out over the entire day. Prudent operation obligates the Districts to try to deliver as much of the irrigation and M&I water as possible within the on-peak period.” *Id.*, p. 8.

In order to evaluate the extent to which the Districts “shaped” releases from Don Pedro to maximize generation during on-peak periods, we evaluated the hydrology data² submitted by TID. *See* TID, “Response to Request for Information”, e-Library no. 20121017-5078 (Oct. 17, 2012). For ease of graphic representation, we converted TID’s Excel file into DSSVue format.³ In addition to each of the ten columns provided in TID’s hydrology data (*see* footnote 2, *supra*), we added an eleventh dataset for the sum of TID’s and MID’s respective canals (Column H + Column I).

Based on our review, we reached the following conclusions:

- The Districts re-regulate releases from Don Pedro Powerhouse on a planned and consistent basis.
 - While the Districts do not re-regulate releases from Don Pedro Powerhouse using La Grange Reservoir storage, they clearly do re-regulate releases from Don Pedro Powerhouse by varying the flow from La Grange Reservoir through the intakes to the Districts’ respective canals.
 - La Grange Reservoir provides head, not storage, for the re-regulation of releases from Don Pedro Powerhouse.
1. The Districts re-regulate releases from the Don Pedro Powerhouse on a planned and consistent basis.

Conservation Groups performed a series of analyses of the hourly data for the calendar years 2009-2011 provided by TID in its October 17, 2012 Response to AIR, *supra*.

On the coarsest level, we averaged the Don Pedro release at each hour of the day. We found that the average Don Pedro release at 2 p.m. (representing on-peak demand) during the years 2009-2011 was 2784 cfs. We found that the average release for 2 a.m. (representing off-

² This hydrology data provided in Excel format hourly data for the following features of the Don Pedro Project and the operation of La Grange Dam and appurtenant facilities:

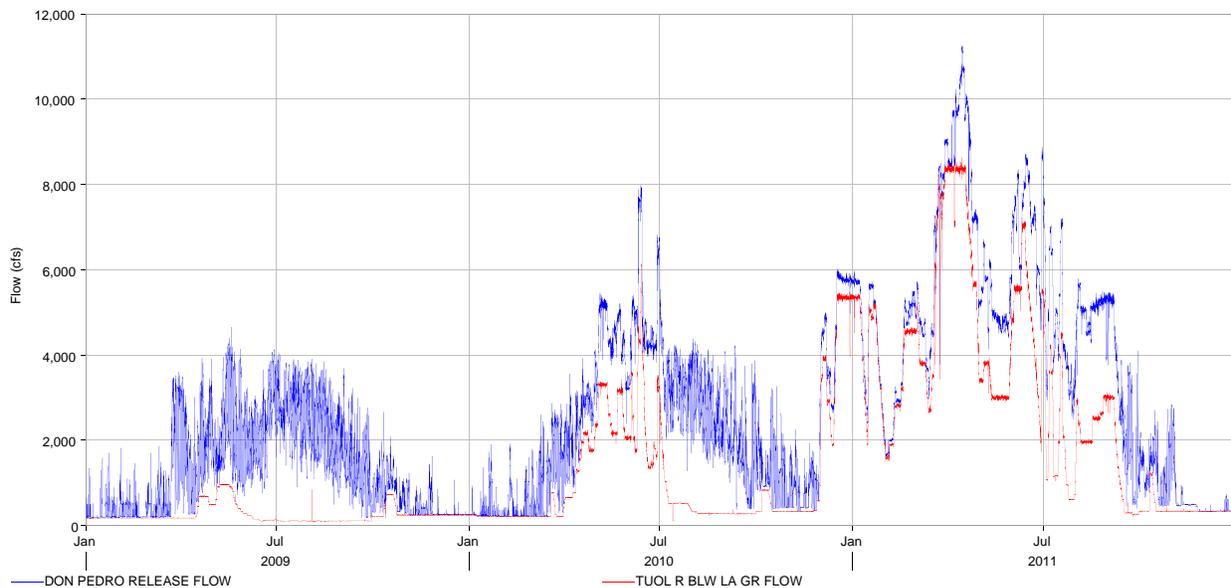
- Total Don Pedro Release (cfs) (Column G)
- TID Canal (cfs) (Column H)
- MID Canal (cfs) (Column I)
- Flood Management Release (cfs) (Column J)
- Minimum Flow Requirement (cfs) (Column K)
- Minimum Flow Requirement Plus Buffer (cfs) (Column L)
- River Flow at La Grange Gauge (cfs) (Column M)
- La Grange Pool Elevation (feet) (Column N)
- La Grange Powerhouse Release (cfs) (Column O)
- La Grange Powerhouse Generation (MW) (Column P)

³ DSSVue is a publicly available Army Corps format that is frequently used in FERC proceedings, and is incorporated for instance into the District’s water operations model.

peak demand) during the years 2009-2011 was 2411 cfs. In order to eliminate the effect of high volumes of flood flows in 2011, we then repeated the analysis for the years 2009 and 2010 only. We found that the average Don Pedro release at 2 p.m. during the years 2009-2010 was 2079 cfs. We found that the average release for 2 a.m. during the years 2009-2010 was 1562 cfs. As a third level of analysis we repeated the analysis for 2009-2010 in the irrigation season (March 15 - October 15). We found that the average Don Pedro release at 2 p.m. during the irrigation season in years 2009-2010 was 2834 cfs. We found that the average release for 2 a.m. during the irrigation season in years 2009-2010 was 2105 cfs.

The daily range of fluctuation is easily seen when it is represented graphically. Using DSSVue, we graphed the Don Pedro release for the years 2009-2011 (Figure 1). On the same graph, we also display the flow at the La Grange Gauge downstream of La Grange Dam⁴:

Figure 1: Don Pedro Release and La Grange Flow 2009 – 2011

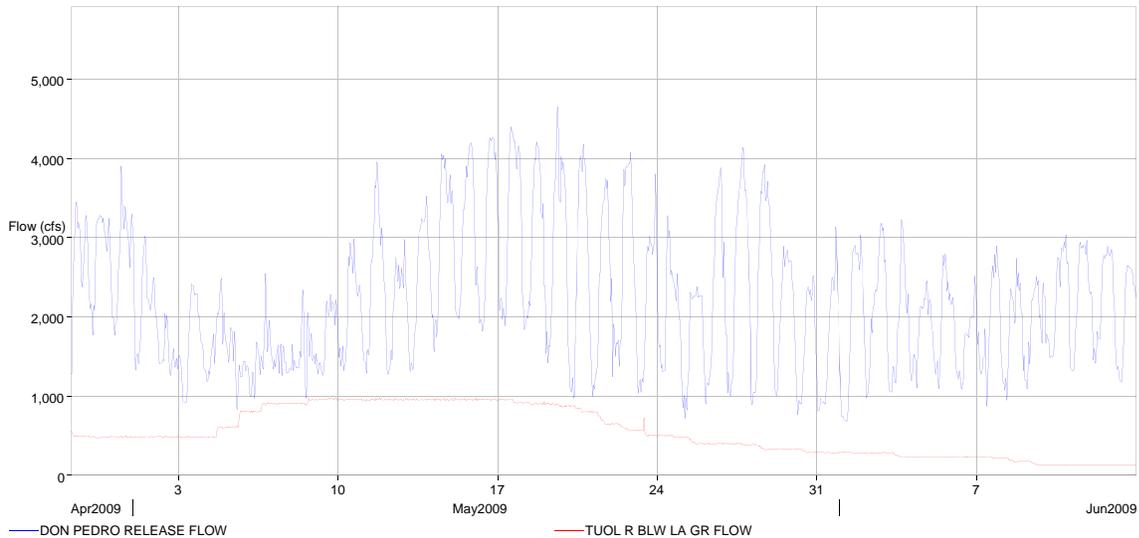


The vertical mass in the blue output (Don Pedro release) for almost the entire 2009-2010 period shows the daily on-peak/off-peak cycling that is evident in the coarse analysis of average flows, as described above. There is almost no variation in daily flow in the Tuolumne River at the La Grange Gauge (shown in red), with some small exceptions during spill periods, particularly in 2011.

⁴ La Grange Gauge is located on the lower Tuolumne River 0.45 miles downstream of La Grange Dam.
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Figure 2 below shows detail from Figure 1, for the period April 29 – June 13, 2009.

Figure 2: Don Pedro Release and La Grange Flow April 29 – June 13, 2009



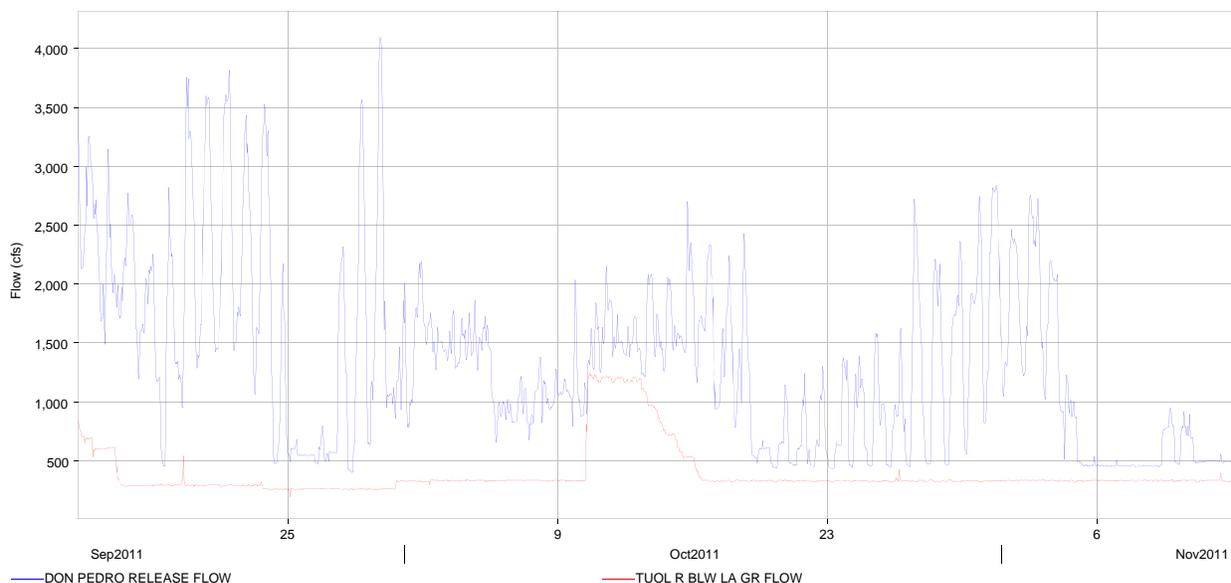
At 7 a.m. on May 20, 2009, the release was 972 cfs. At 2:00 p.m. the same day the release from Don Pedro was 4031 cfs, an increase of over 3000 cfs in less than 12 hours. By 3:00 a.m. on May 21, the release had cycled back down to 998 cfs. This is a classic pattern of increasing release to match on-peak periods. During the entire April 29 through June 13, 2009 period displayed on the graph, the flow at the La Grange Gauge (red line) shows almost no variation. This analysis clearly shows that releases from Don Pedro are being regulated so that there is *de minimus* fluctuation at the La Grange Gauge.

TID claims that “the amount of release that can be moved into the on-peak period is tightly constrained.” TID’s Dec. 3, 2012 AIR Response, *supra*, p. 8. However, TID’s data shows that the release from Don Pedro as shown in Figure 2 routinely doubles, and in some cases quadruples, during on-peak periods. For example, the flow variation through Don Pedro Powerhouse on May 20, 2009 was over 3000 cfs.

From early December 2010, through mid-September 2011, the Districts made “flood management releases” to the lower Tuolumne River. During this time period, the Districts did not cycle the Don Pedro Powerhouse. However, when the Districts ceased flood management releases in mid-September, they resumed the cycling pattern through Don Pedro Powerhouse.

Figure 3 provides detail from Figure 1, for the time period September 14 – November 12, 2011.

Figure 3: Don Pedro Release and La Grange Flow Sept. 14 – Nov. 12, 2011



Not only during the September 16 – November 1 period when flows at the La Grange Gauge were at the FERC-required minimum (plus buffer), but also during the October 2011 salmon up-migration pulse flow, the Districts cycled Don Pedro Powerhouse releases. Cycling even continued in smaller magnitude on November 9 and 10, when MID called for several hundred acre-feet over and above the average daily 140-170 cfs that it presumably uses to meet M&I demand from Modesto Reservoir.

In summary, the Districts routinely and systematically re-regulate releases through Don Pedro Powerhouse in order to match releases to on-peak time periods. The Districts generate at Don Pedro Powerhouse during on-peak hours as much as their overall system allows, within the acknowledged constraints of meeting instream flow requirements, providing water supply, and providing flood control.

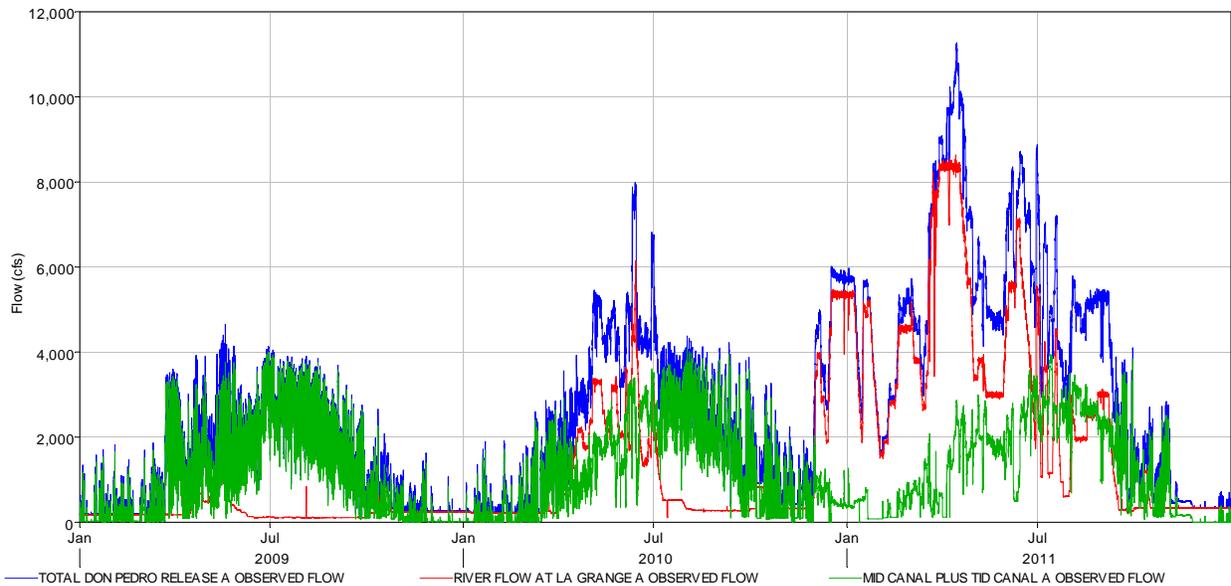
2. The Districts re-regulate releases from Don Pedro Powerhouse by varying the flow from La Grange Reservoir through the intakes to the Turlock and Modesto Canals.

The Order states, “Commission staff also examined whether the La Grange Dam is used to re-regulate flows from the Don Pedro Project.” Order, ¶ 40. It goes on to conclude, “that the amount of available storage in La Grange Reservoir is not sufficient to re-regulate releases from the Don Pedro Project Reservoir. Therefore, the La Grange Project does not require licensing as a re-regulating reservoir for the Don Pedro Project.” *Id.*, ¶ 44.

The Order does not indicate that DHAC Staff investigated our claim that, “[b]ased on our review of flow discharge data at the Districts’ respective canals and data at the La Grange Gauge it appears that the Districts manipulate the gates to the canals at La Grange, and Turlock and Modesto reservoirs to regulate peaking flows.” See Conservation Groups’ Don Pedro PSP Comments, *supra*, p. 11. The Order does not explain why DHAC Staff did not undertake such investigation. As described below, TID’s hydrology data confirms that the Districts use the canal gates to re-regulate releases from the Don Pedro Powerhouse.

Once again using DSSVue graphic output, we took TID’s 2009-2011 data and plotted the entire period for Don Pedro Release (blue) and La Grange Flow (red), and added combined flow in the Districts’ respective canals (green). The result is shown in Figure 4 below.

Figure 4: Don Pedro Release, La Grange Flow, and Combined TID-MID canal flow 2009-2011



During the periods when the Districts are cycling the Don Pedro powerhouse releases to increase on-peak generation, the pattern of canal flows and the pattern of Don Pedro releases track each other almost exactly. Figure 5 provides detail from Figure 4 for the time period April 29 – June 13, 2009.

Figure 5: Don Pedro Release, La Grange Flow, and Combined TID-MID canal flow April 29 – June 13, 2009.

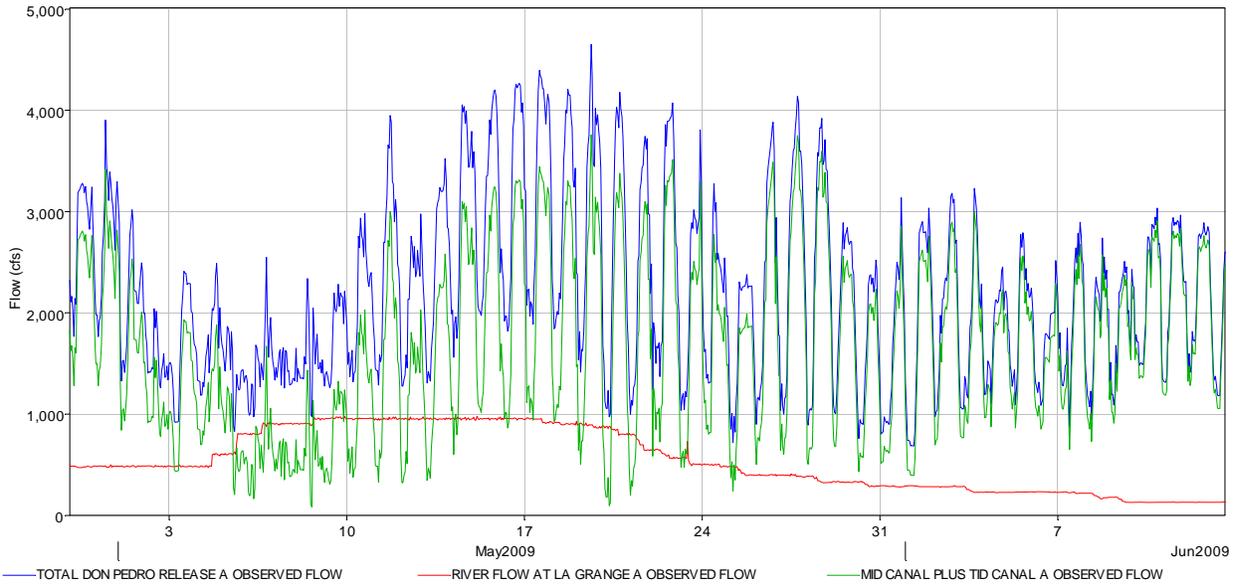
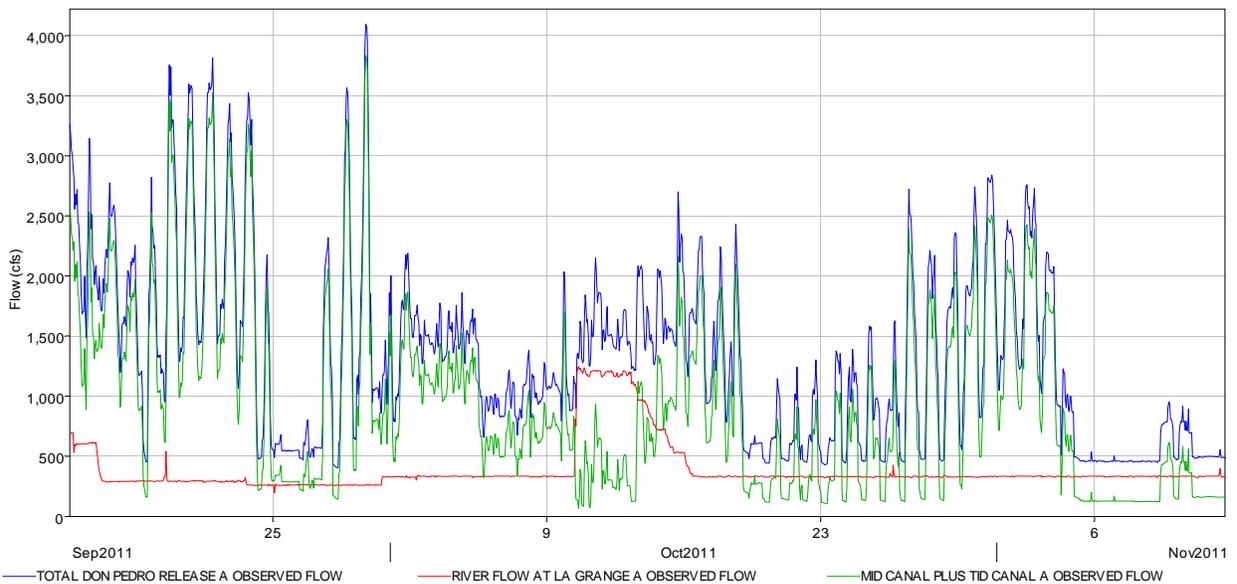


Figure 5 confirms that the daily combined flows from the Districts’ canals flows track the daily Don Pedro releases almost exactly, while the daily flow at the La Grange Gauge remains almost without fluctuation.

The pattern holds during the period from mid-September through October 2011, after the Districts ceased flood management releases to the lower Tuolumne, as shown in Figure 6 below.

Figure 6: Don Pedro Release and La Grange Flow Sept. 14 – Nov. 12, 2011



There is a final subset of releases from Don Pedro in January and February, in both 2009 and 2010, in which there appear to be many days on which both Don Pedro releases and the TID canal cycled with higher flows during on-peak hours. This appears to contradict TID's assertion in its December 3, 2012 Response to AIR:

Again, water is scheduled for release from Don Pedro primarily to meet irrigation demand, M&I demand, and instream flow requirements during the system summer peak period, not electrical system demand. TID and MID experience a much smaller electrical system peak in January. During this period, the only flows being released from Don Pedro are for instream flow purposes (2009, 2010) or pre-flood releases (2011). In either case, there was no peaking operation at Don Pedro.

TID December 3, 2012 Response to AIR, *supra*, p. 6.

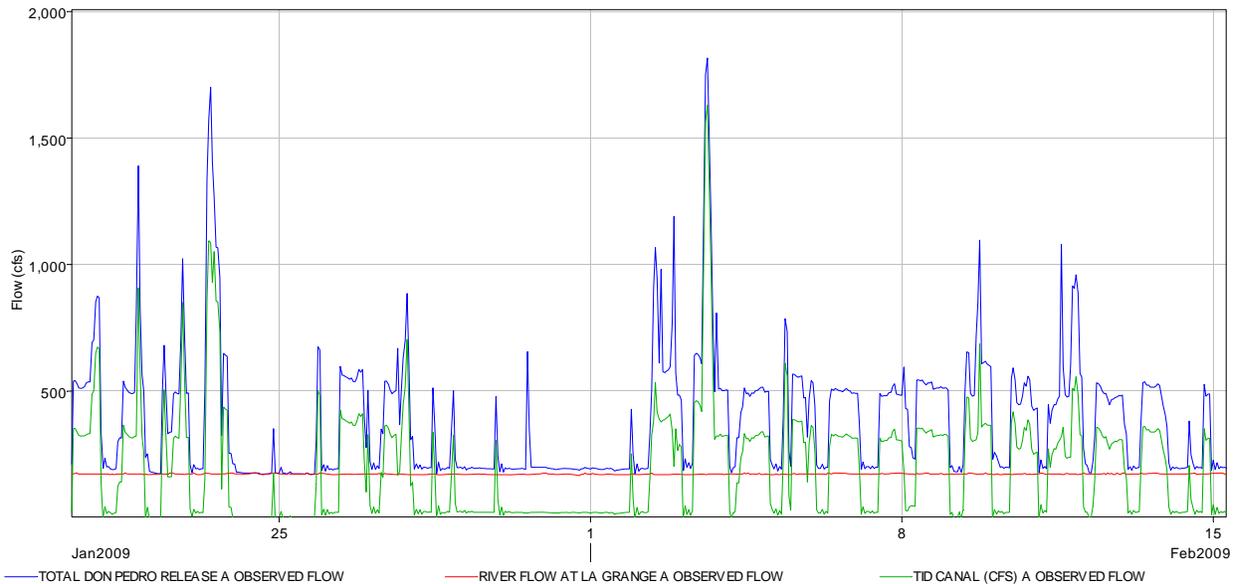
We do not dispute that the Districts release water from Don Pedro for multiple purposes. However, we do dispute the relevance of this fact to the Commission's jurisdictional determination. As stated in Section II.B, *infra*, the Commission's jurisdiction lies at Don Pedro and similarly at La Grange because they are used and useful for power generation.

While we do not dispute that the Districts release water for multiple purposes, there do appear to be some periods when releases are made primarily for peak power generation. In January and February (in the non-irrigation season), there is no reason to schedule releases to the TID canal to meet irrigation demand. Further, there is no M&I demand from the TID canal. However, subject to some daily exceptions, during late January and early February 2009 and 2010, releases during on-peak hours from Don Pedro coincide with increases in flow in the TID canal. The *scheduling* of releases from Don Pedro thus appears to be determined by an effort to generate at Don Pedro Powerhouse during on-peak times of day, using the TID canal to re-regulate Don Pedro releases. For example, on January 27, 2009, release from Don Pedro at 3 a.m. was 191 cfs, and TID canal flow was 17 cfs; at 8 p.m., release from Don Pedro was 886 cfs and TID canal flow was 704 cfs; at 12 a.m. the morning of January 28, Don Pedro release was 192 cfs and TID canal flow was down to 11 cfs.⁵ We show the January 20 – February 15, 2009 period in Figure 7 below.⁶

⁵ A similar pattern occurs in 2010. *See e.g.* January 22, 2010. At 3 a.m., Don Pedro release was 212 cfs and TID Canal flow was 0 cfs; at 4 p.m., Don Pedro release was 1062 cfs and TID Canal flow was 849 cfs; at 12 a.m. on January 23, Don Pedro release was 233 cfs and TID Canal flow was 17 cfs.

⁶ Note that for Figure 7 only, the blue line continues to represent Don Pedro release, the red line continues to represent flow at La Grange Gauge, but the green line represents TID Canal flow only (not combined MID and TID canal flow, as in Figures 4-6).

Figure 7: Don Pedro Release, La Grange Flow, and TID Canal Flow, January 20 – February 15, 2009



As we concluded in our comments on the PSP for the Don Pedro relicensing, “[i]t does not appear the Districts can regulate peaking flows from Don Pedro without the La Grange facilities.” Conservation Groups’ PSP Comments, *supra*, p.13.

3. La Grange Reservoir provides head, not storage, for the re-regulation of releases from Don Pedro Powerhouse.

According to TID, “... the LGDD [La Grange Diversion Dam] was constructed circa 1893 for the purpose of raising the water level of the Tuolumne River to allow diversion of water from the river into the two Districts’ canal systems by means of gravity.” See TID’s Dec. 3, 2012 AIR Response, *supra*, p. 4. So in sum, La Grange Dam and the head provided by the level of La Grange Reservoir provide the Districts the means by which they can accurately control the magnitude of flows into the TID and MID canals, and through operation of the gates, regulate the releases from Don Pedro. As discussed below, this means that the Districts’ operation of the La Grange facilities, including the dam and reservoir which provide necessary head, are used and useful for power generation at both the Don Pedro Project and La Grange.

B. La Grange Should Be Included in the New License for the Don Pedro Project as Part of the Complete Unit of Development.

The Order defers making a determination “whether the La Grange Project might also require licensing as part of a complete unit of development with the Don Pedro Project” based on its use to release minimum flows from the Don Pedro Project into the lower Tuolumne River. Order, ¶ 39.

We request that the Commission reconsider DHAC Staff's decision to defer this determination, and issue a determination regarding how it will license La Grange without delay. Delay may prevent timely inclusion of La Grange in the new license for the Don Pedro Project – a result that we believe is contrary to the public interest.

The evidence shows that La Grange is used and useful to the Don Pedro Project. As discussed below, we believe La Grange's inter-relatedness and usefulness to the Don Pedro Project, in addition to the common ownership, weighs in favor of regulating La Grange and the Don Pedro Project under a single license. Prompt action by the Commission to clarify that La Grange will be included in the license for the Don Pedro Project will allow the Commission, resource agencies, and stakeholders to address the Districts' coordinated operation of La Grange and the Don Pedro Project in a comprehensive manner. A prompt decision to include La Grange in the Don Pedro license would also limit delays in issuing the new license for Don Pedro by resolving lingering uncertainty regarding the sufficiency of the approved study plan and proposed scope of environmental analysis, and avoid inefficiencies associated with a sequential and potentially duplicative proceeding to license La Grange separately.

La Grange is subject to licensing as part of the Don Pedro Project if it is used and useful to the Project. Under FPA section 4(e),⁷ the Commission licenses hydropower “project works,” which are defined in Section 3(12) of the FPA as the physical structures of a “project,” which in turn is defined in Section 3(11) of the FPA as a “complete unit of improvement or development” including:

All dams and appurtenant works and structures (including navigation structures) ... and all storage, diverting or forebay reservoirs ... all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit⁸

“The statutory test for dams and reservoirs that are not directly connected to the part of a unit of development that contains the generating facilities is whether they are necessary or appropriate in the maintenance and operation of such unit.” Order, p. 17, n. 71 (*citing Union Water Power Co.*, 73 FERC ¶ 62,296 at 61824 n. 13 (1995), *Pyramid Lake Paiute Tribe of Indians*, 12 FERC ¶ 61,150 at 61,134 (1980)); *see also Big Bear Area Regional Wastewater Agency*, 33 F.E.R.C. ¶ 61,115, 61,245 (1985). Because the licensing of appurtenant works that meet the statutory definition is a mandatory statutory requirement, it cannot be waived.⁹

As we stated in our comments on the PSP, the Districts use La Grange to make minimum flow releases from Don Pedro to the lower Tuolumne. The Districts' general practice is to make all or part of these releases through the La Grange Powerhouse except during times of spill. *See*

⁷ 16 U.S.C. § 797(e).

⁸ 16 U.S.C. § 796(11).

⁹ *See N.Y. State Elec. & Gas Corp.*, 56 F.E.R.C. ¶ 61,144, 61,528 n.14 (1991).
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TID December 3, 2012 AIR Response, Section 3.6, pp. 8-9. The Order raises, but does not resolve, whether this function requires that La Grange be licensed as part of the complete unit of development for Don Pedro:

Based on these facts, it could be argued that the La Grange Dam, reservoir, powerhouse, and related release structures are used to release minimum flows for fish from the Don Pedro Project into the lower Tuolumne River. As such, they could be considered structures that are necessary or appropriate in the maintenance and operation of the Don Pedro Project, and thus would be part of the complete unit of development comprising the Don Pedro Project.

Order, ¶ 37.

During the study dispute technical conference for the Don Pedro relicensing, the Districts confirmed that they do not simply pass through the Don Pedro minimum flow releases at La Grange; rather, they exercise discretion in how to release those flows through the La Grange facilities:

The Districts do make decisions at La Grange of how to best control [water that is not diverted and instead is released downstream]. If you're a responsible water resource manager, you're controlling the water that comes to your dam and that has nothing to do with Don Pedro; it has to do with the efficient operation at La Grange.

And depending on the condition of the facilities at La Grange at any particular time, the Districts will decide, you know, once it knows how much water is coming, where that water should be. Do you divert X amount and there might be Y left over?

The Districts will want to -- the District operators will want to make a decision about the best way to release that water.

That's not -- that's a non-jurisdictional facility. It's not subject to FERC's jurisdiction. The Districts will decide whether to release it. Say if they have a small powerhouse there and if it's -- will they release it at the powerhouse? Will they release it at the gates adjacent to the powerhouse on the TID side? Will they release it over at the MID side at a gate release over there? Depends on the condition of the facilities at the time and how much water is there.

Don Pedro Study Dispute Technical Conference Transcript, eLibrary no. 20120417-4020, p. 35. Because the Districts affirmatively operate the facilities at La Grange to make flow releases required by the terms of the Don Pedro license, La Grange is used and useful to operation of the Don Pedro Project, and indeed an integral part to the "complete unit of development." As such, it is subject to the Commission's mandatory licensing authority.

As discussed above, the Districts also use La Grange to re-regulate releases from the Don Pedro Project. The Order finds that "the amount of available storage in La Grange Reservoir is not sufficient to re-regulate releases from the Don Pedro Project reservoir. Therefore, the La

Grange Project does not require licensing as a re-regulating reservoir for the Don Pedro Project.” Order, ¶ 44. However, the Order does not recognize that the reservoir is not the only means by which La Grange Dam and Reservoir can be used to re-regulate flows. As described above, it is actually the Districts’ operation of the canal intakes, using head provided by La Grange Dam and Reservoir, that re-regulate releases from the Don Pedro Project.

The Order states that “releases are made from the Don Pedro Project to meet demand for irrigation water, minimum flow requirements for fishery purposes, and for flood control purposes.” Order, ¶ 40. As stated above, we dispute the relevance of this fact. Plainly the Districts release water from the Don Pedro Project for multiple purposes, not just peaking power generation. Jurisdiction lies at Don Pedro and similarly at La Grange because the facilities are used and useful to power generation. The Commission’s jurisdiction does not turn on the purpose of an instantaneous flow release; it turns on the use and usefulness of the project for power purposes across time.

The Commission has considerable discretion as to how it defines the complete unit of development for a given project. *See Chippewa and Flambeau Improvement Company v. FERC*, 325 F.3d 353, 357-58 (D.C. Cir. 2003). Further, the Commission has discretion as to how it licenses a complete unit of development, as noted by the Order: “although all parts of a complete unit of development must be licensed, they do not necessarily have to be included in a single license.” Order, p. 18, n. 73 (citing *Hudson River-Black River Regulating District*, 100 FERC ¶ 61,319 at 62,455 n. 8 (2002); *Orange and Rockland Utilities*, 44 FERC ¶ 61,869 n. 30 (1988)). While the Commission has discretion, it is required to exercise its discretion in a manner that best serves the public’s interest in a waterway. *See* 16 U.S.C. § 803(a)(1). In this case, a single license would better serve the public’s interest in protecting and enhancing non-developmental uses of the Tuolumne River and would also be more efficient in terms of the licensing process and the Commission’s ongoing regulatory oversight of both La Grange and the Don Pedro Project.

Unlike the precedents cited in the Order for the Commission’s authority to license different parts of a complete unit of development in different licenses, there is common ownership of La Grange and the Don Pedro Project. This common ownership means that the Districts already closely coordinate operations at La Grange and Don Pedro to optimize functions for multiple purposes. A single license would formalize coordinated operations and assure that they are best adapted to a comprehensive plan of development for the Tuolumne River.

Further, La Grange is only 2.6 miles below the Don Pedro Project, and both affect the same resources in the lower Tuolumne River. It makes sense from a scientific and administrative standpoint to address common resource issues in a single proceeding, especially since the Districts are liable for environmental compliance at La Grange and the Don Pedro Project. The Order will most likely result in delays to the Don Pedro relicensing regardless of whether La Grange is included in the new license because the Scoping Document¹⁰ and Study Plan

¹⁰ *See* eLibrary no. 20110725-3020.
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Determination¹¹ limited the approved study plan based on the assumption that La Grange was non-jurisdictional. Those decisions now must be reviewed. The Commission should take the time now to accommodate La Grange in the studies and environmental analysis for the Don Pedro relicensing, rather than establish a separate, subsequent proceeding.

For example, it would be more efficient to address fish passage and fish habitat at the projects in one study plan, rather than two. The Study Plan Determination rejected Study Request NMFS-3, “Request for Information or Study Effects of the Project and Related Activities on Fish Passage for Anadromous Fishes,” because La Grange Dam was the downstream barrier to fish passage on the Tuolumne River and La Grange was not jurisdictional:

As we stated in Scoping Document 2 in response to requests to consider project effects on fish passage, the Don Pedro Project does not block the upstream migration of anadromous fish because the upstream extent of anadromous fish in the Tuolumne River is currently limited to areas below La Grange dam.

La Grange dam is not a Commission-licensed facility under the FPA. Even though NMFS states they need to study all fish passage options now, the facts are clear. The unlicensed La Grange dam is the downstream barrier to the upstream migration of anadromous fish, and as a result, anadromous fish do not have access to areas upstream including to Don Pedro dam. Consequently, there is no nexus between the Don Pedro Project and direct effects on fish passage of anadromous fish.

Study Plan Determination, *supra*, p. 74.

This rationale has been negated by the Order. Now the Districts must file an application for license or exemption for La Grange, approval of which may be conditioned on environmental measures such as fish passage in order to comply with the FPA and federal environmental laws. This possibility raises the issue of whether fish passage studies at Don Pedro dam may also be necessary, as well as studies of anadromous fish habitat upstream of Don Pedro Reservoir. It would be more efficient to revise the approved study plan to provide for a fish passage study that addresses both dams, rather than a study of passage at Don Pedro Dam, followed by a study of passage at La Grange, and to provide for a single study of upstream habitat, since suitable habitat does not exist between Don Pedro and La Grange Dams.

If the Commission were to re-license the Don Pedro Project without La Grange and without considering fish passage at either dam, and passage were subsequently required at La Grange, then the Commission would need to reopen the Don Pedro license. The original Don Pedro license required additional study and specific reopener to address flows necessary to protect fish in the Tuolumne River. Procedures and disputes related to the requirement for reopener lasted for the term of the license. The Commission should provide more certainty as to what license conditions are necessary to protect fish in the Tuolumne River from day one of the new license for Don Pedro. Including La Grange in the new license for Don Pedro is the best

¹¹ See eLibrary no. 20111222-3041.
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way to assure that La Grange and Don Pedro will be best adapted to a comprehensive plan of development for fish and other uses of the Tuolumne River from the start of the new license.

CONCLUSION

We respectfully request that the Commission grant Conservation Groups party status in this proceeding. We also request that the Commission grant this limited request for rehearing and act quickly to determine that La Grange should be included in the new license for Don Pedro Project as part of the complete unit of development.

Dated: January 18, 2013

Respectfully submitted,



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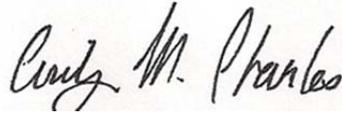
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CERTIFICATION OF SERVICE

**Turlock Irrigation District and Modesto Irrigation District,
Docket No. UL11-1-000 and Project No. P-2299-078**

I, Nicholas Niiro, hereby certify that I have this day served the foregoing document, "Conservation Groups' Motion to Intervene and Request for Partial Rehearing of Order Finding Licensing of Hydroelectric Project Required," by electronic mail, or first class mail if no email address has been provided, upon each person with an email address designated on the official service lists compiled by the Secretary in the P-2299-078 and UL11-1-000 dockets.

Dated: January 18, 2013

By:



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