UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Turlock Irrigation District and Modesto Irrigation District	**)** **)**	**Docket No. UL11-1-000**

TURLOCK AND MODESTO IRRIGATION DISTRICTS' REQUEST FOR REHEARING AND MOTION FOR STAY

Pursuant to the provisions of Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.713) and §313(a) of the Federal Power Act ("FPA") (16 U.S.C. § 825*l*(a)), Turlock Irrigation District ("TID") and Modesto Irrigation District ("MID") (collectively, the "Districts"), hereby request rehearing of the Order Finding Licensing Of Hydroelectric Project Required (141 FERC ¶ 62,211) issued by the Director, Division of Hydropower Administration and Compliance, on December 19, 2012 ("Director's Order" or "Order"), wherein the Director determined that the Commission possessed mandatory licensing jurisdiction under Part I of the FPA over the La Grange Project ("La Grange" or "Project") on the Tuolumne River in California and ordered TID or the Districts to file within 90 days (1) a schedule for submitting a license or exemption application for the Project within 36 months and (2) a schedule for complying with the Commission's Part 12 regulations with respect to the Project within six months. As discussed herein, the Director's assertion of jurisdiction over the La Grange Dam and related facilities, constructed 120 years ago for irrigation purposes, and over the La Grange Powerhouse, constructed nearly 90 years ago and not materially modified since then, is contrary to law, arbitrary and capricious, and an abuse of discretion.

The Districts, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.212), also request that the Commission stay the requirements to

make the above-referenced filings until the federal courts have issued a final order confirming the legality of the Commission's assertion of jurisdiction over the Project. As discussed herein, it is inappropriate to force the Districts to embark on the multi-million dollar licensing/exemption and regulatory compliance processes ordered by the Director unless and until the federal courts have confirmed the legality of the Commission's assertion of jurisdiction.

STATEMENT OF ISSUES

Pursuant to Rule 713(c) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.713(c)), the Districts state that the matters raised herein present the following issues:

1. Whether the Director acted consistent with Commission and court precedent when he asserted that the Tuolumne River at the site of the La Grange Project can be considered navigable if the river is navigable only up to the lowermost facility of the Project. *PacifiCorp Electric Operations*, 73 FERC ¶ 61,365 (1995); *Hubbardston Hydro Co.*, 86 FERC ¶ 61,047 (1999); *City of Centralia v. FERC*, 851 F.2d 278 (9th Cir. 1988).

2. Whether the evidence of navigability of the Tuolumne River at and upstream of the La Grange Powerhouse relied upon by the Director constituted substantial evidence as required by § 313(b) of the FPA (16 U.S.C. § 825*l*(b)). *Consolidated Hydro, Inc.*, 73 FERC ¶ 61,031 (1995), and cases cited therein.

3. Whether the commercial whitewater boating trips relied upon by the Director for his navigability determination constitute support for such determination under case precedent. *PacifiCorp Electric Operations*, 73 FERC ¶ 61,365 (1995); *PacifiCorp*, 79 FERC ¶ 61,130 (1997).

4. Whether it was arbitrary and capricious for the Director to rely on unsupported assertions regarding lack of public access to the Tuolumne River upstream of La Grange Dam for his navigability determination.

5. Whether the Director acted in accordance with applicable legal precedents and the substantial evidence requirement of § 313(b) of the FPA when he ignored the physical characteristics of the Tuolumne River, made sweeping unsupported inferences in determining that the Tuolumne River at and upstream of the La Grange Project was navigable in the past, and failed to consider contemporaneous information. § 313(b) of the FPA;

FPL Energy Maine Hydro, LLC v. FERC, 287 F.3d 1151 (D.C. Cir. 2002); *U.S. v. Utah*, 283 U.S. 64 (1931); *Rochester Gas and Electric Corp. v. FPC*, 344 F.2d 594 (2d Cir. 1965).

6. Whether the Director's decision to apply an un-codified and heretofore unarticulated approach that the Commission itself does not routinely use for determining the extent of the La Grange Reservoir's "backwater" was arbitrary and capricious and an abuse of discretion.

7. Whether the Director's determination that post-1935 construction occurred at the La Grange Project was arbitrary and capricious and not supported by substantial evidence. § 313(b) of the FPA.

8. Whether the Director's determination that post-1935 construction occurred at the La Grange Project was an abuse of discretion. *L.S. Starrett Co. v. FERC*, 650 F.3d 19 (1st Cir. 2011).

BACKGROUND

I. The La Grange Project

A detailed description of the La Grange Project facilities and their history is set forth in the report TID filed with the Commission on October 11, 2011 ("October 2011 Report"). A brief summary of the Project and its history is set forth below.

The La Grange Dam, owned jointly by the Districts, is located at the downstream end of a narrow, steep-sided canyon on the Tuolumne River at River Mile ("RM") 52.2. It was constructed between 1891 and 1893 by the Districts to raise the Tuolumne River to a height sufficient to permit the Districts to divert and deliver by gravity to the Districts' irrigation canals Tuolumne River water for irrigation of Central Valley farmland. The original height of the La Grange Dam was 127.5 feet; in 1923, an 18-inch-high concrete cap was added, and in 1930, an additional 24-inch-high concrete cap was added, resulting in the final and current height of 131 feet. These increases in the crest elevation were for the purpose of increasing flows that could be diverted to each of the Districts' irrigation canals.

The La Grange Project has been used for irrigation purposes continuously since 1893 (*i.e.*, for 120 years). The water diverted by MID at La Grange is now also used by it for municipal and industrial water supply purposes.

The spillway crest of the La Grange Dam is at elevation 296.5 feet. The La Grange Reservoir impounded by the La Grange Dam extends approximately one mile upstream; it has minimal active water storage capacity.

In 1924 TID built a small, 2-unit powerhouse approximately 0.2 miles downstream of the La Grange Dam on the south (left) bank of the Tuolumne River. TID owns and operates the Powerhouse. The units were rehabilitated in 1989/1990, when Unit 2 was updated and the outdated, two-generator Unit 1 configuration was replaced with a modern, one-generator unit configuration. With the exception of this rehabilitation and changes made to accommodate TID's irrigation canal improvements, there have been no modifications to the Powerhouse and associated facilities since 1924, except for routine maintenance and repairs.

II. The UL11-1-000 Proceedings

The Districts are the joint licensees and co-owners of the Don Pedro Project No. 2299 ("Don Pedro Project"), which is located on the Tuolumne River upstream of the La Grange Project. The license for the Don Pedro Project expires on April 30, 2016; the Districts are currently in the process of pursuing a new license for that project pursuant to the Commission's Integrated Licensing Process ("ILP"). The current license requires the Districts to release specified minimum flows for fishery purposes as measured at the La Grange Bridge, located approximately 1.7 miles downstream of La Grange Dam. It is anticipated that the new license will also require the Districts to release minimum flows as measured at La Grange Bridge.

On June 10, 2011, the National Marine Fisheries Service ("NMFS"), in an effort to increase the scope and extent of the studies required of the Districts during the ILP for the Don Pedro Project, requested that the Commission examine the jurisdictional status of the La Grange Project. Commission Staff initiated such examination by sending a letter to TID dated July 26, 2011, requesting that TID provide information regarding the La Grange Project. On October 11, 2011, TID submitted the required information. TID's October 11, 2011 filing included the previously-referenced October 2011 Report, along with summary information from an analysis ("backwater analysis") performed by TID demonstrating that the reservoir impounded by the La Grange Dam (the La Grange Reservoir) does not inundate federal lands upstream of the Dam administered by the Bureau of Land Management ("BLM"), which, at their closest point, are about 5,800 feet upstream of La Grange Dam. On December 15 and 22, 2011, TID, at the request of Commission Staff, filed letters transmitting detailed information regarding TID's backwater analysis.

On November 17, 2011, TID filed a letter responding to various jurisdictional contentions made by NMFS in an October 18, 2011 letter to the Commission. On January 5, 2012, TID filed a letter responding to a December 14, 2011 NMFS letter regarding the upstream extent of the La Grange Reservoir. On May 14, 2012, TID filed a letter responding to additional jurisdictional contentions made by NMFS in an April 12, 2012 letter to the Commission.

On May 29, 2012, Commission Staff issued a Navigation Status Report – Tuolumne River ("Staff Report"), in which it concluded that the Tuolumne River "from above the Don Pedro Reservoir (RM 54.5), past, and below the La Grange Dam (RM 52.2), to its confluence with the San Joaquin River" is a navigable water of the United States as defined in § 3(8) of the FPA (16 U.S.C. § 796(8)) and thus subject to licensing by the Commission pursuant

to § 23(b)(1) of the FPA (16 U.S.C. § 817(1)). On August 2, 2012, TID submitted its comments on the Staff Report and included therewith its own Report on Navigability of the Tuolumne River prepared by Dr. Alan Paterson, Ph.D., Historian ("Paterson Report"). TID's August 2, 2012 filing demonstrated that the Staff Report and its navigability conclusion were flawed and did not satisfy the legal standards of the FPA. On November 21, 2012, TID filed a letter responding to comments on the Staff Report and TID's August 2, 2012 filing submitted by the Tuolumne River Trust ("TRT") on August 2 and October 2, 2012, by the California Department of Fish and Game ("CDFG") on September 21, 2012, and by NMFS on October 2, 2012.

III. The Director's Order

The Director's Order, issued less than one month after TID's last filing in the UL11-1-000 proceeding and less than 18 months after NMFS' request for action, found that the La Grange Project requires licensing under § 23(b)(1) of the FPA. That section specifies that a non-federal hydroelectric project must be licensed if, *inter alia*, it (1) is located on a navigable water of the United States, (2) occupies lands of the United States, or (3) is located on a Commerce Clause water, is constructed or enlarged after August 26, 1935 ("post-1935 construction"), and affects the interests of interstate or foreign commerce. The Director found that licensing was required under all three of these bases.

Specifically, with respect to the navigability issue, the Director found that the "Tuolumne River at the site of the La Grange Project is a navigable water of the United States." Director's Order at ¶ 22. Although the specific foundation upon which this finding is based is not clearly articulated, it appears that it is based primarily on the Director's impression that the Tuolumne River downstream of the La Grange Dam and upstream of the La Grange Powerhouse

is commonly used by canoeists and CDFG staff using motorized drift boats. Director's Order at ¶s 21-22.

As to the use of lands of the United States, the Director determined that the upper end of the La Grange Reservoir inundates the lands administered by BLM. This determination was based on a Commission Staff-prepared "backwater analysis," disclosed for the first time on December 19, 2012 ("Staff Backwater Analysis"), and an un-codified and heretofore unarticulated approach for determining the extent of a reservoir's "backwater." Director's Order at ¶s 27-33.

Finally, with respect to whether the La Grange Project involved post-1935 construction and thus is jurisdictional under the third jurisdictional prong of § 23(b)(1) set forth previously, the Director – in a footnote (n.44) – apparently found ("we would still find that the project requires licensing") that post-1935 construction had occurred. According to the Director, the rehabilitation of the La Grange generating units in 1989/1990 constituted post-1935 construction, since, in the Director's opinion, the "installed capacity" was increased by 174 kilowatts ("kW"). Because the La Grange Project is located on a Commerce Clause water and affects interstate and foreign commerce, the Director found jurisdiction under this third prong. [1]

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[1] As discussed in the Order at ¶s 40-44, at the request of Commission Staff, TID's consultant provided various items of information with respect to the issue of whether La Grange Dam is used to reregulate flows from the Don Pedro Project, in association with Staff's examination of whether the La Grange Project should be considered part of the "complete unit of improvement or development" of the Don Pedro Project as defined in § 3(11) of the FPA (16 U.S.C. § 796(11)). The Director's Order concluded (at ¶ 44) that the La Grange Project does not require licensing as a reregulating reservoir of the Don Pedro Project, but otherwise did not determine whether the La Grange Project might also require licensing as part of a "complete unit of development with the Don Pedro Project." Order at ¶ 39. The Districts concur that the La Grange Project does not require licensing as a reregulating reservoir of the Don Pedro Project. Since the Director's Order did not make any determination with respect to the "complete unit of

DISCUSSION

I. Request For Rehearing

Each of the three bases for the Director's determination that the 120-year-old La Grange Project is subject to the Commission's mandatory licensing jurisdiction under Part I of the FPA has no merit, as discussed below. Consequently, the Commission should grant rehearing of the Director's Order, reverse its finding that the La Grange Project is subject to the Commission's mandatory licensing jurisdiction, and rescind the filing requirements of Ordering Paragraphs (B) and (C) of the Director's Order.

A. The Tuolumne River Is Not A Navigable Water At The Site Of The La Grange Project

(1) Current Navigability

The Director's Order, citing to *FPL Energy Maine Hydro, LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002) ("*FPL Maine*"), states that in order to make a navigability finding the Commission need only "consider whether the river is navigable from its confluence with the navigable San Joaquin River up to the lowermost part of the La Grange Project." Director's Order at ¶ 20. It then concludes that information submitted by the CDFG and TRT demonstrates that the Tuolumne River has been or could be navigated past the La Grange Powerhouse up to the base of the La Grange Dam and therefore that the Tuolumne River at the site of the La Grange Project is a navigable water of the United States under the above standard. *Id.* at ¶s 21-22. More specifically, the Director concluded (*id.* at ¶ 22, footnote omitted):

> The Tuolumne River is also used today by recreational canoers, from just below the La Grange Dam to the river's confluence with

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improvement or development" issue, the Districts do not address that issue herein and reserve the right to do so at a later date.

> the navigable San Joaquin River, and by staff of the California DFG in motorized drift boats, from just below the La Grange Project Dam and powerhouse downriver to RM 22, thus demonstrating the river's suitability for the simpler forms of commercial navigation.

It also asserts (*id.* at ¶ 21) that the fact that the California Legislature declared in 1851 that the head of navigation on the Tuolumne River was at the "cañon or foot of the rapids that then existed at what is now the site of the La Grange Dam supports its conclusions in this regard."

The Director's conclusions in this regard are legally and factually incorrect.

The Director's legal conclusion that the Tuolumne River can be considered navigable at the site of the La Grange Project if it is navigable up to the lowermost facility of the Project (Powerhouse) is contrary to both Commission and court precedent. Specifically, in *PacifiCorp Electric Operations*, 73 FERC ¶ 61,365 at p. 62,140 (1995) ("*PacifiCorp*"), the Commission stated that in order to find a river "navigable at the project, there must be substantial evidence that the river is *at that point* [*i.e.*, "at the project"] a part of an aqueous highway that was or is used or suitable for use to transport persons or property between states" (emphasis added). The Commission there was clearly referring to the entire project, not just to the lowermost portion of it. *See also Hubbardston Hydro Co.*, 86 FERC ¶ 61,047 at p. 61,181 (1999), where the Commission, in considering the navigability issue, looked to see if there was evidence of transport of lumber through *the site of a project*. Similarly, in *City of Centralia v. FERC*, 851 F.2d 278, 282 (9th Cir. 1988), the court, in considering the navigability of the Nisqually River and the Commission's assertion of navigability jurisdiction over the Yelm Project, evaluated "the *areas* included in the Yelm Project" (emphasis added). In the case of the Director's Order, it, contrary to these precedents, failed to consider the navigability of the Tuolumne River in all areas occupied by the La Grange Project (*e.g.*, Dam, Reservoir); rather, it

just looked to see if there was some use of the river near the lowermost facility of the Project. Nor did the Director consider, let alone make the required determination, whether the Tuolumne River areas occupied by all the portions of the La Grange Project are being used as "part of an aqueous highway" for commerce. As to the *FPL Maine* case relied upon by the Director, the petitioner there did not raise before the Commission or the court the argument advanced here (that it has to be established that the river in question is navigable through all areas occupied by the project); thus, that issue was not addressed or ruled upon by the court.

As to the factual basis for the Director's determination, the referenced evidence presented by CDFG and TRT with respect to river usage in the vicinity of the La Grange Dam and Powerhouse does *not* support the Director's conclusion set forth above that he indicated was based on such evidence. The evidence submitted by CDFG (affidavit of CDFG employee Timothy Heyne) demonstrated only that CDFG survey crews were able to travel in their motorized drift boats upstream on the river only to a point *downstream* of the La Grange Powerhouse. Mr. Heyne did not present *any* evidence demonstrating that any CDFG employee or any other person had passed upstream to and past the La Grange Powerhouse to the Dam in any type of watercraft; rather, he merely expressed his *opinion* that a person might be able to reach the pool at the foot of La Grange Dam with a short portage upstream of the powerhouse. As to the relevant TRT evidence, it consisted of a reference to a *single* trip undertaken past the Powerhouse up to the Dam by an "expert sea-kayaking instructor and guide" in a closed kayak who, based on the photographs included in TRT's August 2, 2012 filing, had to paddle through rapids while attempting to reach the Dam from downstream; those photographs also demonstrate that there is no means to exit the river in the area immediately downstream of the Dam.

In other words, the evidence upon which the Director based his conclusion set out above and his navigability determination consisted, in its entirety, of: (1) an *opinion* of a CDFG employee, who did not profess to possess any expertise in river travel, that one might be able to go past the La Grange Powerhouse to reach the La Grange Dam by boat; and (2) *one* trip in a closed kayak by an expert sea-kayaking instructor and guide that required paddling through rapids and which ended in an area that has no means to exit the river. Thus, contrary to the Director's conclusion, "recreational canoers" do not use the Tuolumne River "from just below the La Grange Dam," and staff of the CDFG do not use drift boats "from just below the La Grange Project Dam."

The Districts submit that the TRT reference to a single trip taken by an expert kayaker does not constitute the substantial evidence that is required by § 313(b) of the FPA (16 U.S.C. § 825*l*(b))[2] to demonstrate that the Tuolumne River at the site of the La Grange Powerhouse, Dam, and Reservoir is part of a continuous aqueous highway for commerce, particularly when it is being used to assert federal control over an important irrigation facility that has operated without incident for 120 years. The Districts note in this regard that an expert kayaker's use of a river has been found by the Commission as not constituting evidence of navigability. As the Commission stated in *PacifiCorp*, 73 FERC at n.26, with respect to expert kayak use of a river, "we would distinguish this highly specialized recreational use of a river, which requires a great deal of skill, from simpler forms of commercial navigation, which have as their purpose the transportation of a persons or property in interstate commerce."

[2] *See also Consolidated Hydro, Inc.*, 73 FERC ¶ 61,031 (1995), and cases cited therein.

The Director's Order's reliance on the 1851 declaration of the California Legislature to support its navigability determination is also unavailing. The generalized reference over 160 years ago to the "cañon or foot of the rapids" does not establish precisely where *vis-à-vis* the present location of the La Grange Dam and Powerhouse the Legislature thought the head of navigation was. The referenced rapids could have extended considerably downstream of the current location of La Grange Dam and Powerhouse. Further, as noted in the Paterson Report (at p. 14), the official head of navigation was moved downstream to Dickinson's Ferry in 1854. In any event, what the California Legislature did in 1851 or 1854 has no relevance to the Director's Order's determination that the Tuolumne River at the site of the La Grange Project is *currently* navigable.

The Director attempts to buttress his finding that the Tuolumne River at the site of the La Grange Project is currently navigable by referencing (1) the commercial whitewater boating trips that occur on the river upstream of the Don Pedro Reservoir (Director's Order at ¶ 18) and (2) TRT assertions that "if public access were granted" to the section of the Tuolumne River between Don Pedro Dam and the La Grange Dam, navigation could occur on that section (Director's Order at ¶ 19 and n.34). Both of these attempts to buttress the Director's navigability finding are unavailing.

(a) <u>Commercial Whitewater Boating Trips</u>

The Director is not clear with respect to the purpose of his reference to the commercial whitewater boating trips, given that they occur upstream of the Don Pedro Reservoir more than 20 miles from the La Grange Project and thus shed no light on the issue of relevance here: the navigability of the Tuolumne River at the site of the La Grange Project. In any event, the Commission's decision in *PacifiCorp*, 79 FERC ¶ 61,130 at p. 61,563 (1997) ("*PacifiCorp*

II"), referenced by the Director, where the Commission held that commercial whitewater boating companies that transport people in exchange for money constitute "the very essence of commercial navigation" and thus render a river navigable at the location where this activity occurs, does not resolve the navigability issue in this case as the Commission apparently believes.

First, the Commission has found that the presence of rapids that only skilled kayakers or whitewater rafters can use renders that area of a river non-navigable. *See PacifiCorp*, 73 FERC at pp. 62,140-41. *See also Pennsylvania Electric Company*, 56 FERC ¶ 61,435 (1991), where the Commission, in finding that the Deep Creek Project No. 2370 was not subject to the Commission's mandatory licensing jurisdiction, determined that a river was non-navigable because it could not be safely navigated by an average recreational canoeist. *Id.* at pp. 62,549-550. The fact that commercial whitewater boating companies now transport people in exchange for money on the Tuolumne River upstream of the Don Pedro Reservoir cannot transform that whitewater reach from non-navigable to navigable. The Districts are not aware of, and the Commission does not cite to, any court decision affirming this Commission transformation theory.

Second, in order for a river to be considered navigable, it "must form a continuous highway for commerce between states or with foreign countries." *PacifiCorp II* at p. 61,562. In *PacifiCorp II*, the reach of the river where the commercial whitewater boating occurred was between an upstream navigable stretch of the river and a downstream navigable stretch that linked to the interstate waterway and thus formed part of the "continuous highway for commerce between states." *Id.* at pp. 61,562-563. In the instant case, the commercial whitewater boating area does *not* form part of a "continuous highway for commerce between states;" rather, the non-

navigable portion of the Tuolumne River where the La Grange Project is located prevents the commercial whitewater boating reach above Don Pedro Reservoir from linking with and becoming part of a "continuous highway for commerce." Once again, the Districts are not aware of, and the Director's Order does not cite to, any court decision affirming the *PacifiCorp II* theory in any situation, let alone one where the commercial whitewater boating was not linked to a "continuous highway for commerce."

(b) <u>Lack Of Public Access</u>

Although the Director also did not specifically articulate the purpose of his reference to the TRT assertions regarding lack of public access, it appears that he was trying to establish that navigation would occur on the Tuolumne River between Don Pedro Dam and La Grange Dam if access were allowed, thus potentially establishing a linkage to a "continuous highway for commerce." The TRT assertions and the Director's apparent belief on this issue are incorrect.

The assertions by the TRT that "landowners prohibit boaters from using the stretch of the river between the dams" (Director's Order at ¶ 19) and that the TRT would use this stretch "if public access were granted" (Director's Order at n.34) are nothing more than that – mere assertions unsupported by any evidence. More importantly, these assertions are simply not true. TRT and other potential boaters can access this stretch of the river by walking down BLM lands and Don Pedro Project lands directly to the river at Twin Gulch. The Districts do not prohibit use of their lands for this purpose; the Districts are not aware that the BLM prevents use of its lands for such purpose; and there are no other private lands that need to be crossed to access the river in this area. Boaters do not use this reach of the river because of lack of access; rather, they do not use it because it is unsafe and challenging for them to do so. As TID

explained in its November 21, 2012 letter in this proceeding (at p. 4), it would be physically challenging for them to exit at the downstream end of the reach because of the steepness of the canyon walls in this entire area, and dangerous for them to be near the La Grange Dam and Spillway in any type of boat. In other words, the characteristics of this reach – not lack of public access – make it unsuitable for use by potential boaters and unsuitable for use as part of a continuous aqueous highway for commerce and thus render it non-navigable. Therefore, the Director's reliance on these TRT assertions was arbitrary and capricious.

(2) <u>Past Navigability</u>

The Director's Order devotes considerable space to discussing the Staff Report's analysis of, and conclusions regarding, whether the Tuolumne River was navigable at and past the site of the La Grange Project in the past. Like the Staff Report, the Director's Order makes repeated references to whaleboats allegedly traveling upstream and downstream to and from Jacksonville upstream of the La Grange Project site. *Id.* at ¶s 6, 13, 17, 20, 21, and 22. Based on this alleged whaleboat use, the Director hesitantly states that the Tuolumne River was navigable through and upstream of the La Grange Project site (emphasis added): at ¶ 21 ("the Tuolumne River was navigable by whaleboats and other small craft at least as far as the La Grange Dam site (RM 52.5) and *perhaps* above that site as far upstream as Jacksonville (RM 70)"); and at ¶ 22 (same).

The Director's hesitancy regarding the whaleboat matter is certainly justified. Although the Director's Order does not disclose this fact, there exists only *one* original reference to whaleboat use upstream of the La Grange Project site to Jacksonville: an article that appeared in the March 30, 1850 edition of the *Stockton Times*. All other references to this whaleboat use (*e.g.*, Tinkham) rely on this single *Stockton Times* article. *See* the Paterson Report at p. 11.

While the Districts recognize, as pointed out by the Director (at ¶ 17), that a volume of evidence of past use need not be large to sustain a finding of navigability, the evidence must be sufficient enough to meet the substantial evidence standard. This single newspaper article does *not* meet this standard, particularly given that, if such whaleboat use was prevalent as implied in the Director's Order, additional original source references to it should be readily available. They are not.

Further, in making navigability determinations and judging what weight to place on a historical reference to navigable use, the Commission must consider the physical characteristics of a river. *See, e.g.*, *FPL Maine*, 287 F.3d at 1158, *citing U.S. v. Utah*, 283 U.S. 64, 83 (1931). In this case, *all* of the physical characteristics of the Tuolumne River at the time of the single report of whaleboat use (1850) suggest that such whaleboat use was highly unlikely. As the Paterson Report explained (at pp. 11-12):

> How credible is the report of whale boats ascending the river to Jacksonville? The falls at or near the site of La Grange Dam—a well-known cascade in a stretch that had a formidable 50 foot per mile average gradient—would have been an insurmountable obstacle to any vessel; comparable to going upstream over at least Class IV or Class V rapids. Above those falls were other rapids and a daunting gradient averaging five or ten times steeper than the valley stretch.
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> There was no reasonable way around the cataract in the canyon at La Grange Dam; the steep sides of the river canyon would have made portaging at the falls impractical. Photographs of the canyon above La Grange Dam show that the walls continue to be too precipitous to easily climb upstream to the Don Pedro Dam site. The topography at the site of the Wheaton and La Grange dams and canyon upstream to Don Pedro is shown on Attachments 7-9. Any cargo and the boats themselves would had to have been carried to the top of the surrounding cliffs then overland until there was a place where it was safe to descend the steep hillsides to the river. Portaging would have required hauling an unwieldy

> wooden boat up hundreds of feet in elevation and across perhaps miles of difficult terrain. There were other rapids and other narrow canyons upstream that would have required similar exertion. Going downstream, a wooden whale boat would have been at risk of being smashed on the rocks and boulders in the riverbed. Based on all of those factors—the falls at La Grange, the river gradient, upstream falls or rapids and the topography of the river canyon that would have made portaging extremely difficult—it seems safe to conclude that navigation by whale boats above La Grange was virtually impossible.

The Paterson Report included graphs showing the steep gradient of the Tuolumne River at and upstream of the La Grange Project site (Attachments 4 and 5 thereto) and, as noted in the above excerpt, photographs of the rugged topography of the river canyon in this area.

Although the Director's Order indicates that the Paterson Report included such discussion (Director's Order at ¶ 12), it failed to address *any* of this evidence regarding the characteristics of the Tuolumne River. Instead, it simply infers, from a U.S. Army Corps of Engineers' report regarding flows in the lower Tuolumne River, that high flows in the upper Tuolumne River that theoretically could support whaleboat use were seasonal and routine. Director's Order at ¶s 13, 17. However, such sweeping inferences are unacceptable. *See Rochester Gas and Electric Corp. v. FPC*, 344 F.2d 594, 598 (2d Cir. 1965). It also cites a magazine article that references a flood that occurred in 1861 and infers that such flood somehow reshaped the river to allow navigation upstream of the La Grange Project site. Director's Order at ¶ 11. It does not, however, point to anything in that article demonstrating that such "reshaping" occurred in the reach of the Tuolumne River at and upstream of the La Grange Project site. In addition, it chastises the Paterson Report for failing to address "the downriver traffic from Jacksonville, also mentioned in the historical sources." *Id.* at ¶ 13. However, the only "downriver traffic" mentioned in the "historical sources" is the whaleboat traffic to and from Jacksonville mentioned in the 1850 *Stockton Times* article. However, if

whaleboats could not navigate upstream, there would be no downstream traffic unless such whaleboats were hauled overland or were being built in Jacksonville, which the Director's Order does not contend occurred. Further, the Director's Order does not address how the heavy whaleboats would be able to travel downstream through the steep canyon with rocks and boulders in the high flow, turbulent water the Director's Order infers was occurring. Finally, it dismisses the fact that the U.S. Army Corps of Engineers has repeatedly excluded relevant stretches of the Tuolumne River from its reports of navigable rivers[3] by asserting that the Commission is not bound by determinations of another federal agency. Director's Order at n.13. However, TID had previously referenced these reports not to bind the Commission, but rather to provide evidence that during the time period the *Stockton Times* article was published the relevant stretches were commonly considered non-navigable. For the same reason, TID had noted that the Ninth Circuit had twice reaffirmed this historical view of non-navigability in 1965 in *State of California v. FPC*, 345 F.2d 917, 919, 921 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965). The Commission simply ignored this important information.[4]

In summary, and as demonstrated by the Director's own hesitancy in this regard, substantial evidence that navigation occurred on the Tuolumne River at and past the site of the La Grange Project in the past simply does not exist.

B. The La Grange Project Does Not Occupy Federal Lands

The second basis for the Director's finding that the La Grange Project is subject to the Commission's mandatory licensing jurisdiction is his conclusion that "the La Grange

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[3] *See* pp. 10-11 and Attachment F of TID's October 11, 2011 filing.

[4] As noted earlier, the Director had no qualms about using a declaration of the California Legislature in 1851 as to the head of navigability as evidence supporting its finding.

Reservoir occupies lands of the United States." Director's Order at ¶ 33. The Director, after stating that the Commission has defined "backwater" as "the amount the depth of flow has been increased by an obstruction such as a dam" (citing to *Public Utility District No. 1 of Pend Oreille County, WA*, 77 FERC ¶ 61,146 at p. 61,543 n.11 (1996) ("*Pend Oreille*")), goes on to state "[a]ccording to the Commission's definition of backwater, the upstream extent of the reservoir is the point where the water surface elevations for 'with-dam' and 'without-dam' conditions for a given flow are equal." Director's Order at ¶ 28. He then states that Commission Staff used the backwater modeling analysis previously submitted by TID without any modifications (*i.e.*, Commission Staff agreed with TID's modeling approach, flows to be assessed, and results of the analysis), and, based on that model, found that the location where the water surface elevations for the La Grange Reservoir under "with dam" and "without dam" conditions are equal is "11,325.5 ft upstream of the dam," well upstream of the downstream boundary of the BLM property. Director's Order at ¶ 29.

Commission Staff in the Staff Backwater Analysis and the Director agreed with TID's statements in its filings that the upstream extent of the La Grange Reservoir should be based on an analysis of water levels at the Project's normal maximum operating conditions. However, they disagreed with TID's use in its backwater analysis of hydraulic gradients as a proper engineering method for determining the practical upstream end of the Reservoir; under that approach, the upstream end of the La Grange Reservoir would be approximately 4,700 to 5,300 feet upstream of La Grange Dam, which is downstream of the BLM property boundary. Instead, they assert that the "with dam" and "without dam" conditions being equal approach must be used. As noted above, they state that this approach constitutes the Commission's definition of "backwater." Director's Order at ¶s 31, 32.

The Director and Commission Staff make three fundamental errors in their analysis related to the La Grange Project's alleged occupation of BLM lands, as follows:

- It is not now, nor has it ever been, the Commission's customary practice to consider the upstream extent of a project's reservoir, and therefore the project's upstream boundary, to be where the "with dam" and "without dam" water levels are equal.
- They improperly dismiss on technical grounds TID's position that examining water level gradients is a proper method for determining the upstream extent of a reservoir and improperly declare that TID's use of hydraulic gradients does not account "for the full backwater effect of the dam."
- They improperly conclude that the results TID draws from its backwater analysis are incorrect "because Turlock does not use the Commission's definition of backwater." Director's Order at ¶ 32.

As discussed below, because of these errors, the Director's determination that the La Grange Reservoir occupies BLM lands is incorrect. Thus, occupation of federal lands cannot serve as a basis for the Commission's assertion of jurisdiction over the La Grange Project.

(1) <u>Backwater Analysis</u>

To support his decision regarding the determination of the proper upstream extent of the La Grange Reservoir, the Director relies almost exclusively on the definition of backwater ("the amount the depth of flow has been increased by an obstruction such as a dam"). Commission Staff indicates in the Staff Backwater Analysis that backwater analyses are a well accepted and broadly used standard in engineering practice, that TID's analysis was found to meet the standards of engineering practice, and that Commission Staff found no reason to modify

it. The Districts agree that the definition of backwater taken from *Pend Orielle* quoted above is indeed the standard engineering definition of the term "backwater" in the field of open channel hydraulics. This is not a definition exclusive to the Commission; this is an engineering standard. However, the Director then goes on to state that, according to the "definition of backwater," the upstream extent of a reservoir is the point where the water surface elevations for "with dam" and "without dam" are equal. While the Director is correct about the standard definition of the term "backwater," he is incorrect in holding that the *definition* of backwater in any way establishes the proper upstream extent of a reservoir as being where the "with dam" and "without dam" water elevations are equal.

To use the term backwater in this manner, or to define a reservoir's upstream extent as being where these two water levels "are equal," is not only *not* a standard engineering practice, it is impossible to achieve. Water levels under "with dam" and "without dam" conditions can never truly be "equal." According to the fundamental theoretical basis of backwater analyses, "the backwater curve [caused by a dam] extends indefinitely in the upstream direction; hence, it has no upstream end point." (Ven Te Chow, Open Channel Hydraulics, 1959). Chow (1959) is recognized as one of the highest regarded textbooks in this field of engineering. This is the common understanding of backwater analyses, the "with" and "without" conditions will never be equal; they will approach each other, but never be equal. Therefore, the Director cannot define the upstream extent of the La Grange Reservoir or any other reservoir as the location where these two water elevations "are equal." Engineers practicing in this field have long recognized the theoretical limitations of backwater analyses as applied to locating the upstream end of a reservoir. The industry also has long recognized several other practical limitations to backwater analyses, including, but not limited to:

- a common equation used in such analysis is the Mannings equation, which applies to steady and *uniform* flow; however, natural channels seldom represent uniform flow conditions, and certainly the Tuolumne River channel above La Grange Dam does not exhibit uniform flow;
- stream transects used to define a channel are approximate, and contain errors, no matter how many transects are developed or how careful the survey used to acquire the information; and
- roughness coefficients (Manning's "n") are estimated values, may vary significantly over short stream reaches, vary with flow and depth at the same transect, and are difficult to accurately determine for natural channels.

In recognizing these theoretical and practical limitations, and contrary to the "definition" used by Commission Staff and the Director, standard engineering practice is to *not* rely on the "where 'with dam' and 'without dam' conditions are equal" approach, but instead rely on either graphical analyses or water level tangency (*i.e.*, hydraulic grade lines or "gradients"). Again according to Chow (1959), "[i]n field studies, however, an approximate point of tangency of the normal-depth line to the backwater curve is often taken as the end point [of the reservoir]. The *point is determined simply by eye observation from the drawing of flow profiles*" (emphasis added). This is exactly the approach used by TID in the backwater analysis it submitted to the Commission in this proceeding, in accordance with standard engineering practice. TID plotted the water surface profiles to depict the point of tangency (*see* Figure 5 of TID's October 11, 2011 filing). The point of tangency is perfectly clear from these plots, as it is from Commission Staff's own plots included in the Staff Backwater Analysis. Further, TID in the same submittal also showed where the backwater curve of "with dam" conditions displayed a

hydraulic grade line (gradient) very similar to the "without dam" condition, thereby further depicting the location where tangency had been achieved (where the two gradients approached each other) and the return to riverine conditions. Contrary to the Commission Staff's comments, TID *did* use standard engineering practice which calls for graphical analysis and/or point of tangency analysis (gradient similarity). Therefore, also contrary to the Director's claim, use of hydraulic gradients is not "misleading," it is an accepted and standard engineering practice. It is the Director's approach which provides "misleading" results. In fact, the Director in finding that the La Grange Reservoir occupies BLM lands has to rely on an approach which would actually establish a new engineering "standard" that would replace a widely held and commonly-accepted engineering principle in water resource engineering.

The U.S. Bureau of Reclamation ("BOR"), in its use of open channel hydraulic analyses, recommends that the resulting water levels be considered to have no better than a 0.5 ft to 1.0 ft degree of accuracy in natural channels (especially steep, rocky channels) even when detailed data is available for the channel (*see* the BOR's Design of Small Dams, 1977, Appendix B – Flow in Natural Channels). Applying this degree of accuracy, the upstream end of the La Grange Reservoir would extend no further than 5,400 ft upstream of the La Grange Dam, yielding nearly the same result as the TID method using Chow (1959), and further confirming TID's analysis.

(2) <u>The Commission's Reliance On *Pend Oreille*</u>

Commission Staff's and the Director's reliance on the *Pend Oreille* case does not contradict TID's approach. The Director simply cites the *Pend Oreille* case to provide the definition of the commonly used term "backwater," as set forth above. The Districts do not dispute the definition of that term. *However, the Commission never indicated in the Pend*

Oreille order (or any other order) that it considers the upstream extent of a reservoir to be where the "with dam" and "without dam" water levels "are equal." Further, the fact that the Commission in *Pend Oreille* intentionally used water surface elevations consistently *rounded to the nearest foot* when describing reservoir elevations and their upstream extent is fully consistent with good engineering practice and TID's approach in this proceeding. While the Director states that in the *Pend Oreille* case water levels were as much as 10 ft apart well upstream of the dam in the "with" and "without" case (Director's Order at n.62), that is immaterial. All rivers are different, and their hydraulic characteristics (slope, channel configuration, flows, meander, etc.) are all different. Indeed, the Pend Oreille impoundment is over 50 miles long, while the La Grange Reservoir is approximately one mile long.

The Director interprets TID's analysis as evaluating hydraulic gradients only, and states that "focusing on gradient can be misleading and can lead to incorrect conclusions about the extent of the reservoir." Director's Order at ¶ 31. The Director is incorrect. First, the Districts fully acknowledge that reservoir water surfaces have slopes. That is neither an issue nor important to this matter. Second, the Director misinterprets TID's analysis and its use of water surface slope (hydraulic grade line, or gradient). TID graphically analyzed, consistent with good engineering practice, the two conditions ("with dam" and "without dam"). TID also showed where the "with dam" condition clearly began to display hydraulic gradients very similar to the "without dam" condition; that is, where tangency had been achieved and the stream had returned to riverine conditions. The point of tangency is readily identified by either graphical analysis or the locations where the two hydraulic grade lines ("gradients") begin to approach each other. There is nothing in the *Pend Oreille* case that contradicts this.

(3) The Commission's Standard Practice For Establishing An Upstream Reservoir Boundary

The Director states in ¶ 32 of his Order that, "while staff accepts the assumptions and output of Turlock's backwater analysis, the conclusion that Turlock draws from that analysis is incorrect, because Turlock does not use the Commission's definition of backwater." As noted previously, the Commission's definition of backwater is the standard engineering definition of the term. The Districts certainly recognize that definition of the term. It is the Commission that misapplies the term. It is the Commission that errs when it infers that, by definition, the term backwater establishes that the upstream end of a reservoir is located where the backwater elevation from a dam is equal to the original stream water surface elevation.

Moreover, the Commission itself does not routinely apply this "definition" it now asserts is its standard. A brief sampling of other licenses shows that the Commission often uses a contour line for establishing a reservoir's upstream boundary. The Commission regularly establishes the upstream end of a reservoir, or approves of a licensee's proposed upstream limit, by establishing the normal maximum water level at the spillway or dam, then extending this elevation upstream *as a constant elevation* to an approximate point where that elevation is generally exceeded by the existing river water level. It generally applies no backwater to that elevation. To confirm the Commission's practice in this regard, the Districts conducted a very cursory review of Commission orders and Exhibit G maps filed with the Commission, the results of which are shown in Attachment A hereto. As demonstrated in Attachment A, it is not unusual for the Commission to extend a constant water level at a project dam upstream at that same elevation, without any backwater effect, to a point where it approximately intersects the free-flowing river. The Districts also could not locate any Commission policy statement that states

that the upstream end of a project's reservoir is to be located where "with" and "without" dam water levels "are equal."

Even when a horizontal offset is used for shoreline protection, the elevation at the dam is extended upstream without consideration of a backwater curve. In fact, there is no requirement that a license applicant for a new license or for an original license at an existing dam even submit a backwater analysis that applies the approach that the Director now purports in the case of La Grange to be the Commission "standard."

The Director goes on to state in ¶ 32 of his Order that "Commission regulations permit the use of contour lines, including contour elevation, to describe the boundary around a project impoundment." While this is correct, the Commission seldom requires a license applicant to submit a backwater analysis to establish that contour line, or to establish where the natural stream "intersects" that contour line. The contour line is frequently just established at the dam, then extends horizontally upstream with no backwater gradient applied.

For the La Grange Project case, the Commission appears to be applying an entirely new "standard," not only a new engineering standard different than the general industry standard, but a new "standard" for Commission license boundaries.

In summary, the Director's assertion that the La Grange Reservoir occupies BLM land is based entirely upon his use of the Commission's "standard" approach where the "with dam" and "without dam" water levels "are equal" to determine the upstream extent of the La Grange Reservoir. However, this standard approach does not appear to have been articulated in any Commission regulation, guidance document, or policy statement. Nor does it appear in the *Pend Orielle* case cited by the Director or in any other case as far as the Districts have been able to ascertain. Clearly, in these circumstances, the Director's application of this new un-codified

and unarticulated approach to assert jurisdiction over the La Grange Project is arbitrary, capricious, and an abuse of discretion.

C. Post-1935 Construction Has Not Occurred At The La Grange Project

As noted previously, the Director stated in footnote 44 of his Order that "[e]ven if we were to conclude that the Tuolumne River is not navigable at the lowermost project feature (the tailrace) we would still find that the project requires licensing. . . [because of] the post-1935 construction that occurred when the project's *generating capacity* increased in 1989" by 174 kW (emphasis added). The Director then goes on to state that "[a]n increase in *installed* capacity constitutes post-1935 construction within the meaning of FPA section 23(b)(1)" (emphasis added), citing to *L.S. Starrett Co. v. FERC*, 650 F.3d 19, 27 (1st Cir. 2011) ("*Starrett*"), where the court affirmed the Commission's assertion of jurisdiction over a project based on an increase in installed capacity of 86 kW.

The Director's contention that the La Grange Project's installed capacity increased by 174 kW as a result of the 1989/1990 rehabilitation work is incorrect. Consequently, his assertion of jurisdiction on the basis of alleged post-1935 construction is arbitrary and capricious.

The Director derived the apparent increase in generation capacity of 174 kW by assuming that the original two units in the La Grange Powerhouse were "rated at 1,000 kilowatts (Unit 1) and 3,750 kilowatts (Unit 2)." Director's Order at ¶ 2. He then stated that "Turlock replaced the turbine generating units in 1989 with units rated at 1,231 kilowatts (Unit 1) and 3,693 kilowatts (Unit 2), increasing the project's capacity by 174 kilowatts." *Id.* He cites Appendix E of the October 2011 Report as the source of the "ratings" of the original two units. Appendix E is a copy of a 1987 report prepared for TID by Bechtel Civil ("Bechtel Report").

The Director apparently established that the original "unit ratings" were 1,000 kW and 3,750 kW based on the single reference that appeared in the Bechtel Report (at p. 1). However, the Bechtel Report does not actually provide a "rated capacity" for the two original units, nor does it provide or reference any information about the actual "ratings" of the two original units, or even what conditions of head and flow from which these so-called "ratings" were calculated. The only bit of information provided by Bechtel in its report is limited to a statement that Unit 1 was a Francis turbine coupled to two 500 kW generators and Unit 2 was a Francis turbine connected to a 3,750 kW generator.

The Director made two errors in interpreting the Bechtel Report as he has here. First, the Bechtel Report never actually provides the "ratings" of the original units, not does it label the 1,000 kW and 3,750 kW numbers as rated capacity. In citing the Bechtel Report as stating that the original units were "*rated* at 1,000 kW (unit 1) and 3,750 kW (Unit 2)" (emphasis added) the Director misinterprets the Bechtel Report. Bechtel never indicates what the "rated capacity" of the original units was; Bechtel simply states, without any other citation, that the original *generators* were 1,000 kW and 3,750 kW. Therefore, the Director was wrong to rely on the Bechtel Report as providing any "rated capacity" for the original units. Since the Bechtel Report does not actually state the basis for referring to the Unit 1 generator as 1,000 kW and Unit 2 generator as 3,750 kW, the Director cannot just assume these are actual machine ratings; nor can it be assumed that these were the actual **maximum generating capacities** at the La Grange site of the original units, because the original units were acquired by TID as used equipment from another site. Therefore, the information provided in the Bechtel Report has nothing to do with their actual generating output at the La Grange Project site.

Second, as the Commission is well aware, and as TID carefully pointed out in the October 2011 Report, turbine and generator capacity can be rated by a number of different methods, and manufacturers use different methods to determine "ratings" of their machines. In addition, turbines are "rated" at different conditions than generators. The Director also erred when he compared the 4,750 kW total capacity of the original units with the 4,924 kW total capacity of the new units. Even if it is assumed that the 4,750 kW capacity of the original units was their "rated capacity," this is the capacity of the *generators*. The total capacity of the new units (4,924 kW) that the Director cited is the rated output of the *turbines***.** Under industry standards, the rating of capacity for turbines is different than the rating of capacity for generators. Turbines are rated as horsepower (hp) at design head and flow conditions, and often specified as a maximum output at their cavitation limit. Generator capacity is normally limited by allowable heat rise, and therefore rated as kilowatt output at a specified temperature rise over ambient conditions. The Director made the mistake of comparing a turbine rating for the new machines to the generator "rating" of the old machines, the two of which are not directly comparable. In fact, the simplest example of comparing a turbine and generator rating, although not precisely correct, would be to apply the average generator efficiency to the turbine output to arrive at the generation capacity. Applying a 95% average generator efficiency (a customary expected efficiency) to the turbine "rating" of 4,924 kW yields 4,678 kW as the expected "rated output" of the new generators, 72 kW *less* than the original units' capacity of 4,750 kW.

The Commission is well aware of the differences in turbine and generator output and ratings, and applies them routinely in its owns calculations of authorized installed capacity in calculating annual administrative charges. Specifically, pursuant to 18 C.F.R. § 11.1(i), a licensee's authorized installed capacity is the lesser of a plant's turbine capability or generator

capability, recognizing these values often differ significantly. This depends on whether the limiting factor of actual output at design conditions is either the turbine or the generator.

Therefore, the Director erred in finding that the La Grange replacement units installed in 1989/1990 increased the generating capacity of the older units by 174 kW by relying on a Bechtel Report reference to the older units that has no supporting information to describe the basis for the referenced generator "capacity," by erroneously comparing the rating of the new *turbines* to the "capacity" of the old *generators*, and by making no effort to compare the outputs of the original and newer units at similar conditions of head and flow. As TID pointed out with ample supporting material in the October 2011 Report, the new *turbines* chosen to replace the old *turbines* had a lower hydraulic capacity than the old units at the same conditions of available head. Therefore, except for changes resulting from improved efficiency due to modern machine design practices, the newer units would have less capacity at the same conditions of head and flow. The La Grange Project should not be subject to mandatory Commission jurisdiction simply because TID changed out old, outdated, and inefficient equipment that had reached the end of its useful life with equipment meeting modern design standards.

Because of the above-described errors in the Director's assumptions regarding, and calculations of, unit capacities at the La Grange Powerhouse, the *Starrett* case relied upon by the Director does not support the Commission's assertion of jurisdiction over the La Grange Project based on post-1935 construction. The Districts note, however, that the *Starrett* court indicated that the term "construction" is a chameleon with no fixed meaning (650 F.3d at 26) and that the Commission has the authority to exercise administrative discretion in making its jurisdictional determinations (*id*. at 29 n.15). Given the above-described shortcomings in the Director's analysis of the unit capacities at La Grange, substantial evidence does not support the

Director's determination, and the Districts believe that it would be an abuse of discretion for the Commission to find that "construction" occurred at the La Grange Project after 1935.

II. Motion for Stay

The Districts request that the Commission stay the requirements of Ordering Paragraphs (B) and (C) of the Director's Order requiring them to file within 90 days (1) a schedule for submitting a license or exemption application for the La Grange Project within 36 months and (2) a schedule for complying with the Commission's Part 12 regulations with respect to the Project within six months until the federal courts have issued a final order confirming the legality of the Commission's assertion of jurisdiction over the Project.

As the Commission is fully aware, complying with the process to prepare and file a license application has become a significant and costly endeavor. The Districts will be required to prepare an appropriate Pre-Application Document, prepare detailed study plans, participate in study plan meetings and respond to comments on the study plan and requests for studies, conduct a host of studies on environmental issues, prepare draft and final study reports, and prepare a draft and final license application. In the case of La Grange, the Districts anticipate that they will potentially be required to prepare over a dozen studies at an estimated cost of $3 to $4 million. These studies are likely to include investigations of upstream and downstream fish passage studies at both La Grange and Don Pedro dams that would easily exceed just by themselves over $1 million; anadromous fish habitat studies both at La Grange and potentially above Don Pedro ($700,000); water quality investigations ($50,000); bathymetry and channel surveys ($100,000); reservoir sediment studies ($100,000); reservoir habitat studies ($100,000); feasibility studies of potential environmental protection and recreation measures ($250,000); cultural resource studies ($250,000); and a number of other assessments. The

Commission is well aware that these studies are likely to be requested by licensing participants, as the Commission Staff has previously rejected a number of studies already requested by resource agencies dealing with La Grange and Don Pedro dams which will now likely be requested again. Commission Staff previously rejected these various agency study requests because La Grange was not subject to Commission jurisdiction; it will not be able to do so when these requests are renewed. The Districts estimate that the total cost to complete all phases of the licensing process, including conducting the studies, would be approximately $6 to $8 million.

Similarly, complying with the Commission's Part 12 requirements would also be costly for the Districts. They would have to prepare a full Supporting Design Report including detailed geotechnical and structural stability investigations, dam condition studies, and hazard assessments. The Director's Order already is requiring the completion of an emergency action plan and related public safety studies. The Districts estimate that the total cost of complying with the Part 12 requirements would be in excess of $2 million, thus bringing the likely total cost of complying with Ordering Paragraphs (B) and (C) of the Director's Order to $10 million or more, a significant expense by any reasonable measure.

The Districts believe that it would be highly inequitable and inappropriate for the Commission to force the Districts to embark on this multi-million dollar process unless and until the federal courts have confirmed the legality of the Commission's assertion of jurisdiction over the La Grange Project. If the Commission does not stay these filing requirements and a federal court were to overrule the Commission's assertion of jurisdiction over La Grange in two or three years, the Districts would have spent millions of dollars in complying with the requirements of Ordering Paragraphs (B) and (C) for no purpose whatsoever. Indeed, the right the Districts have under § 313(b) of the FPA to pursue judicial review of the Commission's orders will be in

essence partially revoked should the Commission not grant this stay request, since the Districts would have spent large sums of money and expended considerable effort complying with the Commission's requirements before they had an opportunity to obtain a judicial ruling on the appropriateness of the Commission's jurisdictional determination and the imposition of these requirements.

In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 705, *i.e.*, the stay will be granted if the Commission finds that "justice so requires." *See, e.g.*, *Bangor Hydro-Electric Co.*, 70 FERC ¶ 61,216 (1995), and *Appomattox River Water Authority*, 58 FERC ¶ 61,358 (1992). The Districts submit that the circumstances of this proceeding justify the Commission finding that "justice so requires" and granting the Districts' stay request, just like the Commission did in the two cases cited above.

CONCLUSION

The Districts respectfully request that the Commission: (1) grant rehearing of the December 19, 2012 Director Order, reverse its finding that the La Grange Project is subject to the Commission's mandatory licensing jurisdiction under Part I of the FPA, and rescind the filing requirements of Ordering Paragraphs (B) and (C) of the Director Order; and (2), should the Commission not grant the requests in (1), stay the above-referenced filing requirements until the federal courts have issued a final order confirming the legality of the Commission's assertion of jurisdiction over the La Grange Project.

Respectfully submitted,

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ATTORNEYS FOR
TURLOCK AND MODESTO IRRIGATION DISTRICTS

Dated: January 18, 2013

ATTACHMENT A

ATTACHMENT A

Summary of Research on FERC Project Boundaries for La Grange Jurisdictional Appeal

FERC No.	Project Name	License Issue Date	River	ST	Authorized Capacity (kW)	Normal Max Pond Elevation	Spillway Crest Elevation	Boundary Contour Elevation	Boundary Description	Submittal Date
1354	Crane Valley	9/16/03	Willow Creek	CA	28,700	3,376.8	No spillway elevations provided in 10/31/12 Exhibit A	Offset from 3,376.8 Contour	This license includes 5 developments. **Crane Valley Reservoir** (1,165 acre Bass Lake) impounded by the Crane Valley dam is based on an established offset from maximum water surface elevation of 3,376.8 around the entire impoundment without backwater curve. Offset not established by a backwater analysis.	10/31/12
2306	Clyde River	11/21/03	Clyde River	VT	4,675	Not stated, but the top of flashboards or spillway crest	FB - 882.8 1,059 1,248.33	882.8 1,059 1,249	**Pursuant to 2012 Exhibit G Maps:** **Newport** Dam Crest El 881.5; Newport Dam Flashboard El 882.8. Project Boundary (upstream of dam) around Clyde Pond El 882.8. **West Charleston** Crest El 1059.0. Project Boundary (upstream of dam) around West Charleston Pond El 1059.0. **Echo Dam** Crest El 1248.33. Echo Lake Project Boundary El 1249.0.	10/31/12

FERC No.	Project Name	License Issue Date	River	ST	Authorized Capacity (kW)	Normal Max Pond Elevation	Spillway Crest Elevation	Boundary Contour Elevation	Boundary Description	Submittal Date
							1,278.67	1,280	**Seymour Dam** Crest El 1278.67. Seymour Lake Project Boundary El 201280.0. Pursuant to 2006 Amendment Application and corresponding FERC Order Approving Amendment (which was later rescinded): "Generally, the project boundary is located at the normal high water elevation for each of the Project's impoundments…."; however, no backwater analysis was provided.	
459	Osage	3/30/07	Osage	MO	242,590	660 (project also has flood pool to El 661)	Spillway El 638 w/NHW controlled by Radial gate with EL 660	662	Boundary amended as part of effort to remove encroachments within original boundary in 2012. Elevation 662 is a single contour for the entire boundary; there was no backwater analysis provided to determine "without dam" elevation.	7/30/12
2365	Anson	7/25/03	Kennebec	ME	9,000	248.15	248.22 Permanent Crest El of 242.62 w/ 5.6 foot high inflatable flashboard system for a reservoir control	248.15	Boundary is a mix of metes/bounds and contour, with the contour sections all set at El 248.15. Boundary is actually set below spillway crest without any backwater applied.	12/5/07

FERC No.	Project Name	License Issue Date	River	ST	Authorized Capacity (kW)	Normal Max Pond Elevation	Spillway Crest Elevation	Boundary Contour Elevation	Boundary Description	Submittal Date
2364	Abenaki	7/25/03	Kennebec	ME	18,800	222.65	222.65 Permanent crest El of 219.65 with 3-foot timber flashboards for an reservoir control elev of 222.65	222.65	Boundary is a mix of metes/bounds and contour, with the contour sections all set at El 222.65. No backwater applied.	12/5/07
2621	Pacolet Hydro	7/20/11	Pacolet River	SC	1,900	519.0 492.0	519.0 492.0	519.0 492.0	Upper Development Lower Development Upper Development has crest elevation of 516.0 w/ 3' flashboards Lower Development has crest elevation of 488 w/4 foot flashboards (Exh A) Elevations 492.0 (Lower Development) and 519.0 (Upper Development) is a single contour for the entire boundary; there was no backwater analysis provided to determine "without dam" elevation.	8/7/12

FERC No.	Project Name	License Issue Date	River	ST	Authorized Capacity (kW)	Normal Max Pond Elevation	Spillway Crest Elevation	Boundary Contour Elevation	Boundary Description	Submittal Date
2692	Nantahala	2/8/12	White Oak Creek	NC	43,200	3,012.16	Fuse plug crest elevation of 3,012.66 feet.	3,012.16	The Nantahala Development Reservoir has a Full Pond El 3012.16. Project Boundary around Nantahala Reservoir is primarily at El 3012.16 (see G-6) with some sections at 3,022.16. Spill control provided by four radial Tainter Gates with a height of 19 feet and two erodible fuse plugs with a total length of 59 feet. Fuse plug No 1 has a crest elevation of 3,012.66 feet and Fuse Plug No 2 has a crest elevation of 3,014,16 feet. There was no backwater analysis provided to determine "without dam" elevation.	7/3/12
2004	Holyoke	8/20/99	Connecticut	MA	42,955	100.6	100.6	100.6	Boundary upstream of dam is defined by contour elevation 100.6 NGVD which is the elevation of the top of the wooden flashboards on the masonry dam.	7/3/11

FERC No.	Project Name	License Issue Date	River	ST	Authorized Capacity (kW)	Normal Max Pond Elevation	Spillway Crest Elevation	Boundary Contour Elevation	Boundary Description	Submittal Date
637	Lake Chelan	11/6/06	Chelan	WA	59,200	1,100	Assumed to be at El 1,100	1,100	License order notes that the Normal Maximum Pond Elevation is 1,100 and it held above 1,098 for most of the summer recreation season. The reservoir is 55 miles long and has a surface area at max pool of 32,560 acres. The Exhibit G maps do not depict either the normal max pool or boundary contour elevations but these are clearly spelled out in the license order.	6/7/07

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on the parties designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 18th day of January, 2013.

/s/ John A. Whittaker, IV

John A. Whittaker, IV