

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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Turlock Irrigation District and Modesto Irrigation District	)	Docket No. UL11-1-000 Project No. 2299-078
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**CONSERVATION GROUPS' MOTION FOR LEAVE TO FILE AN ANSWER  
AND ANSWER**

Pursuant to 18 C.F.R. § 385.212 and § 385.213(a)(2), the Conservation Groups<sup>1</sup> submit this request for leave to file an answer and answer to the Request for Rehearing and Motion for Stay filed by Turlock and Modesto Irrigation Districts (collectively, Districts) on January 18, 2013 (*see* eLibrary no. 20130118-5187).

Conservation Groups filed a Motion to Intervene concurrently with their Request for Partial Rehearing (*see* eLibrary no. 20130118-5256) (Jan. 18, 2013)), of the Director of Hydropower Administration and Compliance's (DHAC) "Order Finding Licensing of Hydroelectric Project Required" (Order) (*see* eLibrary no. 20121219-3106 (Dec. 19, 2012)). We incorporate by reference herein the description of Conservation Groups contained in our Request for Rehearing and concurrent Motion to Intervene which is still pending.

**MOTION**

The Conservation Groups request that the Commission grant their request for leave to file an answer and consider the answer in the Commission's review of the Districts' Request for Rehearing. We limit our answer to factual information necessary to clarify the record in light of new assertions made by the Districts' Request for Rehearing.

The Commission has discretion to accept answers to rehearing requests. *See* 18 C.F.R. §§ 385.212, 385.213(a)(2). It has exercised this discretion when answers help clarify complex issues, provide additional information, or are otherwise helpful in the decision making process. *See, e.g., City of Kaukauna, Wisconsin*, 137 FERC ¶ 61,072 (Oct. 20, 2011).

The information we provide is limited in scope and focuses on clarifying the factual record on which the Commission will base its decision on the Districts' Rehearing Request. The Districts have made new factual assertions regarding access to and navigability of the Tuolumne

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<sup>1</sup> The Conservation Groups include 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.

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River between Don Pedro and La Grange Dams that we believe are inaccurate and must be clarified.

The limited scope of this answer does not mean that we otherwise agree with the Districts' arguments. In fact, we dispute the Districts' interpretation of the legal standard for determining navigability for purposes of establishing the Commission's jurisdiction. We would welcome the opportunity to provide further briefing on this and other issues raised in the Districts' Request for Rehearing if the Commission determines it would assist in its decision-making process.

We request that the Commission grant our request and consider the additional information provided below.

### **ANSWER**

The Districts dispute the Order's finding that the Tuolumne River is navigable based in part on actual use by recreational and commercial whitewater boating. One of the bases for this dispute is the Districts' claim that lack of public access is not a factor limiting boating on the Tuolumne River between Don Pedro Dam and La Grange Dam:

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.

Districts' Request for Rehearing, p. 14.

To our knowledge this is the first time the Districts have claimed their lands are open to public access. This statement contradicts previous statements made by individuals we understand to be Turlock Irrigation District employees, specifically Don Pedro Recreation Agency staff, to John Dye, the guide who has led the Tuolumne River Preservation Trust's Paddle to the Sea event for the last 2 years.

According to Mr. Dye, during a trip to the Tuolumne in late April and early May 2011 he was informed by several individuals – including a kiosk attendant at Fleming Meadows Campground, Don Pedro Visitor Center staff, Turlock Lake State Park rangers, and the campground docent – that there was no public access between Don Pedro and La Grange Dams. *See Exhibit 1 (Decl. of John Dye), ¶ 6.*

If there is public access at Twin Gulch, it does not appear the Districts publicize it. Mr. Dye looked but was unable to find information about public access on Turlock Irrigation District's website, or in materials available at Don Pedro Blue Oaks and Fleming Meadows

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Entry Stations. *Id.*, ¶ 10. After reviewing the Districts' Request for Rehearing, Mr. Dye asked four other long-time California boaters whether they were aware of public access at Twin Gulch. They were not. *Id.*

According to Mr. Dye, Twin Gulch does not provide obvious access to the river. He reports that this area is protected by fences, locked gates, and barbed wire. *Id.*, ¶ 11. He states that it requires a steep descent via a diversion chute, which could become dangerous during times of high runoff. *Id.* He also states that anyone hiking in this area likely would encounter poison oak. *Id.* Thus, even if this access point were better known, the lack of improvements may discourage its use.

During his scouting trips he did identify three roads that approach the La Grange Reservoir that could provide boating access in this area if the Districts opened the roads to the public. *Id.*, ¶ 13. He provides a satellite image that shows a road that leads to the south side of La Grange Reservoir just above the dam. *Id.*, ¶ 13, Ex. 1.1. The image shows that it is not dangerous to access the river here, and indeed shows the suitability of this low-gradient area for access: “[t]his area appears to be complete with a small beach, vehicle access, a small area for parking, a spot to tie up a boat, or boats, and a boat itself.” *Id.*, ¶ 13. It appears this road was used by the Districts and/or their consultants to access La Grange Reservoir immediately upstream of La Grange Dam in the course of conducting Study W&AR-13, “Fish Assemblage and Population.” *See* Districts’ ISR, eLibrary no. 20130117-5141 (Jan. 17, 2013), W&AR-13, p. 5-7, Fig. 5.1-3. The photograph shows that the road goes to the waters-edge, and that it would be possible to back a boat trailer down into the water. *See id.*

Mr. Dye also states that the river upstream of the La Grange powerhouse and up to La Grange Dam is not an inherently dangerous stretch for boating:

The river here is a Class 1 and Class 2 stream appropriate for even a beginning river enthusiast, especially at such low flows. I would estimate the river to be very forgiving at flows up to 1,500 to 2,000 cfs, and to be boat-able well past 8,000 cfs.

*Id.*, ¶ 7. Further:

There are no drops or abrupt changes except for the man-made debris pile in the center of the river which occurs a few hundred yards below the La Grange Dam. I had to portage this debris pile paddling upstream and down due to low flows in June 2012. The debris pile could be run on river right with minimal effort given enough water and attention to the flora growing in the stream bed.

*Id.*, ¶ 8.

He also states that the steep canyon walls at La Grange Dam would not deter most boaters from paddling in the reach between Don Pedro and La Grange dams. Exhibit 1, ¶ 12. He offers his opinion based not only on his own skill level, but also based on his experience instructing and guiding less-experienced paddlers. Further, it appears that the steep canyon walls

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in the area between the two dams did not prevent the Districts' and/or their consultants from safely navigating a boat upstream from the La Grange Dam to just below the Don Pedro Dam in the course of their habitat studies. *See* Districts' ISR, W&AR-13, p. 5-7, Fig. 5.1-3.

This information confirms the Director of DHAC's finding that lack of public access is a factor limiting boating on the Tuolumne River past the La Grange Powerhouse and up to La Grange Dam and at La Grange Reservoir, and otherwise supports the Director's finding of navigability.

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## **CONCLUSION**

We request that the Commission grant the Conservation Groups' Motion for Leave to File an Answer and Answer and consider the new information offered in ruling on the merits of the Districts' Request for Rehearing.

Dated: February 12, 2013

Respectfully submitted,



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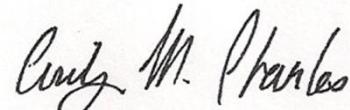
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**CERTIFICATION OF SERVICE**

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

I, Patrick Koepele, hereby certify that I have this day served the foregoing document, "Conservation Groups' Motion for Leave to File an Answer and Answer," 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: February 12, 2013

By:



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**Exhibit 1**

## **DECLARATION OF JOHN DYE**

I, John Dye, declare the following:

1. I provide this declaration from my own personal knowledge and recollection.

2. I am an experienced Sea Kayak, River Kayak, Canoe, Outrigger Canoe, Surf Ski and Olympic Sprint Boat paddler. I have been involved in the sport since 1985. I have paddled California, Oregon, Washington, Idaho, Colorado, and Arizona whitewater, including two self-supported trips on the Grand Canyon. I have also done brief boating trips to Australia and Mexico. In short, I have spent my life on and in the water with a family who loves water sports and water travel.

3. I have taught kayaking since 1986. I first taught for Reg Lake's Paddle Sports in Brisbane, California. I moved on to the California Canoe and Kayak in Oakland, California, and then to Outdoors Unlimited in San Francisco. I am an American Canoe Association (ACA) trained Instructor, and Instructor Trainer in sea kayaking. I am also an ACA member. I currently host paddle sport events, run a small river conservation non-profit organization, and mentor other paddlers at the Berkeley Paddling and Rowing Club in Berkeley, California.

4. While I am a highly experienced paddler, I am not a daredevil and shy away from excessive risks. I have instead concentrated my efforts on helping other people to enjoy the Golden State's water resources and develop a personal appreciation for how wonderful and precious those resources are. I have years of experience getting people on the water and supporting their needs, making sure they are challenged but not scared. This means spending a lot of time on mild lakes, bays, and class 1, 2, and 3 whitewater with developing boaters.

5. In March of 2011 I was fortunate enough to be contracted by the Tuolumne River Trust to apply those skills toward leading their 2011 and 2012 month long Paddle to the Sea on the Tuolumne River down to the Golden Gate in San Francisco. The trip was to be done all on water, all under human power. This led me to explore and learn about the lower Tuolumne River, including the Don Pedro Reservoir. It was important to me that we cover every single stretch of the Tuolumne that we could, with a reasonable margin of safety and without causing any undue distress to any involved.

6. In late April and early May of 2011 while scouting the lower Tuolumne in preparation for leading my first 200 plus mile source-to-sea kayak and canoe trip on the Tuolumne River, I had occasion to speak with several people that I understood to be Turlock Irrigation District employees regarding access to the river. I spoke with the kiosk attendant at Fleming Meadows Campground about camp sites and water access. She was very informative and knowledgeable about the area. She confirmed my understanding that there was no water access below Don Pedro Dam until the town of La Grange. A ranger I spoke with that morning reiterated that there was no water access below Don Pedro Dam. He advised using the portage route lead out to La Grange Road and down toward Basso Bridge. He advised against putting in at La Grange because it was too dangerous in his opinion. I proceeded to the Don Pedro Visitor

Center with its impressive overview of the canyon below. The staff here reiterated the same message: no access between the Don Pedro Dam and the La Grange Dam. I later made inquiries at Turlock Lake State Park with both the rangers and the campground docent and received the same response.

7. On June 3, 2012, I set out to assess the stream conditions present and recreational viability of the section between the La Grange Bridge on the Tuolumne River, and the La Grange Dam, approximately 1.5 miles upstream. I arrived at the bridge at 9:15 a.m., got on the water at 9:30 a.m. and paddled up to the dam without incident. I used a Jackson "Rogue" kayak, a general purpose river touring boat appropriate to easier whitewater and lake paddling. I estimated the flow to be between 125 and 200 cubic feet per second (cfs). The river here is a Class 1 and Class 2 stream appropriate for even a beginning river enthusiast, especially at such low flows. I would estimate the river to be very forgiving at flows up to 1,500 to 2,000 cfs, and to be boat-able well past 8,000 cfs. I had run the lower river that high earlier in 2011.

8. The river does require minor maneuvering skill to avoid the occasional obstacle, but it is a very forgiving stretch of water. There are no drops or abrupt changes except for the man-made debris pile in the center of the river which occurs a few hundred yards below the La Grange Dam. I had to portage this debris pile paddling upstream and down due to low flows in June 2012. The debris pile could be run on river right with minimal effort given enough water and attention to the flora growing in the stream bed.

9. The river scenery here is very good and I observed wildlife. On my return trip downstream to the bridge, I encountered two fishermen. One was wading and fly fishing for trout, the other was paddling upstream with fishing gear in a 12-foot long kayak (Perception brand Dancer model, light blue). The wading fisherman informed me the section of river above the dam "fished well" and was possibly the best fishing on the river, due to the dam blocking fish passage. I wished him luck and floated down to the bridge without incident.

10. I was very surprised to read in Modesto and Turlock Irrigation Districts' Request for Rehearing and Motion for Stay, *see* eLibrary no. 20130118-5187 (Jan. 18, 2013), that the area between Don Pedro and La Grange Dams is accessible from Twin Gulch. I made four calls to other long-time California boaters to ask if they were aware of this access. Larry Beard, of San Francisco, Joe Neic of Brentwood, Penny Wells of San Rafael, and Erica Severns of Nevada City. All of us have paddled extensively in California, including runs on the Tuolumne. None of us were aware that this was an access point. I also reviewed whitewater and reservoir paddle trip guides which did not reveal any record of the Twin Gulch access. I then reviewed the Don Pedro Lake website, which I understand is operated by the Turlock Irrigation District. As of January 29, 2013, the website did not mention any access to the lower reservoir. I could not locate any description of access in the handouts available at the Don Pedro Blue Oaks and Fleming Meadows Entry Stations, or in the literature prepared by Turlock Irrigation District and the California Department of Boating and Waterways that I found at the Don Pedro Recreation Area.

11. Although I did not know the name of specific drainage prior to reading the Districts Rehearing Request, I did survey Twin Gulch during my 2011 scouting trips to Don

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Pedro Reservoir. I was interested in the Twin Gulch area because I had seen images of a high water release made by the Districts in years past.<sup>1</sup> It was not obvious to me at the time that this was a point of public access. Accessing the river at this point, as suggested by the Districts, would involve a scramble over barbed wire, past security fences, locked gates and down a steep hillside featuring 400 feet of steep elevation drop and approximately 1.5 miles of portaging over rough terrain. I would not be surprised to find a healthy crop of poison oak on these hillsides, making this an even more difficult portage experience for the sandal and shorts clad canoeist. Also, there is no parking and visitors would be hiking down a diversion chute, which though unlikely, could become inundated with life-threatening flood waters during excessive spring rains.

12. The canyon walls right at the La Grange Dam do appear to be steep. However, the canyon walls do not extend a great distance upstream or downstream of La Grange Dam. It is my opinion that the canyon walls would not prevent boaters from accessing the river near the La Grange dam site *if* they were aware that there was public access to this area. However, it is my understanding that all access is currently restricted by the Districts, except for the newly disclosed access via Twin Gulch, which is not widely known.

13. Based on my scouting trips to the river, and some further research on Google Earth, I have noted three roads or vehicle paths that appear to be used by the Districts, and which I believe could provide public access.

- One access is via a road which leads to the base of the powerhouse on the north side of the reservoir, just below Don Pedro Dam. Downstream from the powerhouse, a two track leads off of this road, down to a small beach or launch site. This is located 1100 feet below the powerhouse on the north shore of the Reservoir.
- A second access is via a dirt road which leads to the South side of La Grange Reservoir from the South, immediately opposite Twin Gulch. This road also ends at a small beach.
- A third access is via a dirt road which leads to the South side of the La Grange Reservoir just above the dam. This area appears to be complete with a small beach, vehicle access, a small area for parking, a spot to tie up a boat, or boats,

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<sup>1</sup> A photo of such a release is available at [http://www.google.com/imgres?hl=en&client=firefox-a&hs=dXv&sa=X&tbo=d&rls=org.mozilla:en-US:official&biw=1920&bih=898&tbm=isch&tbnid=ARfgYDX7V6WCKM:&imgrefurl=http://geotripper.blogspot.com/2010/06/rapid-canyon-formation-1997-tuolumne.html&docid=2ab-YYOEJreEdM&imgurl=http://2.bp.blogspot.com/\\_u8RzBC9dWv0/TCJPJEmF3AI/AAAAAAAADIg/UfimwtGnrnc/s1600/spill3.jpg&w=406&h=284&ei=uCMUZLeJeamiQL53YCABQ&zoom=1&iact=rc&dur=708&sig=105623178124623956821&page=1&tbnh=176&tbnw=229&start=0&ndsp=16&ved=1t:429,r:0,s:0&tx=95&ty=249](http://www.google.com/imgres?hl=en&client=firefox-a&hs=dXv&sa=X&tbo=d&rls=org.mozilla:en-US:official&biw=1920&bih=898&tbm=isch&tbnid=ARfgYDX7V6WCKM:&imgrefurl=http://geotripper.blogspot.com/2010/06/rapid-canyon-formation-1997-tuolumne.html&docid=2ab-YYOEJreEdM&imgurl=http://2.bp.blogspot.com/_u8RzBC9dWv0/TCJPJEmF3AI/AAAAAAAADIg/UfimwtGnrnc/s1600/spill3.jpg&w=406&h=284&ei=uCMUZLeJeamiQL53YCABQ&zoom=1&iact=rc&dur=708&sig=105623178124623956821&page=1&tbnh=176&tbnw=229&start=0&ndsp=16&ved=1t:429,r:0,s:0&tx=95&ty=249). In the photo, high flow releases flowed from gates directly upstream of Twin Gulch, across the road bed, and down the gulch in a white, foaming fury.

and a boat itself. *See* Ex. 1.1, which is an image from Google Earth that includes my notes.

14. If any of the three roads listed above were open to the public, I believe they would be suitable for small, lightweight craft such as canoes, kayaks, and rafts with minor improvements. The river access at Wards Ferry and Lumsden Road directly upstream is much more difficult because it is mostly unimproved, but these two spots alone accommodate hundreds possibly thousands, of river travelers annually. Paddlers are used to carrying their watercraft short distances (300 feet or less) in order to put on a run.

15. It is my opinion that providing public access to the La Grange Reservoir would be a valuable asset to the boating public. Small reservoirs below Folsom Reservoir in Sacramento, Keswick Reservoir in Redding and numerous reservoirs on the Feather near Oroville are very popular and provide access for canoes and kayaks but less so for powered craft. These are popular and safe boating spots where the public utilizes these water and recreation assets. The reservoir below Don Pedro could be a similar public asset with minimal investment.

16. I declare under penalty of perjury of the laws of the State of California and the United States of America that the foregoing is true and correct and that this declaration was executed February 11, 2013 in San Rafael, California.

Respectfully submitted,



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John Dye  
Associate Director, Rivers for Change

**Exhibit 1.1**

EXISTING POWER BOAT, AT  
EXISTING LAUNCH SITE

ACCESS ROAD ABOVE  
DAM

LA GRANGE DAM

IMAGES SHOWN FROM GOOGLE MAPS



Document Content(s)

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