

144 FERC ¶ 61,051  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony Clark.

Turlock Irrigation District and  
Modesto Irrigation District

Docket No. UL11-1-001  
Project No. 2299-079

ORDER ON REHEARING, CLARIFYING INTERVENTION STATUS, AND  
DENYING STAY PENDING JUDICIAL REVIEW

(Issued July 19, 2013)

1. On December 19, 2012, Commission staff issued an order finding licensing required for the unlicensed 4.9-megawatt La Grange Hydroelectric Project, located on the Tuolumne River near the town of La Grange in Stanislaus and Tuolumne Counties, California.<sup>1</sup> The owners of the La Grange Dam, Turlock Irrigation District and Modesto Irrigation District (the Districts), filed a request for rehearing and a stay pending judicial review, arguing that the project does not require licensing. Conservation Groups<sup>2</sup> filed a motion to intervene and a request for rehearing, arguing that the La Grange Project requires licensing as part of the Districts' Don Pedro Project No. 2299. For the reasons discussed below, we affirm that the La Grange Project requires licensing under the Federal Power Act (FPA). We further find that, because licensing is required on other grounds, we need not determine now whether the La Grange Project might require licensing as part of the Don Pedro Project.

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<sup>1</sup> *Turlock and Modesto Irrigation Districts*, 141 FERC ¶ 62,211 (2012) (*Turlock and Modesto* or December 19 Order).

<sup>2</sup> Conservation Groups are: American Rivers, American Whitewater, 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.

## **Background**

2. The Districts jointly own the La Grange Dam. They constructed it between 1891 and 1893 to raise the height of the Tuolumne River to a level that would enable them to divert and deliver water by gravity flow to their irrigation canals, located on opposite sides of the river. In 1924, Turlock Irrigation District (Turlock) built a two-unit powerhouse on the south (left) bank of the Tuolumne River, which it has continued to own and operate for power generation.
3. In June 2011, the National Marine Fisheries Service (NMFS) asked Commission staff to review the La Grange Project to determine whether it requires licensing under section 23(b)(1) of the FPA.<sup>3</sup> NMFS requested this review because the unlicensed La Grange Project lacks fish passage facilities and therefore blocks the movement of anadromous fish to parts of the Tuolumne River upstream of the La Grange Dam. NMFS and Conservation Groups are currently participating in the pre-application stage of the integrated licensing process for relicensing the Districts' much larger Don Pedro Project, located on the Tuolumne River about two miles upstream of the La Grange Dam. These participants support fish passage studies and requirements at the Don Pedro Project, and support licensing the La Grange Project so that fish passage can be required at La Grange Dam.
4. To inform its jurisdictional determination, Commission staff prepared a navigation review of the Tuolumne River and placed it in the public file on May 29, 2012. Turlock, NMFS, and Conservation Groups filed comments, not only on staff's navigation review but also on other possible bases for requiring that the La Grange Project be licensed under the FPA.
5. On December 19, 2012, staff issued an order finding that the La Grange Hydroelectric Project requires licensing under section 23(b)(1) of the FPA. As discussed in more detail below, staff found that the project requires licensing because it is located on a navigable river and occupies U.S. lands, either of which is sufficient for mandatory licensing under that section. Staff further found that, if the Tuolumne River were determined to be non-navigable at the project site, the project would nevertheless require licensing on the alternative ground that it is located on a non-navigable Commerce Clause stream, experienced post-1935 construction when it was enlarged in 1989, and affects the interests of interstate commerce by its connection to the interstate electrical grid. Because licensing could be required on any of these three grounds, staff did not find it necessary to determine whether the La Grange Project might also require licensing as part of the Don Pedro Project.

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<sup>3</sup> 16 U.S.C. § 817(1) (2006).

6. On January 14, 2013, NMFS filed a motion to intervene and comments in the jurisdictional proceeding. On January 18, 2013, the Districts filed a timely request for rehearing and a stay pending rehearing and judicial review. That same day, Conservation Groups filed a motion to intervene and a request for rehearing based on staff's failure to determine whether the La Grange Project requires licensing as part of the Don Pedro Project.

7. On February 1, 2013, Conservation Groups filed an answer in opposition to the Districts' motion for a stay. On February 12, 2013, Conservation Groups filed a motion for leave to file an answer and an answer to the Districts' request for rehearing. On February 19, 2013, the Districts filed a motion for leave to file an answer and an answer to Conservation Groups' request for rehearing and answer in opposition to the Districts' motion for a stay. On February 27, 2013, the Districts filed a motion for leave to file an answer and an answer to Conservation Groups' February 12, 2013 motion to file an answer and an answer to the Districts' rehearing request.

8. On March 6, 2013, the Tuolumne River Conservancy filed a motion to intervene and comments. On April 2, 2013, the California Department of Fish and Wildlife (California DFW) filed comments. On June 12, 2013, the Districts filed a renewed motion for a stay and, in the alternative, an extension of time to meet the filing requirements of the December 19 Order.

## **Preliminary Matters**

### **A. Motions to Intervene**

9. Commission staff began this proceeding by opening a "UL" docket for an unlicensed project and requesting information from the project owner about possible bases for mandatory licensing jurisdiction.<sup>4</sup> Consistent with its practice for this type of jurisdictional inquiry, staff did not issue a public notice of the proceeding at that time.

10. On May 29, 2012, staff issued a notice of availability of its navigation review, request for comments, and notice of its pending jurisdictional inquiry. Staff did not solicit protests or motions to intervene in response to that notice. Several entities subsequently filed motions to intervene.

11. The purpose of seeking to intervene in a Commission proceeding is to obtain party status, which entitles the intervenor to file a request for rehearing of any final order

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<sup>4</sup> See letter from Charles Cover, Commission staff, to Casey Hashimoto, Turlock, requesting that information on jurisdictional criteria be filed within 45 days in Docket No. UL11-1-000 (July 26, 2011).

issued in the proceeding and to seek judicial review of such orders.<sup>5</sup> For this reason, in a proceeding for which the Commission has not issued a public notice establishing a deadline for intervention, the latest time that an entity may file a motion to intervene is 30 days after issuance of a final Commission order.<sup>6</sup> The Commission uses this date as a cut-off because it is the statutory deadline for a request for rehearing under FPA section 313(a).<sup>7</sup>

12. In this case, the U.S. Department of the Interior (Interior) filed a notice of intervention on August 2, 2012.<sup>8</sup> NMFS filed a motion to intervene on January 14, 2013. Conservation Groups filed their motion to intervene on January 18, 2013, together with their request for rehearing. All of these filings were timely, because they were made on or before the January 18, 2013 deadline to file a request for rehearing of staff's December 19 Order finding licensing required.<sup>9</sup> Because the filings were also unopposed, these entities became parties by operation of the Commission's rules.<sup>10</sup>

13. Staff typically opens a UL docket to begin a jurisdictional investigation for an unlicensed project in response to a request from someone other than the project owner,

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<sup>5</sup> See *City of Orville v. FERC*, 147 F.3d 979, 984 n.3 (D.C. Cir. 1998).

<sup>6</sup> See *Homestake Mining Co.*, 98 FERC ¶ 61,236, at 61,957 (2002); *Pacific Gas & Electric Co.*, 40 FERC ¶ 61,035, at 61,099 n.13 (1987).

<sup>7</sup> 16 U.S.C. § 825l(a) (2006). The requirement that a party seek rehearing within 30 days of issuance of a Commission order is a statutory obligation that the Commission cannot waive. See, e.g., *City of Tacoma, Washington*, 105 FERC ¶ 61,333, at P 17 (2003). Therefore, even if the Commission could grant a motion to intervene filed after that date, it could not accept any request for rehearing that such a party might file. See *Alaska Power & Telephone*, 81 FERC ¶ 61,239 (1997).

<sup>8</sup> Under Rule 214(b), certain federal and state agencies may file a notice of intervention rather than a motion to intervene, if the period for filing interventions has not yet expired. See 18 C.F.R. § 385.214(a)(2) (2012).

<sup>9</sup> The Tuolumne River Conservancy, Inc. filed a motion to intervene on March 6, 2013. Because this motion was filed after the January 18, 2013 statutory deadline to file a request for rehearing, the Commission's Secretary denied the motion by notice issued on May 17, 2013.

<sup>10</sup> See 18 C.F.R. § 385.214(c) (2012), which provides that if no answer in opposition to a timely motion to intervene is filed within 15 days after the motion is filed, the movant becomes a party at the end of the 15 day period.

and has not customarily issued a public notice of the proceeding requesting comments, protests, and motions to intervene. In contrast, when a project owner files a declaration of intention requesting a jurisdictional determination for a proposed or existing project, or someone files a petition for a declaratory order on jurisdiction, staff opens a “DI” docket and issues a public notice requesting comments, protests, and motions to intervene.<sup>11</sup>

14. This difference in how these two types of proceedings are handled can create confusion about whether or when entities may file a motion to intervene in a UL proceeding. In most respects, DI and UL proceedings are similar and they both involve the same statutory requirements for mandatory licensing jurisdiction. Federal and state resource agencies and other entities might have an interest in the outcome of either type of proceeding and thus might seek to protect that interest by becoming a party. To avoid any possible confusion about whether or when these entities may file a motion to intervene, Commission staff should issue a public notice in all future UL proceedings requesting comments, protests, and motions to intervene, in the same manner as it now does for DI proceedings.

#### **B. The Districts’ Motion for a Stay**

15. The Districts request a stay of the December 19 Order’s requirements to file a license or exemption application and to comply with the Commission’s dam safety regulations pending rehearing and judicial review.<sup>12</sup> The Districts argue that it is inappropriate to require them to embark on the multi-million dollar licensing/exemption and regulatory compliance processes unless and until the federal courts have confirmed the legality of the Commission’s assertion of jurisdiction over the La Grange Project.

16. The Districts estimate that the studies that will likely be required in connection with their license application will cost between \$3 and \$4 million, and the total cost to complete all phases of the licensing process, including conducting the studies, would be approximately \$6 million to \$8 million. The Districts estimate that the total cost of complying with the Commission’s Part 12 dam safety requirements would exceed \$2 million, for a total cost of complying with the December 19 Order of \$10 million or more. The Districts argue that, without a stay, their right to pursue judicial review under section 313(b) of the FPA will be in essence partially revoked, because they will be required to expend large sums of money and considerable effort complying with the

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<sup>11</sup> See 18 C.F.R. Part 24 (2012) and section 23(b)(1) of the FPA, 16 U.S.C. § 817(1) (2006). A declaration of intention under FPA section 23(b)(1) is a particular form of a petition for a declaratory order. See 18 C.F.R. § 385.207(b) (2012).

<sup>12</sup> The Districts filed the required schedules for complying with these requirements on March 18, 2013.

Commission's requirements before they have had an opportunity to obtain a judicial ruling on the appropriateness of the Commission's jurisdictional determination. In these circumstances, they contend that the Commission should grant a stay because "justice so requires."<sup>13</sup>

17. Conservation Groups oppose the Districts' motion for a stay. They argue that the Districts do not provide any explanation or data to support their cost estimates, and state that some of the licensing process costs could be lowered if the LaGrange Project were licensed as part of the Don Pedro Project rather than in a separate proceeding. Conservation Groups also maintain that the Commission's precedent establishes that monetary or economic injury is generally insufficient to warrant a stay, and that pecuniary losses are not irreparable.<sup>14</sup>

18. Conservation Groups argue that, if the Commission is considering granting the Districts' motion for a stay, it should take into account the Districts' likelihood of success on the merits. Because the Districts' motion did not address this factor, they request that the Commission require the Districts to make a showing of their likelihood of success and allow other interested parties an opportunity to respond before reaching a decision on whether to grant a stay.

19. Conservation Groups maintain that a stay will substantially harm their and their members' interests in protecting and enhancing fish and wildlife and recreational uses on the Tuolumne River, because it will potentially delay the Districts' compliance with the FPA and federal environmental statutes by several years. They assert that, among other things, a stay will delay a hard look at fish passage at the La Grange and Don Pedro dams at a time when Chinook salmon and Central Valley steelhead populations in the San Joaquin River basin have experienced dramatic declines in recent years, and overall declines since the original Don Pedro Project was licensed. They add that licensing the La Grange Project will involve substantially the same environmental resource issues that are being addressed in the Don Pedro relicensing proceeding, and argue that a stay of the La Grange licensing proceeding will limit, and may even eliminate the opportunity for the Commission and other stakeholders to consider these issues efficiently and at one time, thus extending the time and cost for the Commission and other stakeholders.

20. Conservation Groups contend that the Commission must also consider the public interest, and maintain that a stay would be contrary to the public's interest in requiring that the La Grange Project comply with the FPA and federal environmental statutes to

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<sup>13</sup> 5 U.S.C. § 705 (2006).

<sup>14</sup> In support, they cite *Aquenergy Systems, Inc.*, 39 FERC ¶61,373, at 62,211 (1987), and *City of Centralia, Washington*, 20 FERC ¶ 61,311, at 61,607 (1982).

protect fish and wildlife resources, water quality, and recreation. They also argue that compliance with the Commission's dam safety requirements is in the public interest to assure that the La Grange Project does not pose a risk to public safety.

21. As noted, on June 12, 2013, the Districts filed a renewed motion for a stay and, in the alternative, a request for an extension of time to comply with the Commission's licensing and dam safety requirements. The Districts state that they filed their renewed motion because the Commission had not yet acted on their stay request, and they would soon be required to begin incurring costs associated with the first steps of their proposed schedules for compliance with these requirements. On June 27, 2013, Commission staff granted a six-month extension of time to allow the Districts more time to comply with the licensing and dam safety requirements.<sup>15</sup> As a result, the Districts' motion for a stay pending rehearing is now moot.

22. The Districts also seek a stay pending judicial review. 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." Under this standard, the Commission considers a number of factors, such as whether the movant will suffer irreparable injury in the absence of a stay, whether the issuance of a stay would substantially harm other parties, and where the public interest lies.<sup>16</sup>

23. In order to meet the requirement of irreparable injury for a stay, the injury must be both certain and great, actual and not theoretical.<sup>17</sup> Economic loss alone does not constitute irreparable harm.<sup>18</sup> Yet the Districts cite only economic harm as the basis for their stay request and do not provide any support for their cost estimates or indicate when the costs might be incurred. Moreover, as a result of staff's grant of a six-month extension of time to comply with the licensing and dam safety requirements, the Districts' near-term costs of compliance would be considerably less than their overall estimate. The La Grange Project requires licensing on several grounds, and has operated for many years without the requisite Commission authorization. The Commission's licensing process, which balances developmental purposes and environmental protection,

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<sup>15</sup> See *Turlock and Modesto Irrigation Districts*, 143 FERC ¶ 62,223 (2013).

<sup>16</sup> *Aquenergy Systems, Inc. (Aquenergy)*, 39 FERC at 62,211 (citing *Columbia Gulf Transmission Co.*, 37 FERC ¶ 61,003 (1986)).

<sup>17</sup> *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at P 26 (2001) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

<sup>18</sup> *Id.*

should be followed. In addition, the public interest in ensuring that the dam is safe outweighs the potential economic harm to the Districts of complying with the Commission's dam safety regulations.<sup>19</sup> We do not believe that granting a stay here would be in the public interest. We therefore find that justice does not require a stay, and we deny the Districts' motion.

### **C. Conservation Groups' Request Concerning Don Pedro Relicensing**

24. In their answer to the Districts' motion for a stay, Conservation Groups request that the Commission direct staff to propose a process for addressing the Commission's jurisdiction over the La Grange Project in the Don Pedro relicensing proceeding. They argue that Commission staff has rejected fish passage and anadromous fish habitat studies in the Don Pedro relicensing proceeding on the grounds that the La Grange Project was not subject to the Commission's jurisdiction, and that staff should now require these studies during the second Don Pedro study season. The Districts acknowledge in their stay motion that staff might require these studies now that it has found that the La Grange Project requires licensing.

25. The Districts argue that the Commission should reject Conservation Groups' request for a process to assert control over the La Grange Project sooner than the timetable reflected in the December 19 Order. They add that, because Conservation Groups did not specifically challenge the December 19 order's 36-month deadline for filing a license application for the La Grange Project in their request for rehearing, they should not be permitted to do so now in their answer to the Districts' stay motion. They also maintain that there is no basis for considering La Grange in the Don Pedro relicensing proceeding before the issue of La Grange jurisdiction is finally resolved.<sup>20</sup>

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<sup>19</sup> The Commission's dam safety requirements apply to all unlicensed constructed projects for which the Commission has determined that licensing is required. *See* 18 C.F.R. § 12.1(a)(2) (2012). For this reason, in cases granting a stay of the requirement to file a license application, the Commission has denied a stay of dam safety requirements. *See, e.g., Habersham Mills*, 55 FERC ¶ 61,158 (1991); *Consolidated Hydro, Inc.*, 55 FERC ¶ 61,136 (1991).

<sup>20</sup> On March 22, 2013, the California Department of Fish and Wildlife (California DFW) filed comments on staff's December 19 Order finding licensing required. California DFW states that it concurs with the result of that order and with Conservation Groups' assertion that requests for studies of anadromous fish passage and upstream habitat that staff denied in the Don Pedro relicensing proceeding should now be revisited. California DFG also states that the Commission should consider coordinating the Don Pedro and La Grange Project process plans and schedule to avoid delays and discrepancies.

26. There is no need to direct staff to propose a process for addressing the Commission's jurisdiction over the La Grange Project in the Don Pedro relicensing proceeding. To the extent that information is available and has already been developed for the Don Pedro relicensing proceeding, the Districts can use it in preparing a license application for La Grange. However, we find no basis for shortening the schedule for filing a license application for the La Grange Project so that it can be considered concurrently with the Don Pedro Project, as Conservation Groups request. Depending on the outcome and how the issues are ultimately resolved in the two proceedings, it may be appropriate to consider including a reservation of authority to reopen and amend any license that may be issued for the Don Pedro Project in light of any license that may be issued for the La Grange Project.<sup>21</sup>

#### **D. The Parties' Filings Subsequent to their Rehearing Requests**

27. As noted, Conservation Groups filed a motion for leave to file an answer and an answer to the Districts' request for rehearing.<sup>22</sup> The Districts filed a motion for leave to file an answer and an answer to Conservation Groups' request for rehearing and answer in opposition to the Districts' motion for a stay.<sup>23</sup> The Districts also filed a motion for leave to file an answer and an answer to Conservation Groups' motion to file an answer and answer to the Districts' rehearing request.<sup>24</sup>

28. Commission regulations provide that an answer may not be made to either a request for rehearing or an answer, unless the decisional authority orders otherwise.<sup>25</sup>

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<sup>21</sup> See the Commission's policy on use of reserved authority in hydropower licenses to ameliorate cumulative impacts, 18 C.F.R. § 2.23 (2012). The Don Pedro Project relicense application must be filed no later than April 30, 2014. As noted, staff recently extended the deadline for filing the La Grange Project license application to June 19, 2016.

<sup>22</sup> Conservation Groups' Motion for Leave to File an Answer and an Answer to the Districts' Request for Rehearing (filed Feb. 12, 2013).

<sup>23</sup> Districts' Motion for Leave to File an Answer and an Answer to Conservation Groups' Request for Rehearing and answer in opposition to the Districts' motion for a stay (filed Feb. 19, 2013).

<sup>24</sup> Districts' Motion for Leave to File an Answer and an Answer to Conservation Groups' February 12, 2013 Motion to File an Answer and Answer to the Districts' Rehearing Request (filed Feb. 27, 2013).

<sup>25</sup> See 18 C.F.R. § 385.213(a)(2) (2012).

Therefore, these filings are not permitted under our rules. However, because jurisdiction is an issue that we may consider at any time, we have reviewed these filings to determine whether they contain information or arguments that can assist us in resolving the issues on rehearing. We therefore deny these motions and reject the answers that accompany them, except to the extent discussed in this order.

### **Discussion**

29. Under section 23(b)(1) of the FPA,<sup>26</sup> a license is required for a non-federal hydroelectric project if it: (1) is located on a navigable water of the United States; (2) occupies lands or reservations of the United States; (3) uses the surplus water or water power from a government dam; or (4) is located on a non-navigable stream over which Congress has Commerce Clause jurisdiction, affects the interests of interstate or foreign commerce, and is constructed or enlarged after August 26, 1935.<sup>27</sup>

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<sup>26</sup> 16 U.S.C. § 817(1) (2006). Section 23(b)(1) provides, in pertinent part:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or utilize the surplus water or water power from any Government dam, except under and in accordance with . . . a license granted pursuant to this Act. Any person . . . intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such construction such person . . . shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

<sup>27</sup> See *Farmington River Power Co. v. FPC*, 455 F.2d 86 (2d Cir. 1972).

30. The La Grange Project does not use the surplus water or water power from a government dam. Therefore, whether licensing is required depends on whether the project meets conditions (1), (2), or (4) above.<sup>28</sup>

31. Commission staff found that the La Grange project requires licensing because it is located on a navigable river and occupies U.S. lands. In the alternative, staff noted that if the Tuolumne River is not navigable at the lowermost part of the project, it would require licensing based on its location on a non-navigable Commerce Clause stream, connection to the interstate electrical grid, and enlargement after 1935.

32. On rehearing, the Districts argue that the La Grange Project does not require licensing on any grounds. Conservation Groups agree with Commission staff's determination that the project requires licensing because it is located on a navigable river and occupies U.S. lands, but they seek rehearing of staff's failure to find that the La Grange Project requires licensing as part of the Don Pedro Project. For the reasons explained below, we affirm that the La Grange Project requires licensing because it is located on a navigable water of the United States and occupies federal lands.<sup>29</sup> In the alternative, assuming that the Tuolumne River is not navigable at the site of the La Grange powerhouse and tailrace, we affirm that the La Grange Project requires licensing because it is located on a non-navigable Commerce Clause stream, was enlarged after August 26, 1935, and affects the interests of interstate commerce through its connection to the interstate electrical grid. We further find that, based on the current record, we lack substantial evidence to determine whether the La Grange Project requires licensing as part of a complete unit of development with the Don Pedro Project. However, because licensing is required on other grounds, we need not resolve this issue now, and would only be required to do so if our findings on jurisdiction were reversed on appeal or if Turlock were to cease generating at the project.

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<sup>28</sup> A project can require licensing under one or more of these four grounds, but conditions (1) and (4) above are mutually exclusive. All projects located on navigable waters require licensing, regardless of when they were constructed or whether they affect commerce (unless they have a valid pre-1920 permit). Projects on non-navigable streams require licensing only if they meet all three parts of condition (4). If a project is located on navigable waters, there is generally no need for the Commission to consider the three-part test for projects located on non-navigable streams. If evidence of navigability is contested or lacking, however, the Commission may consider whether the project would require licensing under the three-part test.

<sup>29</sup> The project does not use surplus water or water power from a government dam.

### **A. Navigable Waters**

33. Commission staff found that the La Grange project requires licensing because of its location on a navigable river. Section 3(8) of the FPA defines “navigable waters.”<sup>30</sup> In essence, navigable waters are those that are used or suitable for use to transport persons or property in interstate or foreign commerce, either themselves or by connecting with other navigable waters. Navigability is not time dependent; a river is navigable if: “(1) it *presently* is being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* by reasonable improvements.”<sup>31</sup> Evidence of actual commercial use is not required; a river can be found navigable under the FPA based on its suitability for commercial use.<sup>32</sup> Recreational boating can demonstrate a river’s suitability for the simpler forms of commercial navigation.<sup>33</sup> Moreover, a river’s suitability for commercial use can be shown by test trips, even if there is no evidence of any actual commercial or recreational use.<sup>34</sup>

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<sup>30</sup> 16 U.S.C. § 796(8) (2006). Section 3(8) of the FPA provides:

“[N]avigable waters” means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

<sup>31</sup> *Rochester Gas & Electric Co. v. FPC*, 344 F.2d 594, 596 (2d Cir. 1965) (emphasis by the court). *See also PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, at 1228 (2012).

<sup>32</sup> *See United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940) (*Appalachian*); *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (*FPL Maine*).

<sup>33</sup> *Appalachian*, 311 U.S. at 416.

<sup>34</sup> *See United States v. Utah*, 283 U.S. 64, 83 (1931); *FPL Maine*, 287 F.3d at 1157.

## **1. Current Navigability at the La Grange Project Site**

34. The Tuolumne River flows into the navigable San Joaquin River, which flows into the San Francisco Bay and the Pacific Ocean, thus providing the necessary link for interstate and foreign commerce. Staff therefore found that, in order to support a finding that the Tuolumne River is navigable at the site of the La Grange Project, it is only necessary to 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.<sup>35</sup> The Tuolumne's confluence with the San Joaquin River is at river mile (RM) 0.0, and the lowermost part of the La Grange Project is at approximately RM 51.7.<sup>36</sup> Based on evidence filed by the California Department of Fish and Game (California DFG) and the Tuolumne River Trust, staff found that the Tuolumne River is currently navigable up to at least the La Grange Project tailrace at RM 51.7 and, with a short portage, to the base of the La Grange Dam at RM 52.2.<sup>37</sup>

35. The Districts argue that staff's decision to focus on only the stretch of river up to the lowermost project feature is contrary to both Commission and court precedent. Specifically, they cite the Commission's statement in *PacifiCorp* that, in order to find a river "navigable at the project, there must be substantial evidence that the river is at that point part of an aqueous highway that was or is suitable for use to transport persons or property between states."<sup>38</sup> From this statement, the Districts assume that "at that point" must mean the same thing as "at the project" and maintain that "the Commission there was clearly referring to the entire project, not just the lowermost portion of it."<sup>39</sup> Similarly, they argue that in *Hubbardston Hydro Co.*,<sup>40</sup> the Commission considered

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<sup>35</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at PP 4, 20.

<sup>36</sup> River miles are measured from the mouth of a river (RM 0) to the headwaters.

<sup>37</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at PP 21-22. Paragraph 21 of that order incorrectly states the location of the La Grange Dam site as RM 52.5. The correct location is RM 52.2, as stated in paragraph 19 of the order and in Turlock's October 11, 2011 report on the La Grange Project (La Grange Report) at 1.

<sup>38</sup> *PacifiCorp Electric Operations*, 73 FERC ¶ 61,365, at 62,140 (1995) (*PacifiCorp*), *reh'g denied*, 74 FERC ¶ 61,262 (1996).

<sup>39</sup> Districts' Rehearing Request at 9.

<sup>40</sup> 86 FERC ¶ 61,047, at 61,181 (1999) (*Hubbardston*).

whether there was evidence of transport of lumber through the site of the project, and that the court in *Centralia* evaluated the “areas included in the Yelm project.”<sup>41</sup>

36. The Districts argument is incorrect, and is based on a misunderstanding of these cases. The Commission often considers evidence of navigability above, through, and below the site of a hydroelectric project, particularly where there is sufficient evidence to find that the entire river is navigable. However, this is not a requirement, either for a finding of navigability or a determination that a project must be licensed under the FPA. Rather, the Commission has long held that if any part of a project is located in navigable waters or on U.S. lands, the entire project requires licensing under the FPA.<sup>42</sup>

37. Under FPA section 23(b)(1), a license is required to construct, operate, or maintain any dam or other project works located “across, along, or in” any navigable waters of the United States. Under FPA section 3(11), a “project” is defined as “a complete unit of improvement or development,” including all of its component structures and interests.<sup>43</sup> As discussed below, as a general rule all parts of a complete unit of development must be licensed, although they do not necessarily have to be included in the same license.<sup>44</sup> Thus, if a dam or any other part of a project is located on or in navigable waters, the entire project must be licensed.

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<sup>41</sup> *City of Centralia v. FERC*, 851 F.2d 278, 282 (9<sup>th</sup> Cir. 1988) (*Centralia*).

<sup>42</sup> The Commission has stated: “So long as any part of a project is situated on navigable waters, or on public lands or reservations, and so long as that project generates any electric power, however minor in amount and however insignificant to the project as a whole, . . . the works of that project are subject to be licensed and required to be licensed under the Federal Power Act. *Escondido Mutual Water Co.*, 6 FERC ¶ 61,189, at 61,388 (1979) (footnotes omitted; entire project required licensing based on location of some project works on U.S. reservation lands), *aff’d in pertinent part*, *Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223 (9<sup>th</sup> Cir. 1983), *aff’d in part and rev’d in part*, *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 n.12 (1984). For cases specifically involving navigable waters, *see note 49, infra*.

<sup>43</sup> *See* 16 U.S.C. § 796(11) (2006). The complete definition appears in *infra* and note 149.

<sup>44</sup> *See, e.g., Hudson River-Black River Regulating District*, 100 FERC ¶ 61,319, at 62,455 n.8 (2002); *Orange and Rockland Utilities*, 44 FERC ¶ 61,236, at 61,869 n.30 (1988).

38. *FPL Maine* is an example of this principle.<sup>45</sup> In that case, there were four hydroelectric projects located on the Messalonskee Stream. The project farthest upstream included a dam and storage reservoir, Messalonskee Lake, that was operated to provide flows to maximize hydropower generation at all four projects. The Commission held, and the court observed in its decision, that the four projects comprised a single unit of development and that therefore, if any one of the projects required a license, they all must be licensed.<sup>46</sup> The Commission found that all four projects required licensing because the Messalonskee Stream was navigable from the Union Gas dam, at the project farthest downstream, on down to the navigable Kennebec River (which empties into the Atlantic Ocean).<sup>47</sup> The court affirmed the Commission's navigability determination.<sup>48</sup> Thus, staff's approach in this case is consistent with both Commission and court precedent.

39. The Districts discount *FPL Maine*, arguing that the unit of development issue was not before the court. However, it was an essential element of the Commission's decision that all four projects were required to be licensed because of the lowermost dam's location on a navigable river. The Districts' attempt to characterize this case as contrary to Commission and court precedent is not accurate. A project requires licensing if any of its project works are located on navigable waters, as long as the necessary interstate or foreign navigational linkage is present.<sup>49</sup>

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<sup>45</sup> *FPL Maine*, 287 F.3d at 1154; see *Kennebec Water District*, 80 FERC ¶ 61,208, at 61,828 (1997).

<sup>46</sup> *Id.*

<sup>47</sup> *Kennebec Water District*, 84 FERC ¶ 61,027, at 61,126 (1998).

<sup>48</sup> *FPL Maine*, 237 F.3d at 1160.

<sup>49</sup> See, e.g., *Pennsylvania Water & Power Co. v. FPC*, 123 F.2d 155, 157 (D.C. Cir 1941) (navigability of the Susquehanna River "at and near the point of the dam"); *Iliamna-Newhalen-Nondalton Electric Cooperative, Inc.*, 58 FERC ¶ 61,065, at 61,149 (1992) (licensing required based on navigability of the Tazimina River up to the project powerhouse located at the base of Tazimina Falls); *Sheldon Jackson College*, 54 FERC ¶ 61,263, at 61,765 (1991), *reconsideration denied*, 55 FERC ¶ 61,266 (1991) (licensing required because the project tailrace was located in Sitka Sound on Crescent Bay, a navigable waterway); *Niagara Mohawk Power Corp.*, 45 FERC ¶ 61,404, at 62,268 (1988) (licensing required even if project's dam and reservoir were located above falls in non-navigable waters, because project's powerhouse was located on navigable waters below the falls); *Fairfax County Water Authority*, 43 FERC ¶ 61,062, at 61,165 (1988) (although lower project's dam was above the tidal reach, project required licensing because its powerhouse was located in navigable waters).

40. Nor do the cases that the Districts cite in support of their view establish that navigability must be shown at all parts of a project. In *PacifiCorp* we found that, although parts of the Deschutes River were navigable both upstream and downstream of the Bend Hydroelectric Project, the project itself was located in the middle of a 32-mile-long segment of the river that was not suitable for commercial navigation.<sup>50</sup> In addition, there was a second non-navigable 20-mile-long segment of the river farther downstream. Because these two non-navigable segments of the river made it impossible to navigate up to the site of the project, there was no need to consider where the lowermost project feature was located. In *Hubbardston*, there was evidence that the river was used to transport logs in interstate commerce from above, through, and below the Hubbardston Project site, thus making it unnecessary to consider the precise location of the project works on the river.<sup>51</sup> Similarly, in *Centralia*, the court found that substantial evidence supported the Commission's finding that the Nisqually River is navigable, based on the fact that shingle bolts were floated down the river from above the Yelm Project, through the segments of the river where the project's reservoir and powerhouse are located, and down the to the mouth of the Nisqually at the Mud Flats, which were also navigable to Puget Sound.<sup>52</sup> Because the navigable portion of the river began some 14 miles above the uppermost part of the project, it included the entire project. None of these cases stand for the proposition that the Commission must make a finding of navigability at all parts of the project in order to require a license under the FPA.

41. The Districts next contend that the facts do not support staff's determination that the Tuolumne River is navigable at the site of the La Grange Dam. They maintain that the California DFG's evidence showed only that the department's survey crews were able to travel in their motorized drift boats upstream on the river to a point downstream of the La Grange powerhouse, and that Mr. Heyne, a California DFG employee, did not present any evidence that he or any other person had passed upstream to and past the La Grange powerhouse to the dam in any type of watercraft. Rather, they argue that Mr. Heyne 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. The Districts also discount the Tuolumne River Trust's evidence as "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."<sup>53</sup> The Districts argue that this single trip

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<sup>50</sup> *PacifiCorp*, 73 FERC at 62,140 & n.18.

<sup>51</sup> *Hubbardston*, 86 FERC at 61,180-81.

<sup>52</sup> *Centralia*, 851 F.2d 278 at 281-83. Shingle bolts are quartered sections of logs, normally cedar, about four feet six inches in length, used for making roof shingles. See *Puget Sound Power & Light Co. v. FERC*, 644 F.2d 785, 788 n.3 (9<sup>th</sup> Cir. 1981).

<sup>53</sup> Districts' Request for Rehearing at 11 (emphasis in original).

does not constitute the substantial evidence that is required under section 313(b) of the FPA,<sup>54</sup> citing *PacifiCorp*<sup>55</sup> to the effect that the Commission does not recognize an expert kayaker's use of a river as constituting evidence of navigability.

42. Contrary to the Districts' assertions, we affirm that there is substantial evidence to support a finding that the Tuolumne River is navigable from its confluence with the navigable San Joaquin River up to the site of the La Grange Dam. The Districts do not dispute that recreational boaters use the Tuolumne River from the La Grange Bridge at RM 50.5 downstream to its confluence with the San Joaquin River, or that California DFG survey crews using motorized drift boats routinely navigate the river to conduct salmon spawning surveys from approximately RM 51.5 or 51.6, just below the La Grange powerhouse, downriver to RM 21.5. Rather, they contend that the evidence of navigability up to the site of La Grange dam is insufficient.

43. The Districts reject Mr. Heyne's observation that the pool at the base of the dam can be reached by portaging a 200-foot rocky section of the river immediately upstream of the powerhouse, arguing that he "did not profess to have any expertise in river travel."<sup>56</sup> However, Mr. Heyne based his observation on his and his survey crews' actual experience of navigating the river in the type of boats that demonstrate the river's suitability for the simpler types of commercial navigation. No expertise in river travel was required. In fact, a lack of special expertise on the part of the boater would provide further support for a finding of navigability, demonstrating its navigability by a person of average skill.

44. The Districts also reject the Tuolumne River Trust's evidence that Mr. Dye paddled a kayak from the La Grange Bridge put-in up to the base of La Grange Dam in June 2012 during a period of very low water in the Tuolumne, with only a short portage of the rock island 300 meters below La Grange Dam.<sup>57</sup> The Districts maintain that this evidence is not sufficient because it consists of only one trip, used a closed kayak, was made by an expert sea-kayaking instructor and guide, required paddling through rapids, and ended in an area with no means to exit the river. The Districts' criticisms are unfounded. A single round trip is sufficient if, as in this case, it occurs under conditions that demonstrate a river's suitability for commercial navigation by simple craft, such as a

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<sup>54</sup> Under section 313(b) of the FPA, 16 U.S.C. § 825l(b), the Commission's decisions must be supported by substantial evidence.

<sup>55</sup> 73 FERC ¶ 61,365 n.26.

<sup>56</sup> Districts' Request for Rehearing at 10.

<sup>57</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at P 21 & n.41.

canoe.<sup>58</sup> Although Mr. Dye states that he is an expert kayaker, his declaration makes clear that he did not need to make use of any expert kayaking skills to reach the dam. Rather, he states that the only difficulty in reaching the dam was the short portage that was required because of very low flows. Moreover, although Mr. Dye used a kayak, this was simply his craft of choice. There is no evidence to suggest that a kayak was required to navigate the easy rapids in this stretch of the river. Nor are we aware of any requirement that there be a means of exiting the river at the site of the dam.<sup>59</sup>

45. In a declaration included with Conservation Groups' February 12, 2013 filing, Mr. Dye elaborates on his June 3, 2012 trip on the Tuolumne River from the La Grange Bridge to La Grange Dam, approximately 1.5 miles upstream. He states that his kayak was a "general purpose river touring boat appropriate to easier whitewater and lake paddling."<sup>60</sup> He estimates that the flow was between 125 and 200 cubic feet per second (cfs) and states that the river in this stretch "is a Class 1 and Class 2 stream appropriate for even a beginning river enthusiast, especially at such low flows."<sup>61</sup> He estimates that

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<sup>58</sup> See *FPL Maine*, 287 F.3d at 1160 (navigability based on canoe test trips and physical characteristics of the stream, without historical or present commercial or recreational use).

<sup>59</sup> See *FPL Maine*, 287 F.3d 1151 at 1158-59 (no requirement to identify the possible commercial use to which the stream may be put, or that there be trips in both directions). Although the court found no reason why we must identify the "precise commercial use" to which a waterway may be put, *id.* at 1158, there are some possible commercial uses that would not require a means of exiting the river at the site of the dam. For example, passengers could enter the river at some downstream point and travel up to the dam site and back for commercial fishing or sightseeing trips. Similarly, goods could be gathered or produced on the banks of the river near the top of the dam and sent down to boats at the base of the dam by way of chutes, elevators, or conveyor belts for transport downstream. As the court recognized, we "need only find that [the river] was or is used or suitable for use to transport persons or property between the project and [another navigable water]." *Id.* at 1158 (citing  *Pacificorp*, 73 FERC ¶ 61,365, at 62,140 (1995)).

<sup>60</sup> Declaration of John Dye at ¶ 7, included with Conservation Groups' Motion for Leave to File an Answer and Answer (filed Feb. 12, 2013).

<sup>61</sup> *Id.* The International Scale of River Difficulty classifies rivers as follows: Class I—moving flatwaters; Class II—easy rapids; Class III—rapids requiring precise maneuvering and intermediate skill; Class IV—turbulent waters requiring complex maneuvering and advanced skill; Class V—extremely difficult and long rapids requiring scouting from shore to determine the best route. See *Northwest Power Co.*, 59 FERC ¶ 61,132, at 61,495 n.27 (1992).

the river would be “very forgiving at flows up to 1,500 to 2,000 cfs, and to be boat-able well past 8,000 cfs.”<sup>62</sup> He adds that the river requires “minor maneuvering skill to avoid the occasional obstacle” and that 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 La Grange Dam.”<sup>63</sup> He notes that this is the debris pile that he had to portage upstream and down due to low flows in June 2012 and states that it “could be run on river right [the right side of the river] with minimal effort given enough water and attention to the flora growing in the stream bed.”<sup>64</sup> He also states that his return trip downstream to the La Grange Bridge was “without incident.”<sup>65</sup>

46. In response, the Districts argue that this is “not a new issue” and that Conservation Groups have provided no justification for why they could not have submitted this information earlier in the proceeding. They also maintain that evidentiary submissions in answers to rehearing requests are inappropriate. However, they do not dispute the facts of Mr. Dye’s declaration, reiterating instead that in order to find that the La Grange Project is located on a navigable river, it must be shown that “the entire stretch of the Tuolumne River occupied by the La Grange Project is being used as part of an ‘aqueous highway’ for commerce.”<sup>66</sup>

47. We do not ordinarily accept additional evidence in response to an answer to a request for rehearing. As discussed above, however, jurisdiction is an issue that can be raised at any time. We have therefore considered Mr. Dye’s declaration and the Districts’ response on this particular issue, because they can assist us in our jurisdictional determination. The Districts’ response to this evidence is based on the wrong legal standard, in two respects. First, as we have seen, it is sufficient for a finding of navigability to show that the river is navigable up to the lowermost feature of the project, which in this case is the project tailrace at RM 51.7. Mr. Dye not only navigated past the

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* ¶ 8.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ¶ 9. The Districts argue that an expert kayaker’s use of a river does not constitute evidence of navigability, (citing  *Pacificorp*, 73 FERC ¶ 61,365 at n.26). However, that case turned on the difficulty of the rapids (Class 4 or greater), which required the skill of an expert kayaker. In this case, the record shows that a novice could easily navigate the rapids in question.

<sup>66</sup> Districts’ Motion for Leave to File Answer and Answer at 6 (filed Feb. 27, 2013).

project tailrace and powerhouse up to the base of the La Grange Dam, but also then navigated back down from the dam to the La Grange Bridge. Second, there is no need to show that the river is actually being used as part of an aqueous highway for commerce. Rather, it is sufficient to show that the river is suitable for such use.

48. In short, we affirm that there is substantial evidence that the Tuolumne River is currently navigable from its confluence with the navigable San Joaquin River up to the base of the La Grange Dam. Therefore, the La Grange Project requires licensing because it is located on a navigable river.

## **2. Current Navigability Through and Above the La Grange Project**

49. As additional evidence of navigability, Commission staff found that the Tuolumne River above the La Grange Project is currently being used for commercial navigation by whitewater boating companies, and that the river could be used from above, through, and below the project in a continuous trip by “Paddle to the Sea” participants if they were permitted access to the area between the Don Pedro Dam (RM 54.8) and the La Grange Dam (RM 52.2).<sup>67</sup> The Districts contend that “these attempts to buttress the Director’s navigability finding are unavailing”<sup>68</sup>

50. The Districts reject the evidence of commercial navigation by whitewater boating companies above the La Grange Project. They argue that the Commission found in *PacifiCorp* that a river is non-navigable if it cannot be safely navigated by an average recreational canoeist.<sup>69</sup> They further maintain that, notwithstanding the Commission’s subsequent decision in *PacifiCorp II*,<sup>70</sup> use of a river by commercial whitewater boating companies cannot “transform” a whitewater reach from non-navigable to navigable.<sup>71</sup>

51. The Districts misunderstand these two cases. Taken together, they illustrate how the Commission considers evidence of a particular type of recreational use of a river, whitewater boating, in its navigability determinations. If there is no evidence of actual commercial use, recreational use of a river can be used as a proxy for the river’s commercial suitability. However, if there is evidence of actual commercial use, there is no need to consider recreational use as a proxy. Thus, in *PacifiCorp*, the Commission

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<sup>67</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at PP 18-19.

<sup>68</sup> Districts’ Request for Rehearing at 12.

<sup>69</sup> *PacifiCorp*, 73 FERC 61,365 at 62,140-41.

<sup>70</sup> *PacifiCorp*, 79 FERC ¶ 61,130, at 61,563 (1977) (*PacifiCorp II*).

<sup>71</sup> *Id.* at 13.

found that two segments of the Deschutes River in Oregon that were used by recreational boaters were not navigable, because the only evidence of use or suitability for recreational use consisted of use by skilled kayakers or whitewater rafters on Class 4 or greater rapids.<sup>72</sup> The Commission found that this “highly specialized recreational use of a river, which requires a great deal of skill,” is not the type of recreational boating that demonstrates a river’s suitability for the simpler types of commercial navigation. In contrast, in *PacifiCorp II*, the Commission found that a stretch of Class 3 to 4 rapids on the Swan River in Montana was extensively used by whitewater boating companies to transport people in exchange for a fee.<sup>73</sup> Thus, the river was actually being used for commercial navigation, and there was no need to consider whether this “recreational” use of these rapids could serve as a proxy for the river’s suitability for commercial use.

52. The Districts also contend that evidence of commercial whitewater boating on the Tuolumne River above Don Pedro Reservoir cannot be considered, because the area of commercial whitewater use does not form part of a continuous highway for commerce by linking with the navigable portion of the river below the La Grange Project. The Districts assert that this is because the non-navigable portion of the Tuolumne River where the La Grange Project is located prevents such a continuous linkage.

53. As discussed above, we need not make a finding of navigability for sections of the Tuolumne River above Don Pedro Reservoir, or even at all parts of the La Grange Project. Rather, it is sufficient that we find the river navigable up to the lowermost part of the La Grange Project, in this case the tailrace at RM 51.7. Commission staff considered this evidence as further support of a navigability finding for the entire river, in

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<sup>72</sup> According to the International Scale of Difficulty, Class 4 or advanced whitewater is characterized as follows:

Intense, powerful but predictable rapids requiring precise boat handling in turbulent water. Depending on the character of the river, it may feature large, unavoidable waves and holes or constricted passages demanding fast maneuvers under pressure. A fast, reliable eddy turn may be needed to initiate maneuvers, scout rapids, or rest. Rapids may require “must”, moves above dangerous hazards. Scouting is necessary the first time down. Risk of injury to swimmers is moderate to high, and water conditions may make self-rescue difficult. Group assistance for rescue is often essential but requires practiced skills. A strong Eskimo roll is highly recommended. *PacifiCorp*, 73 FERC at 62,140 n.24.

<sup>73</sup> *PacifiCorp II*, 79 FERC at 61,563. Class 3 rapids require precise maneuvering and intermediate skill. Class 4 rapids are turbulent waters requiring complex maneuvering and advanced skill. *Id.* n.20.

light of the Tuolumne River Trust's evidence that "Paddle to the Sea" participants had traveled the entire length of the Tuolumne River, except for the inaccessible area between the Don Pedro Dam and the La Grange Dam, and would navigate the omitted portion of the river if access were permitted. Staff considered this evidence because, if the area between the two dams is navigable and the dams could be portaged, the entire river could be used as a continuous highway for commerce.

54. The Districts claim that it is "simply not true" that access is prohibited to the stretch of river between the two dams.<sup>74</sup> They maintain that boaters can access this stretch of the river by walking down Bureau of Land Management (BLM) lands and Don Pedro Project lands directly to the river at Twin Gulch. They assert that they do not prohibit use of their lands for this purpose and are not aware of any similar BLM prohibition. Rather, they claim that boaters do not use this reach of the river "because it is unsafe and challenging for them to do so."<sup>75</sup> They assert that it would be physically challenging for boaters to exit at the downstream end of the reach because of the steep canyon walls, and dangerous for them to be near the La Grange Dam and spillway in any type of boat.

55. Conservation Groups filed evidence suggesting that Turlock employees and others in the area stated that there was "no water access below Don Pedro Dam until the town of La Grange."<sup>76</sup> They also questioned the Districts' assertion that the river could be accessed at Twin Gulch, noting that the area includes barbed wire, security fences, and locked gates.<sup>77</sup> The Districts contend that they never claimed there was a "point of public access" at Twin Gulch, but only that "public access was possible," and that it would be "unsafe and challenging" for boaters to use this area to reach the river.<sup>78</sup> Conservation Groups also provided information about other sites where public access to the Tuolumne River between the two dams could be provided if the Districts opened the roads to the public, noting that it appears that the Districts used one of these sites to navigate the river

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<sup>74</sup> Districts' Request for Rehearing at 14.

<sup>75</sup> *Id.*

<sup>76</sup> Declaration of John Dye at ¶ 6, attached to Conservation Groups' Motion for Leave to File an Answer and Answer (filed Feb. 12, 2012).

<sup>77</sup> *Id.* ¶ 11.

<sup>78</sup> Districts' Motion for Leave to File answer and Answer, at 4 (filed Feb. 27, 2013).

between the dams to conduct fish studies for the Don Pedro relicensing proceeding.<sup>79</sup> The Districts contend that this site “could never be used for public access” for safety reasons because the road to the site parallels the open Turlock main canal.<sup>80</sup> They further argue that a river cannot be considered navigable as a result of improvements “to areas adjacent to the river that might provide improved access to it.”<sup>81</sup>

56. If the Districts actually navigated the stretch of the Tuolumne River between the Don Pedro and La Grange Project Dams to conduct their studies, this would support a finding that the river is navigable between the two dams. Because there is no information in the record regarding whether it is possible to portage the dams, however, we lack evidence of a continuous link between the river segments.<sup>82</sup> In any event, as explained above, we need not make a finding of navigability for the river segment between the two dams in order to find that the La Grange Project requires licensing because of its location on a navigable river. Similarly, we need not resolve the parties’ competing claims about whether it is possible to access the river between the two dams. We discuss these issues here simply to provide a response to all of the issues raised in the parties’ rehearing requests.

### **3. Past Navigability Below, Through, and Above the La Grange Project**

57. Commission staff found that the Tuolumne River was navigable by whaleboats and other small craft at least as far as the La Grange Dam site RM 52.2 and perhaps

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<sup>79</sup> Conservation Groups’ Motion for Leave to File an Answer and Answer at 3 and attached declaration of John Dye, at ¶ 13 (filed Feb. 12, 2013).

<sup>80</sup> Districts’ Motion for Leave to File Answer and Answer, at 5 (filed Feb. 27, 2013).

<sup>81</sup> *Id.* (citing *Puget Sound Hydro, LLC*, 109 FERC ¶ 61,039, at P 19 (2004)).

<sup>82</sup> Although participants in the “Paddle to the Sea” event navigated almost the entire river from its headwaters to its confluence with the San Joaquin River and on down to the ocean, they omitted the stretch of the Tuolumne River between the Don Pedro Dam and the La Grange Bridge at the town of La Grange, completing that portion of their trip on foot. Moreover, they did not carry any boats between Don Pedro Dam and La Grange Bridge, so the interruption in their trip was not a portage. Rather, they completed the first part of their trip in kayaks, which they left at Don Pedro Dam and, after hiking, resumed their trip at the La Grange Bridge in canoes. Therefore, this event does not provide evidence that the entire Tuolumne River is presently navigable.

above that site as far upstream as Jacksonville (RM 70).<sup>83</sup> Staff found that steamboats navigated the lower Tuolumne River during the mid-nineteenth century, and the river was used during the period 1849-50 to transport men and supplies in whaleboats between Stockton (on the San Joaquin River at the San Francisco Bay), Crescent City (RM 30), French Bar (near La Grange), and perhaps as far upstream as Jacksonville (RM 70).<sup>84</sup> The Districts do not dispute these findings or the evidence on which they are based, except to the extent that they pertain to use of the Tuolumne River as far upstream as Jacksonville.

58. The Districts argue that the only original reference to whaleboat use upstream of the La Grange Project is an article that appeared in the March 30, 1850 edition of the *Stockton Times*, and that all other references to this use rely on that article. They maintain that this single newspaper article does not meet the standard of substantial evidence. However, the fact that other sources quoted and relied on the article suggests that the authors considered it reliable. The Districts also assert that, if such use was prevalent, there should be additional original sources that reference it. However, historical evidence of navigation may be scarce, and the volume of evidence of past navigational use need not be large to sustain a finding of navigability.<sup>85</sup>

59. The Districts cite the Paterson Report, prepared by their historian, to suggest that such whaleboat use was “highly unlikely.”<sup>86</sup> The report included graphs depicting the gradient of the Tuolumne River and photographs of the canyon walls, using them to infer that the falls at or near the La Grange Dam site “would have been an insurmountable obstacle to any vessel; comparable to going upstream over at least Class IV or Class V rapids,” and that “the steep sides of the river canyon would have made portaging at the falls impractical.”<sup>87</sup> Significantly, the author does not cite any independent sources to

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<sup>83</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at P 21. The correct location of the La Grange Dam is RM 52.2. *See supra* note 37.

<sup>84</sup> *Id.* P 22. The order indicates the location of Jacksonville as RM 70 in some places and RM 70.5 at others. This difference is insignificant for our purposes. The location of the former town is necessarily approximate, as it is now fully submerged under the Don Pedro Reservoir.

<sup>85</sup> *See United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940) (*Appalachian*); *Connecticut Light & Power Co. v. FPC*, 557 F.2d 349, 356 (2d Cir. 1977); *Rochester Gas & Electric Co. v. FPC*, 344 F.2d 594, 597 (2d Cir. 1965); *Puget Sound Power & Light Co. v. FERC*, 644 F.2d 785, 789-90 (9<sup>th</sup> Cir. 1981).

<sup>86</sup> Districts’ Request for Rehearing at 16.

<sup>87</sup> *Id.* (citing the Districts’ Paterson Report at 11-12, attached to letter from John

(continued...)

support his conclusions. Rather, he simply infers, based on Turlock's gradient calculations and photographs, that this part of the river was non-navigable and could not be portaged. We have no basis for assuming that the falls were comparable to Class 4 or 5 rapids based on calculations alone. Moreover, the river gradient depends on how it is calculated, and including the falls can give a misleading impression of the overall gradient of the river. That is, the river above and below the falls is relatively more flat, and including the falls can make the entire reach seem more steep. Similarly, it is not possible to determine from the photographs whether it would be necessary or possible to portage the falls.

60. In any event, we need not find that the falls could be portaged or that the river was navigable either through or above the falls as far upstream as Jacksonville. Rather, it is sufficient to find, as we do here, that the river was navigable in the past at least up to the falls, where the La Grange Dam is now located. This necessarily means that the river was navigable through the part of the river where the La Grange Project powerhouse and tailrace are now located, downstream of the La Grange Dam.

61. The Districts criticize staff's finding that evidence of seasonal use of the lower Tuolumne River by steamboats in winter corresponds to the reported December and January time frame of whaleboat use on the river in 1849-50, suggesting that high flows during that period were seasonal rather than exceptional.<sup>88</sup> The Districts contend that "such sweeping inferences are unacceptable."<sup>89</sup>

62. Staff cited the 1892 Army Corps of Engineers Report as evidence that the lower Tuolumne River was navigable by steamboats in winter when the water was high, typically from three weeks to three months. Staff noted that this seasonal winter use by steamboats corresponds to the reported December to January time-frame during which whaleboats were reportedly used on the river in 1849-50. Contrary to the Districts' assertion, this is not an unacceptable inference, but simply a second source that supports the statement that whaleboats were navigating the river during the winter months in 1849-50.

63. The Districts also contend that staff's reliance on the California Legislature's 1851 declaration that the Tuolumne River was navigable up to the rapids that then existed at

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Whittaker, Winston & Strawn, to Kimberly Bose, Commission Secretary (filed Aug. 1, 2012)).

<sup>88</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at PP 13, 17.

<sup>89</sup> Districts' Request for Rehearing at 17 (citing *Rochester Gas and Electric Corp. v. FPC*, 344 F.2d 594, 598 (2d Cir. 1965)).

the site of the La Grange Dam is “unavailing,” because it does not establish precisely where the head of navigation was with respect to the present location of the dam and powerhouse, and the Legislature later moved the head of navigation downstream to Dickinson’s Ferry in 1854.<sup>90</sup>

64. Staff used this information as providing additional support for the reported whaleboat use on the Tuolumne River in the winter of 1849-50. The Districts’ Paterson Report cited this information and indicated that the “cañon or foot of the rapids” that the Legislature fixed as the upper limit of navigability in 1851 was the site of what is now the location of the La Grange Dam.<sup>91</sup> The fact that the Legislature changed its determination several years later does not mean that the earlier determination was incorrect; conditions could have changed in the intervening years. Moreover, once a river is found navigable, it remains so; navigability cannot be defeated by later obstructions, such as dams or diversions.<sup>92</sup> We find that this evidence can appropriately be used as further support of a finding of past navigability at the site of the La Grange Project Dam and its powerhouse located some two-tenths of a mile downstream.

65. The Districts criticize staff’s reliance on an article referencing a flood that occurred in 1861, reshaping the river. The Districts maintain that there is nothing in the article that demonstrates that such “reshaping” occurred at and upstream of the La Grange Project site, or that the flood “somehow reshaped the river to allow navigation upstream of the La Grange Project site.”<sup>93</sup>

66. The Districts misunderstand staff’s reference to this article. Staff suggested that descriptions of the river after 1861 are of questionable relevance to an understanding of the river in the winter of 1849-50, when the whaleboats were reported to be in use. Staff did not suggest that the flood reshaped the river to create navigability upstream of the La Grange Project. Rather, staff suggested just the opposite; that the reshaping of the river that occurred in 1861 may have changed the river, making later descriptions of it

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<sup>90</sup> Districts’ Request for Rehearing at 12.

<sup>91</sup> Paterson Report at 13-14 (attached to Districts’ Aug. 2, 2012 Filing) (citing California Attorney General Opinion No. SO71-42, July 31, 1972, in Attorney General Opinions, vol. 55, p. 300).

<sup>92</sup> See *Appalachian*, 311 U.S. at 408; *Economy Light and Power Co. v. United States*, 256 U.S. 113, 124 (1921); *Montana Power Co. v. FPC*, 185 F.2d 491,495 (D.C. Cir. 1950).

<sup>93</sup> Districts’ Request for Rehearing at 17.

potentially inapplicable in determining whether the river was navigable before 1861. We reject the Districts' assertion that staff's reliance on this evidence was inappropriate.

67. The Districts argue that staff dismissed 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 by asserting that the Commission is not bound by determinations of another federal agency."<sup>94</sup> They maintain that they referenced these reports not to bind the Commission, but rather to provide evidence that during the time when the Stockton Times article describing whaleboat use was published, the relevant stretches of river "were commonly considered non-navigable."<sup>95</sup>

68. The Districts' argument is incorrect. The Districts argued that the Army Corps failed to include the Tuolumne River in any of its lists of bridges over navigable rivers for the years 1927, 1935, 1941, 1948, and 1961. These reports during the period between 1927 and 1961 do not provide any evidence about whether the Tuolumne River was navigable in 1849-50 when the whaleboats were reported to be in use. Moreover, the fact that a river is not listed in the reports does not necessarily mean that it is non-navigable.<sup>96</sup> In addition, as we have seen, descriptions of the river in Army Corps reports of 1881, 1882, and 1892 are similarly not helpful, because they post-date the 1861-62 flood that substantially altered the river. Staff correctly observed that the Commission is not bound by a navigability determination by another federal agency.<sup>97</sup> Thus, although the Commission can take these reports into account, it must consider their relevance and make its own determination of navigability. We find that these later reports do not call into question staff's finding that the Tuolumne River was navigable in the past at least as far upstream as the present location of the La Grange Dam.

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<sup>94</sup> *Id.* at 18.

<sup>95</sup> *Id.*

<sup>96</sup> Turlock provides excerpts from these reports to indicate that the Army Corps repeatedly determined that the Tuolumne River was non-navigable. *See La Grange Report, Attachment F* (filed Oct. 11, 2011). However, the Commission must make its own determination of navigability under the FPA. *See Pennsylvania Water & Power Co. v. FPC*, 123 F.2d 155, 160-61 (D.C. Cir. 1942) (upholding Commission's navigability determination notwithstanding the Army Corps' prior determinations to the contrary over a 50-year period).

<sup>97</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at n.13 (citing *Pennsylvania Water & Power Co. v. FPC*, 123 F.2d at 161-62 (D.C. Cir. 1941); and *Island Power Co.*, 47 FERC ¶ 61,355, at 62,252 n.14 (1989).

69. Finally, the Districts argue that Commission staff “simply ignored” the fact that the Ninth Circuit affirmed their view of non-navigability in 1965.<sup>98</sup> The Districts overstate the significance of the court’s decision. In *California v. FPC*, the court affirmed the Commission’s inclusion of fish protection measures in the 1964 license for the enlarged Don Pedro Project. The Commission’s jurisdiction in that case was based on the project’s occupancy of federal lands, and there was no need to consider whether the Tuolumne River might be navigable. The court referred to the river as non-navigable early in its opinion and later stated that the project’s use of federal lands made licensing required “notwithstanding the fact that the Tuolumne is not navigable.”<sup>99</sup> However, because navigability was not at issue, this dicta cannot be considered as an affirmation of the river’s non-navigability. Moreover, even if the river were considered non-navigable at that time, this view could not be sustained in light of later evidence to the contrary. The Commission has the authority to review and revise its jurisdictional determinations if warranted by a change in facts or law.<sup>100</sup>

70. For all the foregoing reasons, we find that there is substantial evidence that the Tuolumne River was and is navigable up to and past the La Grange Project Powerhouse at least as far as the base of the La Grange Project Dam. Thus, the La Grange Project requires licensing because of its location along and in the navigable Tuolumne River.

## **B. Federal Lands**

71. Commission staff found that the La Grange Project requires licensing under section 23(b)(1) of the FPA because the La Grange Reservoir occupies lands of the United States.<sup>101</sup> On rehearing, the Districts contend that staff erred in its analysis and that its determination is therefore incorrect. As discussed below, we affirm staff’s analysis and conclusions and find that the La Grange Project requires licensing because the La Grange reservoir occupies federal lands.

72. As discussed in staff’s order finding licensing required, Turlock prepared and filed the results of a water elevation survey from La Grange Dam to Don Pedro Dam and a backwater analysis. Turlock used this analysis to support its conclusion that the La Grange Reservoir ends somewhere between 4,700 and 5,300 feet upstream of La Grange

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<sup>98</sup> Districts Request for Rehearing at 18 (citing *California v. FPC*, 345 F.2d 917, 919, 921 (9<sup>th</sup> Cir. 1965)).

<sup>99</sup> *California v. FPC*, 345 F.2d at 919.

<sup>100</sup> *Nantahala Power and Light v. FPC*, 384 F.2d 200 (4th Cir. 1967).

<sup>101</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at P 33.

Dam, about 400 to 500 feet below the closest federal lands that are administered by the U.S. Department of the Interior's Bureau of Land Management (BLM).<sup>102</sup>

73. Commission staff requested all data associated with Turlock's water elevation survey and backwater analysis, which Turlock provided, including a copy of the analysis. Staff reviewed Turlock's information and analysis and prepared a report, which it made publicly available.<sup>103</sup> Using the same methods and data, staff replicated Turlock's analysis but interpreted the results differently, concluding that the reservoir extends to 11,325.5 feet upstream of the dam, which is more than a mile upstream of the boundary of the BLM property. Staff therefore found that the La Grange Project requires licensing because the La Grange Reservoir occupies U.S. lands.

74. Staff used the definition of backwater that the Commission set forth in its *Pend Oreille* decision; i.e., backwater is defined as "the amount the depth of flow has been increased by an obstruction such as a dam."<sup>104</sup> Using this definition, staff stated that "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."<sup>105</sup>

75. The Districts concede that staff used the correct definition of backwater. However, they maintain that staff erred in determining that the upstream extent of the reservoir could be established by determining where the "with-dam" and "without-dam" water levels are equal.<sup>106</sup> The Districts maintain that it is not the Commission's customary practice to determine the upstream extent of a project's reservoir in this manner, and that to do so is "impossible to achieve."<sup>107</sup> In support, they cite Ven Te Chow's 1959 textbook, *Open Channel Hydraulics*, to the effect that "the backwater curve

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<sup>102</sup> See Turlock's La Grange Report, at 11 (filed Oct. 11, 2011). A backwater analysis is a standard method of conducting hydrologic and hydraulic analyses.

<sup>103</sup> See memorandum to public files from Jeremy Jessup, FERC, attaching staff analysis of La Grange backwater model submitted by Turlock Irrigation District (filed Dec. 19, 2012).

<sup>104</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at P 28 (citing *Public Utility District No. 1 of Pend Oreille County*, 77 FERC ¶ 61,146, at 61,543 n.11 (1996) (*Pend Oreille*)).

<sup>105</sup> *Id.*

<sup>106</sup> Districts' Request for Rehearing at 21.

<sup>107</sup> *Id.*

extends indefinitely in the upstream direction; hence, it has no endpoint.”<sup>108</sup> From this, they maintain that the “common understanding of backwater analyses [is that] the ‘with’ and ‘without’ conditions will never be equal; they will approach each other, but never be equal.”<sup>109</sup>

76. The Districts’ quote is selective. As the complete quote makes clear, it is only as a theoretical matter that the backwater curve extends indefinitely and has no upstream endpoint. As a practical matter, the end point can be determined in exactly the manner that staff used; by finding “the point of tangency of the normal-depth line to the backwater curve,” which is “determined by eye observation from the drawing of flow profiles.”<sup>110</sup> This is simply another way of describing the point where the line showing the normal depth of the river (the without-dam condition) appears to meet up with the backwater curve (the with-dam condition). Although the Districts attempt to draw a distinction between staff’s approach (where the two conditions are equal) and the point-of-tangency approach, they are one and the same.

77. The Districts reach a different conclusion because they plot their results on smaller graphs with a more compressed scale and use thicker lines to depict the with-dam and without-dam conditions. This makes the two lines appear to converge at a point somewhere between 4,700 and 5,300 feet upstream of the La Grange Dam, downstream of the BLM land boundary. Staff, using slightly larger graphs with a less compressed scale and thinner lines, determined the correct point of tangency as occurring much farther upstream, more than 11,300 feet upstream of the La Grange Dam, and well upstream of the BLM boundary. Therefore, the Districts’ criticism of staff’s approach is not accurate. Staff used the same method as the Districts, but its graphs showed the results more clearly.

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<sup>108</sup> *Id.* (citing Ven Te Chow, *Open Channel Hydraulics* (1959). Although the Districts do not give a page reference, the quote appears on page 319).

<sup>109</sup> Districts’ Request for Rehearing at 21.

<sup>110</sup> Chow, Ven Te, *Open Channel Hydraulics*, 319 (New York, McGraw-Hill 1959). The complete quote is as follows:

Theoretically speaking, the backwater curve extends indefinitely in the upstream direction; hence, it has no upstream end point. For practical purposes, however, the end point may be selected at the place where the rise in water surface begins to cause damage. This can be assumed at a place where the depth of flow is equal to a certain fraction of the normal depth, depending on the nature of the problem, say about 1 % higher than the normal depth, or  $y = 1.01y_n$ .

78. The Districts describe several theoretical and practical limitations of backwater analyses, suggesting that they somehow support the use of graphical analyses or water level tangency instead of determining where “with-dam” and without-dam’ conditions are equal.<sup>111</sup> As we have seen, however, there is no real difference in these methods. Moreover, the Districts chose to provide a backwater analysis in support of their argument that the La Grange Reservoir does not occupy federal lands. Staff reviewed the Districts’ analysis and replicated their results, but reached a different conclusion for the reasons just explained. Any theoretical and practical limitations of backwater analyses would apply equally to both the Districts’ and staff’s analysis and are therefore not significant in this particular case.

79. The Districts also criticize staff’s statement that the Districts’ use of hydraulic gradients to identify the return to riverine conditions was “misleading,” contending instead that it is staff’s approach that provides misleading results.<sup>112</sup> This is incorrect. The Districts maintain that Turlock’s analysis showed where the with-dam condition “began to display hydraulic gradients very similar” to the without-dam condition, suggesting that “tangency” had been achieved and the stream had returned to riverine conditions.<sup>113</sup> Staff’s analysis shows that these changes in gradient result from the terrain, and the point of tangency is not observable until much farther upstream.

80. The Districts assert without elaboration that the U.S. Bureau of Reclamation, in its use of open channel hydraulic analyses, recommends that the resulting water levels be considered to have no better than a 0.5 to 1.0 feet degree of accuracy in natural channels.<sup>114</sup> They then maintain that, applying this degree of accuracy, the upstream end of the La Grange Reservoir would extend no further than 5,400 feet upstream of the La Grange Dam.

81. The Districts provide no explanation or discussion that would allow us to determine the relevance of this statement or the basis for their conclusion regarding the extent of the reservoir. We therefore cannot accept this unsupported assertion. In any event, the Districts did not make use of this limitation in their backwater analysis, and they provide no basis for introducing it now.

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<sup>111</sup> Districts’ Request for Rehearing at 21-22.

<sup>112</sup> *Id.* at 23.

<sup>113</sup> *Id.* at 24.

<sup>114</sup> *Id.* at 23 (citing Bureau of Reclamation, *Design of Small Dams*, 1977, Appendix B – Flow in Natural Channels).

82. The Districts argue that staff's review of Turlock's backwater analysis establishes a "new un-codified and unarticulated approach to assert jurisdiction over the La Grange Project [that] is arbitrary, capricious, and an abuse of discretion."<sup>115</sup> This is incorrect. Turlock prepared a backwater analysis and provided it in support of its argument that the La Grange Reservoir does not occupy federal lands. Staff replicated Turlock's analysis using Turlock's data and methods, but reached a different conclusion regarding the results of the analysis for the reasons explained above. This is not a new approach or a new standard for jurisdictional determinations. It is nothing more than an examination and interpretation of the data that Turlock provided in this case.

83. The Districts maintain that the Commission does not use the definition of backwater to establish 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. More specifically, they argue that the Commission does not routinely apply this definition of backwater, but instead often uses a contour line for establishing a reservoir's upstream boundary. They assert that the Commission establishes a normal maximum water level at the spillway or dam and extends this elevation upstream as a constant elevation, without any backwater analysis or effect.<sup>116</sup> In support, they attach a summary of eight projects licensed between 1999 and 2012 for which the project boundary was established by a boundary contour elevation, without any backwater analysis.

84. The Districts are correct in stating that the Commission routinely uses contour elevations to establish the upstream extent or boundary of reservoirs. They acknowledge that, as staff noted in its December 19 Order, Commission regulations permit the use of contour lines, including contour elevations, to describe the boundary around a project impoundment.<sup>117</sup> They nevertheless maintain that the Commission does not require a backwater analysis to establish this contour line, or to establish where the natural stream meets that line.

85. What the Districts fail to recognize, however, is that their suggested method of using a contour elevation simply confirms that the La Grange Reservoir occupies BLM lands. As demonstrated in the examples the Districts provide, the normal maximum surface elevation of a reservoir is typically defined as the crest of the dam or spillway, increased as necessary by the height of any flashboards or crest control structures. In this case, using a contour elevation projected from the La Grange Dam's spillway crest

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<sup>115</sup> *Id.* at 27.

<sup>116</sup> *Id.* at 25 and Attachment A.

<sup>117</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at P 32 (citing 18 C.F.R. § 4.41(h)(2)(i)(A)(1) (2012)).

elevation of 296.46 mean sea level (msl), and without considering any backwater analysis, NMFS demonstrated that the upper extent of the La Grange Reservoir occurs more than two miles upstream of La Grange Dam, crossing BLM lands at two different upstream locations.<sup>118</sup> Commission staff examined NMFS's analysis and replicated it, with essentially the same results. Thus, as staff correctly noted, this method provides additional support for the conclusion that the La Grange Reservoir inundates BLM lands.<sup>119</sup>

86. In short, both Turlock's backwater analysis and NMFS's contour projection method, each of which staff replicated, conclusively demonstrate that the La Grange Reservoir occupies federal lands. Therefore, the project requires licensing under FPA section 23(b)(1).

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<sup>118</sup> See Figure 7, included with letter from Richard Wantuck, NMFS, to Kimberly Bose, Commission Secretary (filed April 12, 2012). Although the Districts criticized many aspects of this filing, they did not directly address the significance of this figure, arguing only that the normal water surface under actual operating conditions of about 294.5 msl should be used, further reducing the upstream extent of the reservoir. See letter from John Whittaker, Winston & Strawn LLP, to Kimberly Bose, Commission Secretary, at 5 (filed May 14, 2012). Staff correctly rejected this argument, noting that spillway crest elevation of 296.46 msl defines the reservoir's normal maximum surface elevation and thus determines its exterior margin. *Turlock and Modesto*, 141 FERC ¶ 62,211 at n.64.

<sup>119</sup> As noted, the Districts argued at one point that the normal operating level of the reservoir is lower than the dam's crest and should be used to define the reservoir's normal maximum surface elevation. Staff correctly rejected that notion. We agree that the dam's crest defines the reservoir's normal maximum surface elevation. Using data readily available for the years 2009-2011, staff found that the La Grange Reservoir elevation was at or above the dam's crest approximately 32 percent of the time (exceeding the dam's crest level by 0.04 percent of the time in 2009, 30 percent in 2010, and 65 percent in 2011). However, 2009 was a below normal water year (part of the drought of 2007 to 2009), 2010 was a normal to above normal year, and 2011 was a wet year. See California Dept. of Water Resources Bulletin 120, available at <http://cdec.water.ca.gov/snow/bulletin120/index.html?CFID=87354796&CFTOKEN=82537755>. The amount of time that the reservoir elevation is above the dam's crest will depend on the amount of precipitation, snowmelt, and runoff in a given year. From these three years of data, it appears that the reservoir sometimes exceeds the 296.46 foot elevation. This demonstrates support for using the 296.46 foot contour to define the boundary of the reservoir and indicates that using the District's proposed lower normal operating level would not be appropriate.

### **C. Post-1935 Construction**

87. As an alternative holding, Commission staff found that, even if the Tuolumne River were not navigable at the lowermost project feature (the tailrace), the La Grange Project would require licensing based on its location on a non-navigable Commerce Clause stream, effect on interstate commerce through its connection to the interstate electrical grid, and the post-1935 construction that occurred when the project's generating capacity increased in 1989. Staff noted that Turlock replaced the project's turbines and generating units in 1989, increasing the project's installed capacity by 174 kilowatts (kW). Staff found that this increase in installed capacity constitutes post-1935 construction within the meaning of FPA section 23(b)(1).<sup>120</sup>

88. The Districts do not dispute, and we affirm, staff's findings regarding the La Grange Project's location on a Commerce Clause stream and effect on interstate commerce.<sup>121</sup> However, they maintain that staff's conclusion that the project's installed capacity increased by 174 kW as a result of the 1989/1990 rehabilitation work is incorrect.

89. It appears that the Districts are arguing that staff made three errors in reaching its conclusion that the projects generating capacity increased by 174 kilowatts in 1989/1990. They contend that staff: (1) relied "on a Bechtel Report reference to the older units that has no supporting information to describe the basis for the referenced generator 'capacity,'" (2) compared "the rating of the new *turbines* to the 'capacity' of the old *generators*," and (3) made "no effort to compare the outputs of the original and newer units at similar conditions of head and flow."<sup>122</sup> Before addressing these arguments, a brief overview is helpful to clarify the discussion.

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<sup>120</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at n.44 (citing *L.S. Starrett Co. v. FERC*, 650 F.3d 19, 27 (1<sup>st</sup> Cir. 2011) (*Starrett*) (licensing required based on installed capacity increase of 86 kilowatts); *Puget Sound Power & Light Co. v. FPC*, 557 F.2d 1311, 1316 (9<sup>th</sup> Cir. 1977)).

<sup>121</sup> It is well settled that Commerce Clause streams include the headwaters and tributaries of navigable waters. *FPC v. Union Electric Co.*, 381 U.S. 90, 94-96 (1965). As noted earlier, the Tuolumne River is a tributary of the navigable San Joaquin River, which flows into the San Francisco Bay and the Pacific Ocean. It is also well settled that the nation-wide class of small hydroelectric projects that are connected to the interstate grid collectively affect commerce in a real and substantial way. *Habersham Mills v. FERC*, 976 F.2d 1381, 1384 (11<sup>th</sup> Cir. 1992); *Starrett*, 650 F.3d at 28-29.

<sup>122</sup> *Id.* at 30 (quote marks and emphasis in original).

90. A hydroelectric generating unit consists of a turbine<sup>123</sup> and a generator.<sup>124</sup> The turbine converts flowing water to mechanical power and transmits that power to the generator. Next, the generator converts that power to electrical energy, which is then distributed through transmission lines. In general, the rated output of a generator is chosen to match the output of the turbine at rated head and discharge, whereas the selection of the turbine unit is an iterative process.<sup>125</sup> Turbine selection is based on analyzing performance data under various conditions and selecting a design best suited for the operating conditions of the project.

91. The amount of power a turbine can produce is a function of the quantity of water flow and energy head.<sup>126</sup> Turbine units can be rated using different combinations of head and flow. The Commission recognized the various factors that go into the rating of turbines and generator units in promulgating its current regulations governing the assessment of annual charges for administering Part I of the FPA.<sup>127</sup> The Commission bases its annual charges on a licensed project's "authorized installed capacity," which is expressed in kilowatts and is defined as the lesser of the ratings of the generator or turbine units.<sup>128</sup> For generators, the Commission uses the nameplate rating unless the generator has been modified such that the nameplate no longer accurately describes the

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<sup>123</sup> A turbine is a machine for generating rotary mechanical power from the energy of a stream of fluid (such as water, steam, or hot gas). Turbines convert the kinetic energy of fluids to mechanical energy through the principles of impulse and reaction, or a mixture of the two. *See Glossary*, U.S. Energy Information Administration, available at <http://www.eia.gov/tools/glossary/index.cfm?id=T>.

<sup>124</sup> A generator is a machine by which mechanical energy is changed into electrical energy. *See Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com/dictionary/generator>.

<sup>125</sup> *See Engineering and Design, Hydropower*, at 5-20, *Department of the Army, Corps of Engineers, Engineer Manual EM1110-2-1701* (Dec. 31, 1985).

<sup>126</sup> *Id.* at 5-3.

<sup>127</sup> *See Charges and Fees for Hydroelectric Projects*, Final Rule, Order No. 576, FERC Stats. & Regs., Regulations Preambles 1991-1996, ¶ 31,016, at 61,303-304 (Mar. 15, 1995), 60 Fed. Reg. 15,040 (Mar. 22, 1995).

<sup>128</sup> *See* 18 C.F.R. § 11.1(i) (2012).

generator's actual capacity.<sup>129</sup> For turbines, the Commission uses the rating at the most efficient use of the water resource, or "best gate" capacity.<sup>130</sup>

92. For unlicensed projects, the Commission considers whether there has been an increase in generating capacity at the project. This generally involves determining whether there has been an increase in the project's "installed capacity," defined in the same manner as "authorized installed capacity" with the only difference being that the installed capacity has not yet been authorized in a Commission license.<sup>131</sup> For jurisdictional purposes, however, precise information regarding a project's installed capacity might not be available, so the Commission considers whether the available information demonstrates that there has been an increase in the project's electrical generating capacity.<sup>132</sup>

93. Staff used the information that Turlock provided. To the extent that information was lacking, it was because Turlock either did not have the information or failed to provide it. Moreover, the Districts' arguments are without merit. Staff correctly used the available information to find that the rehabilitation work undertaken in 1989-90 increased the project's installed capacity, thus constituting post-1935 construction

94. The Districts argue that, because the Bechtel Report does not provide the "ratings" of the original units or provide the basis for stating that the original generators were 1,000 kW and 3,750 kW, staff erred in comparing the original units to the new units. This is incorrect. There is no requirement that the ratings of the units must be provided. In the absence of any additional information, staff reasonably assumed that Turlock

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<sup>129</sup> The generator nameplate capacity (installed) is the maximum rated output of a generator, prime mover, or other electric power production equipment under specific conditions designated by the manufacturer. Installed generator nameplate capacity is commonly expressed in megawatts (MW) and is usually indicated on a nameplate physically attached to the generator. *See Glossary, U.S. Energy Information Administration, available at <http://www.eia.gov/tools/glossary/index.cfm?id=G>.*

<sup>130</sup> *See* 18 C.F.R. § 11.1(i) (2012).

<sup>131</sup> *See Starrett*, 650 F.3d at 27; *Gilman Brothers Co.*, 67 FERC ¶ 61,151, at 61,436 (1994).

<sup>132</sup> *See, e.g., Starrett*, 650 F.3d at 27 (Commission could reasonably interpret "construction" to include all increases in generating capacity); *Puget Sound Power & Light Co. v. FPC*, 557 F.2d 1311, 1316 9<sup>th</sup> Cir. 1977) (no post-1935 construction where project was restored to its original configuration, with no increase in the project's electrical generating capacity).

provided the nameplate installed capacity of the original equipment, which the Bechtel report described as follows: “The small unit [Unit 1] is a S. Morgan Smith horizontal Francis unit with two-500 kW generators coupled to each side. . . . The large unit [Unit 2] is a S. Morgan Smith vertical Francis unit with one directly coupled 3,750 kW Allis-Chalmers generator.”<sup>133</sup> In describing the single generator that replaced the two-generator configuration of Unit 1, Turlock stated that the “replacement generator capability” was 1,220 kW.<sup>134</sup> Turlock did not provide the capacity of the replacement generator for Unit 2, but instead focused its analysis on the ratings of the turbine units.<sup>135</sup> Thus, the information that Turlock supplied indicates that, at a minimum, the generating capacity of Unit 1 increased by 220 kW.

95. The Bechtel Report provides additional information regarding the project’s increased generating capacity. Table 2 provides the manufacturers’ “guaranteed maximum capacity” for the new units. The generating capacity of the new Unit 1 (which was originally 1,000 kW) is 1,231 kW, and the generating capacity of Unit 2 (which was originally 3,753 kW) is 3,693 kW.<sup>136</sup> Taken together, the total generating capacity of the new units is 4,924 kW. Subtracting the combined capacity of the original units, which was 4,750 kW, yields an increase in generating capacity of 174 kW, which is the amount of the increase that staff cited.

96. The Districts argue that staff erroneously compared the rating of the new turbines to the capacity of the old generators. This is also incorrect. Staff used the information in Table 2 of the Bechtel report, which provides values for the replacement units in both kilowatts (for the generators) and horsepower (for the turbines). Staff compared the kilowatt values for the new generators to the kilowatt values for the old generators. Staff did not compare the old turbines to the new turbines in its analysis.

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<sup>133</sup> Bechtel Report at 1, attached to Turlock’s La Grange Report, included with letter from John Whittaker, Winston & Strawn, to Kimberly Bose, Commission Secretary (filed Oct. 11, 2011).

<sup>134</sup> La Grange Report, at 8 (filed Oct. 11, 2011).

<sup>135</sup> *Id.* at 7.

<sup>136</sup> Bechtel Report at 6, Table 2 (filed Oct. 11, 2011). Figures provided in the table under the heading “Original” refer to the original Fuji proposal for replacement equipment; they do not refer to the original equipment at the La Grange Project. We are concerned here with only the Voith proposal for replacement equipment, which Turlock adopted.

97. The Districts argue that staff made no effort to compare the outputs of the original and newer units at similar conditions of head and flow. However, Turlock did not provide the information needed for such a comparison. Moreover, this is not a requirement for a jurisdictional inquiry. Our focus is whether there has been an increase in generating capacity at the project. Detailed information about conditions of head and flow is not necessary in order to make that determination.

98. As noted, it is general practice to match the capacity of turbines and generators.<sup>137</sup> Given no further details in Turlock's October 11, 2011 filing, staff used the information provided as a baseline for determining post-1935 construction. While the Bechtel report does not provide sufficient information to allow a precise comparison of pre- and post-construction conditions, it does conclude that the La Grange Project will use less water and have a greater generating output. It also states that "the approximate 200 HP [horsepower] increase in output with improved efficiency, reflects a favorable return for the investment."<sup>138</sup> This provides further support for the conclusion that the replacement work increased the project's generating capacity. The estimated cost of the replacement work was \$2.31 million.<sup>139</sup> It is reasonable to assume that Turlock would not likely have undertaken such an expensive project to rehabilitate the generating units without a corresponding benefit to the project. Whether the post-construction capacity increased by 174 kW as staff calculated, or by 200 HP, as described in the Bechtel report (which corresponds to an increase of 150 kW),<sup>140</sup> is immaterial. The fact remains that the construction increased the project's generating capacity and therefore constitutes post-1935 construction.<sup>141</sup>

99. the Districts argue that "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." They state that applying a 95 percent generator efficiency, which they state is a customary expected efficiency, to the turbine rating of 4,924 kW yields 4,678 kW as the expected "rated

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<sup>137</sup> See *supra* note 125.

<sup>138</sup> Bechtel Report, at 22 (filed Oct. 11, 2011).

<sup>139</sup> *Id.* at 4.

<sup>140</sup> See 18 C.F.R. § 11.1(i) (2012), which provides: "The rating of the turbine is the product of the turbine's capacity in horsepower (hp) at best gate (maximum efficiency point) opening under the manufacturer's rated head times a conversion factor of 0.75 kW/hp."

<sup>141</sup> See *Starrett*, 650 F.3d at 27.

output" of the new generator. They then maintain that this is 72 kW less than the original unit capacity of 4,750 kW.<sup>142</sup>

100. This comparison is misleading, because the Districts neglect to apply a similar efficiency reduction to the original equipment. Turlock's La Grange Report states that generators designed in the 1910-era would be expected to have maximum efficiencies of about 92-93 percent.<sup>143</sup> Therefore, applying a 93 percent generator efficiency to the old units yields 4,418 kW, which is 260 kW less than the new units. We therefore reject the Districts' assertion that the new units did not increase the project's generating capacity.

101. Finally, the Districts argue that, because of staff's errors in assumptions and calculations regarding generating capacity at the La Grange Project, the *Starrett* case does not support the Commission's assertion of jurisdiction over the project based on post-1935 construction. They maintain 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)." <sup>144</sup> They conclude that, given the shortcomings in staff's analysis, substantial evidence does not support staff's finding.

102. We disagree. As we have seen, the Districts' arguments regarding staff's analysis and conclusion are incorrect. In addition, the court in *Starrett* agreed that the Commission could reasonably conclude that "construction" includes "all increases in capacity."<sup>145</sup> Moreover, our discretion in matters of jurisdiction is limited. There is no recognized *de-minimis* exception or waiver authority under the FPA.<sup>146</sup> If a project meets the jurisdictional criteria of FPA section 23(b)(1), we must require that it be licensed.

103. For all the above reasons, we affirm staff's alternative holding and find that the La Grange Project requires licensing because it has undergone post-1935 construction that increased the project's generating capacity.

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<sup>142</sup> Districts' Request for Rehearing at 29.

<sup>143</sup> La Grange Report, at 8 (filed Oc. 11, 2011).

<sup>144</sup> Districts' Request for Rehearing at 30.

<sup>145</sup> *Starrett*, 650 F.3d at 27.

<sup>146</sup> See *Escondido Mutual Water Authority*, note 43 *supra*; *Nantahala Power & Light*, 57 FPC 1033 (1977).

#### **D. Complete Unit of Development**

104. Under FPA section 4(e),<sup>147</sup> the Commission licenses hydroelectric “project works,” which are defined in FPA section 3(12) as “the physical structures of a project.”<sup>148</sup> A “project” is defined in FPA section 3(11) as a “complete unit of improvement or development,”<sup>149</sup> which includes, among other things, any reservoirs that are directly connected to a powerhouse, all miscellaneous structures that are used and useful in connection with a project, and any dams and reservoirs that are necessary or appropriate in the maintenance and operation of the project.<sup>150</sup> All parts of a complete unit of development must be licensed under the FPA.<sup>151</sup>

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<sup>147</sup> 16 U.S.C. § 797(e) (2006).

<sup>148</sup> 16 U.S.C. § 796(12) (2006).

<sup>149</sup> FPA section 3(11), provides:

“‘project’ means complete unit of improvement or development, consisting of a powerhouse, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands or interests in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.” 16 U.S.C. § 796(11) (2006).

<sup>150</sup> The statutory test for dams and reservoirs that are not directly connected to the part of a unit of development that contains the generating facilities is whether they are necessary or appropriate in the maintenance and operation of such unit. *See Union Water Power Co.*, 73 FERC ¶ 61,296, at 61,824 n.13 (1995); *Pyramid Lake Paiute Tribe of Indians*, 12 FERC ¶ 61,150, at 61,134 (1980).

<sup>151</sup> *See N.Y. State Electric & Gas Corp.*, 56 FERC ¶ 61,144, at 61,258 n.14 (1991). Although all parts of a complete unit of development must be licensed, they do not necessarily have to be included in a single license. *See, e.g., Hudson River-Black River Regulating District*, 100 FERC ¶ 61,319, at 62,455 n.8 (2002); *Orange and Rockland Utilities*, 44 FERC ¶ 61,236, at 61,869 n.30 (1988).

105. In response to Conservation Groups' request, Commission staff considered whether the La Grange Project might require licensing as part of the complete unit of development comprising the District's Don Pedro Project. Staff found that the amount of storage available in La Grange Reservoir is not sufficient to re-regulate releases from the Don Pedro Project reservoir and that therefore, the La Grange Project does not require licensing as a re-regulating reservoir for the Don Pedro Project.<sup>152</sup> Staff also considered, but did not decide, whether the La Grange Project might require licensing based on its use for making fish flow releases required under the Districts' license for the Don Pedro Project. Because the evidence was inconclusive and licensing was required on other grounds, staff found it unnecessary to determine whether the La Grange Project might also require licensing as part of a complete unit of development with the Don Pedro Project.<sup>153</sup> Conservation Groups argue that staff erred with respect to each of these findings.

106. As discussed below, we affirm staff's finding that the La Grange Project does not require licensing as part of the Don Pedro Project based on any re-regulation of flows. We further find that, based on the current record, we lack substantial evidence to determine whether the La Grange Project might require licensing as part of a complete unit of development with the Don Pedro Project for other reasons. However, as we explained above, because licensing is required on other grounds, we need not resolve this issue now.

### **1. Re-Regulation of Flows**

107. Conservation Groups agree that the Districts do not re-regulate releases from the Don Pedro Project powerhouse using La Grange Reservoir storage. However, they maintain that the Districts re-regulate releases from the Don Pedro powerhouse "by varying the flow from La Grange Reservoir through the intakes to the Districts' respective canals."<sup>154</sup> They contend that the Districts re-regulate releases from the Don Pedro powerhouse on a planned and consistent basis and that La Grange Reservoir provides head, not storage, for the re-regulation of these releases.

108. Conservation Groups state that they performed a series of analyses of the hourly hydrology data that Turlock provided for the calendar years 2009-11.<sup>155</sup> Turlock

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<sup>152</sup> *Turlock and Modesto*, 141 FERC ¶ 62,211 at P 44.

<sup>153</sup> *Id.* P 39.

<sup>154</sup> Conservation Groups' Request for Rehearing at 9.

<sup>155</sup> See Letter from Robert M. Nees, Turlock, to Kimberly Bose, Commission Secretary, with attached data in Excel format (filed Oct. 17, 2012).

provided these data in response to staff's request for additional information about releases from the Don Pedro Project and flows and releases to and through the La Grange Project for water supply, generation, and minimum flows. Conservation Groups provide the results of their analyses in the form of arguments and graphs. They argue that their analysis shows that while releases from Don Pedro show daily on-peak and off-peak cycling, there is almost no variation in daily flow at the La Grange gauge. They maintain that this "clearly shows that releases from Don Pedro are being regulated so that there is *de minimis* fluctuation at the La Grange gauge."<sup>156</sup> They contend that La Grange Reservoir provides head, not storage, for the re-regulation of releases from the Don Pedro powerhouse. They conclude that it does not appear that the Districts can regulate peaking flows from Don Pedro without using the La Grange facilities, and that this demonstrates that they are used and useful for power generation.

109. The Districts argue that they should be permitted to respond to Conservation Groups' new evidence, presented for the first time on rehearing. We agree, and consider their response here. The Districts respond that they "have consistently maintained and have shown that releases at Don Pedro powerhouse are shaped to release more water during on-peak times and less during off-peak times."<sup>157</sup> They add that this has nothing to do with La Grange, and that the "La Grange facilities are not used, useful, necessary, or appropriate for power generation at the Don Pedro Generating facilities."<sup>158</sup> They maintain that the re-regulation of flows through Don Pedro that Conservation Groups identify is flow regulation by the Don Pedro reservoir, not La Grange Reservoir, and that flows released from Don Pedro simply pass downstream and enter La Grange Reservoir. The Districts argue that the headgates and canals are not used, useful, necessary, or appropriate for the maintenance or operation of power generation at Don Pedro, and that these structures are not operated to reduce fluctuations at the downstream La Grange gauge. Rather, the Districts explain that releases are made at Don Pedro so that the Districts can capture them for irrigation and municipal and industrial purposes by releasing them into the Districts canals, and that flows released to meet the minimum flow requirements of the Don Pedro license and for generation at the La Grange Project are in excess of the amounts to be captured for irrigation and municipal and industrial use. They agree that La Grange Dam provides the head necessary for delivering water into the Districts' canal systems, and for generation of power at La Grange. However,

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<sup>156</sup> Conservation Groups' Request for Rehearing at 11.

<sup>157</sup> Districts' Motion for Leave to File Answer and Answer, at 5 (filed Feb. 19, 2013).

<sup>158</sup> *Id.*

they contend that “the head at La Grange does not contribute in any way to power generation at Don Pedro.”<sup>159</sup>

110. Conservation Groups misunderstand the concept of re-regulation of flows. A re-regulating reservoir located downstream of a hydroelectric peaking plant must have sufficient pondage capacity to store the widely fluctuating discharges from the peaking plant and release them in a relatively uniform manner downstream.<sup>160</sup> It enables the upstream project to operate for peaking purposes without the potential negative environmental effects that could otherwise result from that operation.

111. In this case, Conservation Groups demonstrate that the flows released into the river from La Grange Reservoir are relatively uniform and do not show the variability of flows released from the Don Pedro Project upstream. However, this is not the result of a re-regulation of flows at La Grange. Rather, it occurs because most of the flows are diverted from La Grange Reservoir into canals and are consumed for irrigation and municipal and industrial uses, and thus are not returned to the river. The La Grange Dam provides head for this diversion and consumption of flows. It does not provide head for the re-regulation of flows. The La Grange Reservoir does not re-regulate the flows because it does not store them for later release to the river.

112. A re-regulating reservoir that stores and releases flows in a relatively uniform manner may be necessary or appropriate to operation of the upstream hydroelectric project for peaking purposes. A downstream reservoir that does not re-regulate flows, but instead diverts them for irrigation and municipal and industrial use, is not necessary or appropriate to the upstream project’s operation for peaking purposes. In these circumstances, we find that the La Grange Project’s operation for water supply does not provide a basis for requiring that it be licensed as part of the Don Pedro Project.

## **2. Minimum Flows for Fish**

113. Conservation Groups request that the Commission reconsider staff’s decision that, because the La Grange Project requires licensing on other grounds, there is no need to determine whether the project might also require licensing because it is used to make minimum flow releases from the Don Pedro Project to the lower Tuolumne River downstream of the La Grange Project. They urge the Commission to find that the La Grange Project is used and useful to the Don Pedro Project and is necessary and appropriate to its maintenance and operation.

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<sup>159</sup> *Id.* at 9.

<sup>160</sup> See U.S. Army Corps of Engineers, Engineering Manual EM 1110-2-1701, at S-14 (Dec. 31, 1985).

114. Conservation Groups argue that the Districts use La Grange to make minimum flow releases from Don Pedro. They state that the Districts' general practice is to make all or part of these releases through the La Grange powerhouse, except during times of spill. They add that the Districts do not simply pass through the Don Pedro minimum flow releases at La Grange; instead, they "affirmatively operate" the facilities at La Grange to make those flow releases, whether through the powerhouse, at Turlock's gate release adjacent to the powerhouse, or at Modesto's gate release on the other side of the river.<sup>161</sup> Conservation Groups maintain that, as a result, the La Grange Project is used and useful to the Don Pedro Project and is an integral part of the complete unit of development.

115. In this case, the La Grange facilities are unrelated to power generation at the Don Pedro Project. Although the Districts can choose among different ways of operating the La Grange facilities to ensure that the Don Pedro minimum flow releases are maintained downstream of the La Grange Dam, this does not strike us as significant for jurisdictional purposes. The fact that minimum flows must be maintained at a particular measuring point downstream of a licensed project, without more, would not suggest that the Commission would be required to assert jurisdiction over all projects and structures that might be located between the licensed project and the measuring point. Based on the current record, we lack sufficient evidence to determine whether the La Grange Project might require licensing as part of the Don Pedro project for reasons other than regulation of flows.

116. In any event, because licensing is required on other grounds, we need not resolve this issue now. The La Grange Project requires licensing under FPA section 23(b)(1); there is no need for us to determine whether the La Grange Project might also require licensing as part of a complete unit of development with the Don Pedro Project.

### **3. Combined or Separate Licensing**

117. Conservation Groups urge the Commission to clarify that La Grange will be included in the license for the Don Pedro Project to allow the Commission, resource agencies, and stakeholders to address the Districts' coordinated operation of the two projects in a comprehensive manner, thus limiting delays and avoiding inefficiencies associated with licensing La Grange separately. They argue that the Commission has considerable discretion as to how it licenses a complete unit of development. They maintain that, in this case, a single license would better serve the public's interest in protecting and enhancing the non-developmental uses of the Tuolumne River and would be more efficient for the Commission's licensing and regulatory oversight of both projects. They add that the Districts' common ownership and coordinated operation of

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<sup>161</sup> Conservation Groups' Request for Rehearing at 18.

the two projects, as well as the common resources affected, all favor a single license for the two projects.

118. As discussed above, we lack sufficient evidence to determine whether the La Grange Project might require licensing as part of a complete unit of development with the Don Pedro Project. Moreover, there is no need to resolve that issue now. Therefore, we would have no basis for requiring a single license for the two projects. In any event, even where two or more projects are part of a complete unit of development, the Commission generally allows the licensee to choose how to license them, as long as the licensee has sufficient rights to control all aspects of the projects.<sup>162</sup> Accordingly, we deny this request.

The Commission orders:

(A) The request for rehearing filed in this proceeding by Turlock Irrigation District and Modesto Irrigation District on January 18, 2013, is denied.

(B) The request for partial rehearing filed in this proceeding by Conservation Groups on January 18, 2013, is denied.

(C) The request for a stay pending rehearing, filed in this proceeding by Turlock Irrigation District and Modesto Irrigation District on January 18, 2013, is dismissed as moot, and their request for a stay pending judicial review filed on that date is denied.

(D) The motion for leave to file an answer and an answer to the Districts' request for rehearing, filed by Conservation Groups on February 12, 2013, is denied, except to the extent discussed in this order.

(E) The motion for leave to file an answer and an answer to Conservation Groups' request for rehearing and answer in opposition to the Districts' motion for a stay, filed by Turlock Irrigation District and Modesto Irrigation District on February 19, 2013, is denied, except to the extent discussed in this order.

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<sup>162</sup> See, e.g., *Avista Corp.*, 127 FERC ¶ 61,265 (2009). In that case, the licensee sought to relicense separately one of five developments that were all originally under a single license. Although some entities objected to the separation, the Commission processed the applications separately but analyzed them in a single environmental impact statement. Following a settlement, the Commission issued a single license for the five developments at the licensee's request.

(F) The motion for leave to file an answer and an answer to Conservation Groups' February 12, 2013 motion to file an answer and answer to the Districts' rehearing request, filed by Turlock Irrigation District and Modesto Irrigation District on February 27, 2013, is denied, except to the extent discussed in this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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