UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Modesto and Turlock Irrigation Districts	)	
New Don Pedro Project	)	P-2299-057

CONSERVATION GROUPS' REQUEST FOR REHEARING OF ORDER ON TEN-YEAR SUMMARY REPORT UNDER ARTICLE 58 AND MOTION FOR LATE INTERVENTION

Pursuant to 18 C.F.R. § 385.713 the California Rivers Restoration Fund, Tuolumne River Preservation Trust, California Trout, Friends of the River, California Sportfishing Protection Alliance, and Golden West Women Flyfishers (collectively, "Conservation Groups") request rehearing of the Commission's "Order on Ten-Year Summary Report," e-Library no. 20080403-3004 (April 3, 2008) (Order).

The Conservation Groups challenge the Order's conclusions that changes in the Article 37 flow schedule and non-flow mitigative measures, except for further monitoring, are not warranted at this time; and Staff's failure to prepare an Environmental Impact Statement or Assessment under the National Environmental Policy Act (NEPA), or to undertake formal consultation under the Endangered Species Act with respect to Project impacts on Central Valley steelhead, before issuance of this Order. These conclusions and actions are inconsistent with the Commission's obligations under the Federal Power Act (FPA), NEPA, and ESA, and are arbitrary and capricious and not supported by substantial evidence as required by the FPA and the Administrative Procedures Act (APA).

We request that the Commission vacate the Order and: (i) immediately adopt the flow schedule proposed by the U.S. Fish and Wildlife Service *(see* Mesick, Carl, *The High Risk of Extinction for the Natural Fall-Run Chinook Salmon Population Due to Insufficient Instream Flow Releases,* (April 30, 2008), *infra*), since it is supported by substantial evidence of sufficiency of protection of the Chinook salmon and steelhead fisheries; (ii) undertake formal consultation under ESA section 7(a)(2) as to Project impacts on the steelhead fishery; (iii) prepare an Environmental Impact Statement or Assessment to analyze Article 37, the agencies' Feb. 2007 flow schedule, FWS's April 2008 flow schedule, and reasonable alternatives, before deciding what schedule to establish for the remaining term of the license; and (iv) conduct an evidentiary hearing on disputed issues of fact appropriate for resolution by an Administrative Law Judge.

PETITIONERS

I. Parties

The California Rivers Restoration Fund (CRRF) is a non-profit corporation dedicated to finding viable solutions for the management, protection, and restoration of habitat for steelhead, salmon, and other game fish in California. CRRF's directors have been actively involved in efforts to restore salmonid habitat in the lower Tuolumne River, and in some instances have collaborated with the Districts on their restoration projects. Many of its members are sport anglers that frequently fish the San Joaquin River basin. Its membership also consists of property and business owners located along the lower Tuolumne. It has offices in Soulsbyville and El Dorado, California.

The Tuolumne River Preservation Trust (Trust) is a non-profit organization that works to promote the stewardship of the Tuolumne River and its tributaries to ensure a healthy watershed. The Trust was a party signatory to the 1995 Agreement and has actively participated thereafter in TRTAC. The Trust is currently implementing projects to improve fisheries and habitat on the lower Tuolumne River. The Trust has members throughout the Tuolumne watershed and offices in Sonora, Modesto, and San Francisco, California.

California Trout (CalTrout) is a conservation organization with over 5,300 members. CalTrout's mission is to protect and restore wild trout, native steelhead and the waters they inhabit throughout California. Its work includes participating in the Commission's dam relicensing proceedings, protecting the public trust, reforming grazing practices on public lands, expanding the wild trout program, and recovering decimated steelhead populations statewide. Its headquarters is in San Francisco, California.

Friends of the River (FOR) is California's statewide river conservation organization, with more than 5,000 members. FOR educates, organizes, and advocates to protect and restore California rivers streams, and watersheds. It is nationally recognized as an authority on the adverse impacts of dams on rivers and ecosystems. FOR is actively involved in the relicensing of hydroelectric projects on the Kern, San Joaquin, Stanislaus, Mokelumne, American, Feather, Sacramento, and Klamath Rivers, and serves on the steering committee of the California Hydropower Reform Coalition. Its headquarters is in Sacramento, California.

CRRF, the Trust, CalTrout, and FOR filed the "Brief in Support of the Petition of the National Marine Fisheries Service for Modifying Project Structures and Operations," *see* e-Library no. 20030606-5044 (June 3, 2006). They filed a timely Motion to Intervene in the docket related to the Ten-Year Summary Report on July 25, 2005, *see* e-Library no. 20050725-5060. They have been active in providing public comments and participating in the public meetings for this proceeding.

II. Non-Parties

Two groups that have signed on to this rehearing request are not parties to the instant proceeding. We acknowledge that under the Commission's Rule 713(b), 18 C.F.R. § 385.713(b), only parties to the proceeding have standing to file a rehearing request. Thus, we file concurrently a Motion for Late Intervention, *infra*. As stated in the Motion to Intervene, because CRRF, the Trust, CalTrout, and FOR clearly have standing to bring this rehearing request, granting party status to the California Sportfishing Protection Alliance and Golden West Women Flyfishers should not cause any disruption to the proceeding or prejudice to the existing parties.

California Sportfishing Protection Alliance (CSPA) is a non-profit, public benefit fishery conservation organization incorporated in 1983 to protect, restore and enhance the state's fishery resources and their aquatic ecosystems. CSPA works to ensure these renewable public fishery resources are conserved to enable public sportfishing activity. As an alliance, CSPA represents several thousand members that reside in California. Since its inception, CSPA has been actively involved in the conservation of the San Francisco Bay - Delta estuary's fishery resources and those of the Central Valley with local, state and federal government. It has been particularly concerned about the prolonged and extensive decline of the estuary's anadromous fish species, including steelhead, winter-run Chinook salmon, and spring-run Salmon, all listed under the federal Endangered Species Act, that result from development activities conducted in waters utilized by these species of fish. CSPA has worked with many government agencies to take action to stop the fishery declines and restore these populations to self-sustaining levels, as the decline of these species has negative impacts on recreational fishing opportunity while significantly reducing sportfishing effort and impacting the state's sportfishing industry which supplies goods and services to more than 2 million anglers. CSPA is signatory to the 1995 Settlement Agreement. It also joined CRRF, the Trust and CalTrout in filing the Conservation Groups' Brief.

Golden West Women Flyfishers (GWWF) is a twenty-five year old angling club with approximately 150 members throughout Northern and Central California. GWWF has been very active in conservation projects over the past several years and is affiliated with the Conservation Network of the Northern California Council, Federation of Fly Fishers. Past fisheries conservation projects have included the GWWF as an intervenor on a proposed hydropower project on Modoc County which would have put Redband Trout, a Species of Concern, at risk. GWWF is actively involved in the steelhead restoration of Alameda Creek, working with agencies and other organizations on a fish passage barrier removal project. We have been involved in a steelhead trout restoration project on the lower Merced, working with the California Department of Fish and Game and the Merced Fly Fishing Club. GWWF is often called to participate in meetings with legislators about fisheries issues in California and regularly works with fish conservation organizations, including CalTrout, Trout Unlimited and Save Our Wild Salmon.

BACKGROUND

In 1964 the Commission granted Modesto Irrigation District and Turlock Irrigation District (collectively, the Districts) a major license under Section 4(e) of the FPA to construct, operate, and maintain the New Don Pedro Project (NDPP or Project) on the Tuolumne River. *See Re Turlock Irrigation District,* 31 FPC 510 (Mar. 10, 1964) (1996 License). The Project provides irrigation and municipal water supply, hydroelectric power, flood control, recreation, and fish and wildlife conservation. *Id.* Issues regarding fish and the flows in the Tuolumne River required to preserve were highly contentious during the original licensing proceeding. The Commission found that the average run of salmon in the Tuolumne River from 1940 to 1961 was 40,000. *See id.*, p. 516. The Commission determined that in order for the license to be best adapted to a comprehensive plan of development, as required under the Federal Power Act section 10(a), 16 U.S.C. § 803(a), it should be conditioned on fish water releases:

> "In our judgment [fish water] releases are required as hereinafter prescribed if the project is to be found to be best adapted to a comprehensive plan for development of the waterway, since only by making the releases a condition of the license can we be sure that the project will be operated so as to utilize the available water in the best interest of all parties and provide the best plan for comprehensive development for all public uses."

Id., p. 515.

Article 37 established a minimum flow schedule (MFS) for "fish purposes" for the first 20 years of operations. The Commission decided to prescribe flows for only the first 20 years of project operation, explaining, "it is our intention that the parties be encouraged to cooperate in continuing studies of the fish problem and to coordinate their efforts in seeking a mutually satisfactory solution in the future. Further releases will therefore be determined only after further hearing to consider the results of the parties' own efforts to solve the problem." *Id.* This conditional flow schedule was intended to maintain an average run of 40,000 salmon. *See id.*, p. 516. Article 39 required the Districts to study during that period whether the original MFS "assur[ed] the continuation and maintenance of the fishery of the Tuolumne River in the most economical and feasible manner." *Id.*, p. 526.

In the course of a license amendment in 1987, the Commission agreed, at the request of the Districts, California Department of Fish and Game (DFG), and U.S. Fish and Wildlife Service (FWS), to have the Districts conduct additional fishery studies, ending in 1998; however, the Commission did not amend the MFS required under the 1964 license. *See* 38 FERC ¶ 61,097.

On March 19, 1992, the Districts submitted an application to amend the Project license to implement an agreement with DFG in which the Districts agreed to increase the MFS for fish protection. In 1995, after several years of negotiations, the Districts and other parties entered into the "New Don Pedro Proceeding P-2299-024 Settlement Agreement" (1995 Agreement). The 1995 Agreement required that flow and non-flow measures be employed to implement the following recovery strategy: (1) increase naturally occurring salmon populations, (2) protect any remaining genetic distinction, and (3) increase salmon habitat in the Tuolumne River. *See* 1995 Agreement, ¶ 8. Such measures also were to be used to achieve the following comparative goals: (1) improvements in smolt survival and successful escapement in the Tuolumne River, (2) increase in naturally reproducing Chinook salmon in this subbasin, and (3) barring events outside the control of the participants to the settlement, by 2005 the salmon population should be at levels where there is some resiliency so that some of the management measures described herein may be tested on an experimental basis. *See id.,* ¶ 9. The 1995 Agreement also established the Management Committee and Technical Advisory Committee (TAC):

> "The Management Committee is comprised of management representatives of MID, TID, CDFG, FWS, and the City. Their role is to oversee all TAC activities, to request and receive recommendations from the TAC, and to make policy decisions. The Management Committee will be responsible for resolving all issues elevated to it by the TAC. The Management Committee shall operate by consensus.
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> Under the direction of the Management Committee, the TAC will coordinate, by consensus, flow and non-flow measures for the fishery, monitoring activities, develop adaptive management strategies, and oversee their implementation. Any substantive disagreements among the TAC participants shall be elevated to the Management Committee for timely resolution."

Id., ¶ 14.

On February 5, 1996, the Districts filed a conforming application to amend the project license to "revise the license to release higher minimum flows [based on the results of the Article 39 study] to protect Chinook salmon in the lower Tuolumne River and to monitor fish resources under the new minimum flow regime and other management changes in the Tuolumne." The Commission approved the license amendment, and Articles 37 and 58 were revised accordingly. *See Turlock Irrigation District and Modesto Irrigation District*, 76 FERC ¶ 61,117 (July 31, 1996) (1996 Order).

The amended Article 37 requires the Districts to release higher minimum flows for "fish purposes." *See* Ordering ¶ D. The Order also incorporates by reference the requirements in the 1995 Agreement that all flow schedules include a pulse flow to assist young salmon in their outmigration, and that flow schedules during wetter years include an

attraction pulse flow to provide improved habitat conditions and encourage spawning salmon to move up-river.

The amended Article 58 requires the Districts to develop a program to monitor Chinook salmon populations and habitat in the Tuolumne River:

> "The Licensees, after consulting with the California Department of Fish and Game, and the U.S. Fish and Wildlife Service, shall implement a program to monitor chinook salmon populations and habitat in the Tuolumne River. The monitoring program shall conform to the monitoring schedule set forth below and shall include:
>
> (1) Spawning Escapement Estimates;
> (2) Quality and Condition of Spawning Habitat;
> (3) Relative Fry Density/Female Spawners;
> (4) Fry Distribution and Survival;
> (5) Juvenile Distribution and Temperature Relationships; and
> (6) Smolt Survival.
>
> The monitoring frequencies and methods shall be agreeable among the Licensees and the consulted agencies. Any disagreements regarding the conduct of these studies, not resolved among the Licensees and consulted entities, shall be filed with the Commission for determination.
>
> The above monitoring information is to be documented in annual reports which will be filed with the Commission by April 1 of each year and be available for public review. The results of any fishery studies, already completed and not yet filed with the Commission, shall be filed by the Licensees by April 1, 2005."

Id., Ordering ¶ F. Article 58 also provides procedures for review of the April 1, 2005 report:

> "The Licensees shall include in the results of fishery studies to be filed with the Commission by April 1, 2005, all results and a discussion of the results of all monitoring studies related to the effects of flow release fluctuations on the salmon resources in the lower Tuolumne River. The filing shall also identify all non-flow mitigative measures implemented to date and the results of all monitoring studies related to the non-flow mitigative measures. [¶] Based on the information provided in the Licensees' study results to be filed by April 1, 2005, the Commission will determine whether to require further monitoring studies and changes in project structures and operations to protect fishery resources in the Tuolumne River, after notice and opportunity for hearing."

Id., Ordering ¶ G.

In 1998, subsequent to the 1996 Order, the National Marine Fisheries Service (NMFS) listed the Central Valley Steelhead Evolutionary Significant Unit (steelhead) as threatened under the ESA, and included the lower Tuolumne River as part of its geographic range. 63 Fed. Reg. 13,347 (Mar. 19, 1998).[1] On January 5, 2006, following legal challenges to the initial listing, NMFS determined that CV steelhead should remain listed as threatened. 71 Fed. Reg. 834 (Jan. 5, 2006). According to the proposed listing determination, "The loss of most historical spawning and rearing habitat above impassable dams throughout the California Central Valley, the restriction of natural production areas, the apparent continuing decline in *O. mykiss* abundance, and the lack of any monitoring efforts designed to assess *O. mykiss* abundance and trends remain major concerns for this ESU." *See* 69 Fed. Reg. 33102, 33163 (June 14, 2004). On September 2, 2005, NMFS issued critical habitat designations for CV steelhead which includes the Tuolumne River downstream of La Grange Dam. *See* 70 Fed. Reg. 52488 (Sept. 2, 2005).

On May 2, 2003, NMFS filed a "Petition of the National Marine Fisheries Service For Modifying Project Structures and Operations," (NMFS's Petition), requesting that the Commission initiate formal consultation and reopen the license to modify the Article 37 MFS in order to protect both steelhead and Chinook salmon in the Tuolumne River. *See* e-Library no. 20030512-5144. The Districts agreed to be the non-federal representatives in such consultation. *See* letter from Walter P. Ward and Robert M. Nees to George H. Taylor (Mar. 31, 2003), e-library no. 20030624-0322. On June 6, 2003, the Conservation Groups filed a "Brief in Support of the National Marine Fisheries Service For Modifying Project Structures and Operations" (Conservation Groups' Brief). *See* e-Library no. 20030606-5044. The Commission stayed action on the petition at the request of NMFS and other interested stakeholders.

On March 24, 2005, the Districts filed the 2005 Report pursuant to Article 58. *See* e-Library no. 20050324-5063

On June 24, 2005, the Commission issued, "Notice of Filing of Fisheries Studies Report and Study Proposals, and Soliciting Comments, Motions to Intervene, and Protests." *See* e-Library no. 20050624-3034.

On July 25, 2005, Conservation Groups filed a Motion to Intervene and Comments on the 2005 Report. Motions to Intervene and Comments also were filed by the Department of Interior (DOI), DFG, NMFS, among others. In response to requests by DFG and Friends of the Tuolumne, the Commission extended the period for comment to November 22, 2005, and the period for District response to December 22, 2005.

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[1] On July 10, 2000, NMFS issued protective regulations under section 4(d) of the ESA, which prohibit "take" of CV steelhead. *See* 65 Fed. Reg. 42475.

By letter dated June 20, 2006, NMFS filed comments on steelhead in the Tuolumne. It renewed its request for formal consultation, effectively vacating its request for a stay of its 2003 Petition. *See* NMFS, "Comments and Recommendations on Ten-Year Summary Report; Proceeding on Petition to Re-Open License," e-Library no.20060724-5041.

On July 25, 2006, the Commission convened a public meeting to discuss the 2005 Report. We herein incorporate the description of such meeting and subsequent comments submitted by the parties as stated in the Ten-Year Order. *See* Ten-Year Order, pp. 10-11.

On December 20, 2006, the Commission issued a letter directing the Districts to prepare a fisheries study plan to address the needs identified during the review process. *See* e-Library no. 20061226-0019. The letter stated:

> "Our general conclusion about the 10-Year Summary Report, as presented at the meeting, is that for most of the required monitoring, the data were insufficient to reach any valid conclusions about the effects of the modified streamflow releases and restoration efforts on the fisheries resources of the Tuolumne River. Some of the monitoring efforts were improperly designed or executed and could not, therefore, produce data that would allow valid conclusions. Some of the mitigative measures simply have not had sufficient time for the monitoring efforts to show any change, or the response was not great enough to detect.
>
> Therefore, we conclude that under Article 58 of the license, further monitoring studies are needed. Additional, well-designed and well-executed studies are necessary before the effectiveness of the revised flow schedule and the non-flow mitigative measures can be determined."

Id. at 2. The Commission directed the Districts to develop a study plan and schedule for the additional monitoring which addressed the following tasks:

> "Instream Flow
>
> There is a lack of evidence that either smolt survival or spawner escapement has increased in response to the increased flow requirements. The collection of additional data is needed to better define the flow to survival relationship: in particular, data points are needed for high flow years (i.e., greater than 4,000 cfs)....
>
> Habitat Restoration
>
> The remaining habitat restoration projects should be completed and the effectiveness of all projects should be assessed....

Fry Survival

A statistically valid estimate of fry production per female spawner and of fry distribution is needed, and should include site-specific fry emergence, fry distribution over time, and fry transport relative to flow.

Steelhead Presence/Protection

The size and habitat needs of the *Oncorhynchus mykiss* population in the Tuolumne River, and the presence of anadromous members (steelhead trout) of this population should be determined….

Predator Control

The reduction of predation on juvenile salmon by other species will improve smolt survival. An identification and implementation of measures to this end, and the monitoring of the effectiveness of these measures are needed.

River Temperature

The effect of project operations on river temperatures resulting effect on the fisheries resources should be assessed."

Id., p. 3-4.

On February 2, 2007, the Districts distributed their draft fisheries study plan to the TAC members and NMFS. On March 5, 2007, the agencies provided their respective comments on the draft plan. We herein incorporate the Commission's summary of such comments. *See* Ten-Year Order, p. 12. On March 20, 2007, the Districts filed the fisheries study plan with the Commission. Several parties filed comments that the Districts' plan did not address their comments.

On June 15, 2007, the Commission issued its staff's preliminary analysis of the Tuolumne Fisheries Study Plan and comments received thereon. *See* e-Library no. 20070619-0175. According to Staff:

"For the most part, the plan submitted by the Districts addresses the issues we presented. *With the exception of the instream flow issue,* the Districts' plan with some fine tuning should address most of Staff concerns with the results presented in the 10-year summary report. In some cases the plan does not include details of

individual studies that are crucial to evaluating their likely success.... These details should be worked out through the TRTAC."

Id., p. 8 (emphasis added). With regard to instream flow, Staff concluded:

"We conclude that the Districts continue monitoring smolt production and adult escapement to further develop the relationship between production and flow....Staff believes the Districts should develop a study that tests moderately high flow conditions (>4,000 cfs average Modesto flow during April-May) at least once during the next four years to produce smolt production data for high flow conditions...."

Id., p. 2. With regard to *O. mykiss*, Staff concluded:

"Except for not including in their analysis a consideration of data from nearby rivers, the Districts' plan addresses most of the items we identified to begin a meaningful analysis of the status of O. mykiss in the system. If these studies document the presence of a steelhead trout population in the Tuolumne River, further analysis should be defined to determine what protective measures (e.g., flows, temperature, habitat, passage, etc.) are needed...."

Id., p. 6.

On July 16, 2007, the Districts filed a revised fisheries study plan. *See* e-Library no. 20070718-0082.

On July 16, 2007, the Conservation Groups filed comments in response to Commission Staff's Preliminary Analysis. *See* e-Library no. 070716-5028. The U.S. Fish and Wildlife Service (FWS) (*see* e-library no. 20070803-0078) and DFG (*see* e-Library no. 20070803-0076) also filed comments in response to Staff's analysis.

On August 8, 2007, the Commission convened a second public meeting to discuss the fisheries study plan.

The Order issued on April 3, 2008.

STATEMENT OF ISSUES

Issue 1: Does the Order Comply with FPA section 10(a)(1), 16 U.S.C. § 803(a)(1)?

We rely on the following Legal Authorities for this issue.

Supreme Court Cases

Udall v. Federal Power Commission, 387 U.S. 428, 437 (1967)

Statutes

16 U.S.C. § 803(a)(1)

Other Authorities

Re Turlock Irrigation District, 31 F.P.C. 510 (Mar. 10, 1964)

Turlock Irrigation District and Modesto Irrigation District, 76 FERC ¶ 61,117 (July 31, 1996)

Issue 2: Is the Order's Failure to Consider Alternative Measures to the Existing Flow Schedule Arbitrary, Capricious, and Abuse of Discretion, and otherwise not in accordance with law?

We rely on the following Legal Authorities for this issue.

Statutes

5 U.S.C. § 706

16 U.S.C. § 803(a)(1)

Administrative Regulations

18 C.F.R. § 713(c)(3)

Other Authorities

California Independent System Operator Corporation, 120 FERC ¶ 61,271 (2007)

Dominion Cove Pont LNG, LP, Dominion Transmission, Inc., 118 FERC ¶ 61,007 (2007)

Turlock Irrigation District and Modesto Irrigation District, 76 FERC ¶ 61,117 (July 31, 1996)

Issue 3: Does the Order constitute an agency action for purposes of the National Environmental Policy Act, 42 U.S.C. 4221 et seq.?

We rely on the following Legal Authorities for this issue.

Circuit Court Cases

Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846 (9th Cir. 2005)

Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir.2002)

Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1023 (9th Cir.2003)

Anderson v. Evans, 314 F.3d 1006, 1021 (9th Cir.2002)

Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir.1992)

District Court Cases

Sierra Club v. Bosworth, 465 F. Supp. 2d 931 (N.D. Cal. 2006)

Statutes

16 U.S.C. § 1536(a)(2)

42 U.S.C. § 4332(c)

Administrative Regulations

18 C.F.R. Part 380

40 C.F.R. § 1501.3

40 C.F.R. § 1501.4

40 C.F.R. § 1508.3

40 C.F.R. § 1508.9

40 C.F.R. § 1508.18

40 C.F.R. § 1508.27

Other Authorities

Turlock Irrigation District and Modesto Irrigation District, 76 FERC ¶ 61,117 (July 31, 1996)

Issue 4: Are the Order's findings that changes to the Article 37 flows are not warranted and that steelhead are not present based on substantial evidence as required by FPA section 313(b), 16 U.S.C. § 825l(b), and the APA sections 556-7 and 706(2)?

We rely on the following legal authorities for this issue.

Supreme Court Cases

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

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

FPC v. Texaco, Inc., 417 U.S. 380 (1974)

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

Securities & Exchange Commission v. Chenery Corporation 332 U.S. 194 (1947)

Circuit Court Cases

Columbia Gas Transmission Corporation v. FERC, 628 F.2d 578 (D.C. Cir. 1979)

Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965)

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

Statutes

5 U.S.C. § 556(d)

5 U.S.C. § 557

5 U.S.C. § 706

16 U.S.C. § 803

16 U.S.C. § 825*l*

Administrative Regulations

18 C.F.R. § 713(c)(3)

NOAA, "Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; 2008 Management Measures and a Temporary Rule," 73 Fed. Reg. 23971 (May 1, 2008)

Other Authorities

California Independent System Operator Corporation, 120 FERC ¶ 61,271 (2007)

Dominion Cove Pont LNG, LP, Dominion Transmission, Inc., 118 FERC ¶ 61,007 (2007);

Re Turlock Irrigation District, 31 F.P.C. 510 (Mar. 10, 1964)

Turlock Irrigation District and Modesto Irrigation District, 76 FERC ¶ 61,117 (July 31, 1996)

Federal Rules of Evidence 702

Issue 5: Does the Order comply with FERC's obligation under ESA section 7(a)(1), 16 U.S.C. § 1536(a)(1), to carry out programs for the conservation of threatened steelhead?

We rely on the following Legal Authorities for this issue.

Circuit Court Cases

Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988)

California Sportfishing Protection Alliance v. FERC, 472 F.3d 593 (9th Cir. 2006)

City of Sausalito v. O'Neill, 386 F.3d 1186 (9th Cir. 2004)

Pacific Rivers v. Thomas, 30 F.3d 1050 (9th Cir. 1994)

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987)

Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985)

Turtle Island Restoration Network v. National Marine Fisheries Service, 340 F.3d 969 (9th Cir. 2003)

Statutes

16 U.S.C. § 1532

16 U.S.C. § 1536(a)(1)

16 U.S.C. § 1538

Administrative Regulations

50 C.F.R. § 402.02

50 C.F.R. § 402.03

50 C.F.R. § 402.14

50 C.F.R. § 402.16

"Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs)," 65 Fed. Reg. 42422, 42475 (July 10, 2000).

"Interagency Cooperation--Endangered Species Act of 1973, as Amended; Final Rule," 51 Fed. Reg. 19,926 (June 3, 1986)

Other Authorities

FWS, ESA Section 7 Consultation Handbook (1998)

Turlock Irrigation District and Modesto Irrigation District, 76 FERC ¶ 61,117 (July 31, 1996)

Issue 6: Does the Order comply with FERC's obligation under ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), to consult with NMFS to insure that the action prescribed by the Order will not jeopardize the continued existence of threatened steelhead or their critical habitat?

We rely on the following Legal Authorities for this issue.

Circuit Court Cases

Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984)

Statutes

16 U.S.C. § 1536(a)(2)

ARGUMENT

I. The Order Permits the License Not to be Best Adapted to a Comprehensive Plan of Development of the Tuolumne for the Protection of Chinook Salmon and Steelhead, in Violation of FPA section 10(a)(1).

FPA section 10(a)(1), 16 U.S.C. § 803(a)(1) requires:

> "That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

See also Udall v. Federal Power Commission, 387 U.S. 428, 437 (1967). Thus, Section 10(a) requires that the Project benefit *all* public uses of the waterway, not just the use of power:

> "The question whether the proponents of a project 'will be able to use' the power supplied is relevant to the issue of the public interest. So too is the regional need for the additional power. But the inquiry should not stop there. A license under the Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the

public interest. And that determination can be made only after an exploration of all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife."

Id. at 450.

As is the case now, the fishery flow schedule was the primary issue in the original licensing proceeding:

> "The basic question presented in this case is whether the Commission should condition its license to Turlock and Modesto to require specified releases of water from New Don Pedro for the projection of the fall run of King salmon which spawn in the Tuolumne below La Grange dam. The State of California, through its Department of Fish and Game (California), intervened at the outset of the proceeding to request such a condition for protecting the existing salmon fishery. Formal hearing was postponed while the applicants and California sought to work out a settlement with respect to the release of fish water. A tentative agreement was reached, but the California Fish and Game Commission (an independent California agency) declined to ratify the agreed-upon settlement. ... The Secretary [of the Interior] requests releases of water for the protection of fish similar to California's but with summer flows somewhat greater than those requested by California.
>
> The applicants contend that New Don Pedro, without fish water releases, will provide a definite improvement over fish conditions in the Tuolumne as they are under existing Don Pedro. They contend that a license condition requiring the fish water releases requested by California or the Secretary would impair and infringe their vested rights to water for irrigation which are protected by Section 27 of the Power Act. They further contend that the requested releases would reduce the dependable power capacity of the project to zero after 1985, when San Francisco's upstream diversions will exceed 295 mgd (million gallons per day), thus making the project economically unfeasible as a power project.
>
> The Commission's staff takes the position that the license should be conditioned to require California's recommended releases, with some modification, for a period of 20 years, during which continuing studies of the fish problem would be made by the applicants in cooperation with the fish interests, and after which minimum releases would be made as prescribed by the Commission upon re-examination of the question.

1964 License, 31 F.P.C. at 512 (internal notes omitted). The examiner presiding over the formal hearing determined that a minimum flow schedule for fish was appropriate, but was unable to make a specific finding regarding what flows should be prescribed:

"…[H]e would impose a condition requiring the applicants to maintain a minimum stream flow based on the additional waters to become available to them and to San Francisco as a result of the construction of New Don Pedro, thus maintaining stream flow to the extent possible to assist in preserving the fish runs; but he finds that he is unable to make a computation of the waters available on the basis of the present record. He therefore includes Article 30 in his recommended license requiring applicants to maintain minimum stream flows as may be prescribed hereafter by the Commission upon its own motion or the recommendation of the Secretary or California, after notice and opportunity for hearing and upon a finding that such minimum flows are available, are necessary and desirable and are consistent with provisions of the Act."

Id., p. 514.

The Commission adopted the examiner's findings:

"Upon review of the record presented at the hearing, the parties' briefs, the examiner's decision, the exceptions thereto, and the oral argument before the Commission, it is our judgment that a license should be issued to Turlock and Modesto upon the conditions for fish water releases recommended by staff. Subject to these conditions and such other conditions as are hereinafter set forth in the license, we find the applicants' proposed New Don Pedro project to be best adapted to a comprehensive plan for the development of the river as required by Section 10(a) of the Act.

In concluding that releases for fish should be required as a condition of the license, we do not seriously question the applicants' contention that even without such a condition the salmon runs would be preserved longer with New Don Pedro than with existing Don Pedro. On the basis of the record, we would expect that New Don Pedro could be operated without adverse effect on the salmon runs until after 1985, when San Francisco's upstream diversions reach 295 mgd; whereas without New Don Pedro it appears that the fish would be seriously affected, if not destroyed, after 1968, when San Francisco's diversions reach 210 mgd. This evidence, however, does not substantiate the applicants' contention that no fish water releases should be required in the New Don Pedro license. In our judgment such releases are required as hereinafter prescribed if the project is to be found to be best adapted to a comprehensive plan for development of the waterway, since only by making the releases a condition of the license can we be sure that the project will be operated so as to utilize the available water in the best interest of all parties and provide the best plan for comprehensive development for all public uses.

Assuming the hydrologic cycle of the past 39 years as a generally representative

> pattern for the future, and assuming the operation of the project so as to maximize the availability of water for fish requirements, it is our judgment that the prescribed releases will maintain the fishery for at least a 20-year period without depriving the applicants or San Francisco of the water needed to meet their essential irrigation and municipal requirements. The license therefore prescribes such releases for a 20-year period. We are not now, however, prescribing releases beyond the first 20 years of project operation, since it is our intention that the parties be encouraged to cooperate in continuing studies of the fish problem and to coordinate their efforts in seeking a mutually satisfactory solution for the future. Further releases will therefore be determined only after further hearing to consider the results of the parties' own efforts to solve the problem. As will be seen below, the need for some modification of the releases after San Francisco's diversions reach 295 mgd, and the possibility that the parties can find an economical and reasonable solution to the problem through the use of alternative sources of water or artificial propagation facilities justify a re-examination of the release requirements by the Commission at the end of the first 20 years of operation.

Id., pp. 515-516 (internal notes omitted). Thus, Article 37 included flows for only the first 20 years of the license:

> *"Article 37.* For the first 20 years of project operation, the Licensees shall maintain minimum stream flows in the Tuolumne River at La Grange bridge (river mile 50.5) for fish purposes in accordance with the schedules set forth below or with such monthly schedules as may, with the approval of the Licensees, be prescribed by the California Department of Fish and Game;...
>
> After the first 20 years of project operation, the Licensees shall maintain minimum stream flows in the Tuolumne River at La Grange bridge as may be prescribed hereafter by the Federal Power Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the California Department of Fish and Game, after notice and opportunity for hearing and upon a finding based on substantial evidence that such minimum flows are available and are necessary and desirable and consistent with the provisions of the Act."

Id., p. 526. Article 39 required 20-years of further study:

> "The Licensees in cooperation with the California Department of Fish and Game shall make necessary studies aimed at assuring continuation and maintenance of the fishery of the Tuolumne River in the most economical and feasible manner. Such studies shall be completed prior to the end of the 20-year period for which minimum stream flows have been provided in Article 37."

Id., p. 527.

The Commission essentially punted the central issue to the licensing proceeding. Even after a formal, evidentiary hearing, the Commission could not make a final determination on appropriate MFS for the term of the 50 year license. It assumed 20 years of further study would provide adequate information to support a final determination, so it *required* reopener of the license so the license could be properly conditioned on measures necessary to mitigate project impacts on fish. This was not a standard reopener as required under the Commission's standard license articles,[2] it was an extraordinary reopener so the Commission could assure the license was conditioned as necessary to be best suited to a comprehensive plan of development under FPA section 10(a)(1).

The proceeding to reopen the license culminated in the 1996 Order. Despite almost 30 years of additional studies, the Commission still was unable to make a conclusive determination that the Article 37 flows, as amended, and other mitigative measures would protect salmon. The 1996 Order provides:

> "The minimum flow regime set forth in the proposed Article 37 provides benefits to the Tuolumne River fishery by improving water quality and creating additional habitat for various life stages of Chinook salmon. … In addition to adjustments made for changing hydrologic conditions, changes to the flow regime can be made upon mutual agreement with relevant resource agencies or as a result of emergencies beyond the control of the licensee. …
>
> The revised Article 58 proposes implementation of a monitoring plan that is designed to identify benefits realized by the Chinook fishery as a result of improved environmental conditions in the Tuolumne River. The Article calls for the results of fisheries monitoring studies to be filed with the Commission by April 1, 2005, with intervening annual reports.
>
> …A complete picture of all management influences on the Tuolumne River is necessary to evaluate whether future changes in project flow releases and ramping rates are necessary to ensure the continued survival of the Chinook salmon population in the Tuolumne River. The Districts must therefore inform the Commission of the nonflow mitigation measures that are implemented and planned for implementation. Information on the non-flow mitigative measures shall be presented in the annual

[2] "Article 10. The Licensee shall, for the conservation, and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance and operation of such facilities and comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing and upon findings based on substantial evidence that such facilities and modifications are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the Act." *Id.,* p. 530.

reports filed with the Commission, including an identification and description of the measures implemented in the previous year and planned for implementation in the following year. The final report, to be filed with the Commission by April 1, 2005, must identify all the nonflow mitigative measures implemented to date, and all information collected on the effects of the implemented measures.

...[F]urther information regarding the effects of the fluctuations is needed to determine ramping restrictions on project flow releases appropriate to protect salmon in the lower Tuolumne River. The Agreement and proposed amendment to Article 58 identify flow fluctuation monitoring studies that will be conducted. The Districts' final report ... must include all study results related to the effects of flow fluctuations on the salmon fishery, including studies already commenced, those completed, and those to be conducted. The Commission will review the information provided by the Districts' studies to determine whether the Commission, pursuant to its general reserved authority in the license issued in 1964, should effect changes in project structures and operations to protect the Chinook salmon in the Tuolumne River."

Id., pp. 10-12 (internal notes omitted).

As with the 1964 License, the Commission deliberately reserved reopener in the 1996 Order for a determination of whether changes in project structures and operations were necessary to protect salmon based on the information gathered over 10 years of study and provided in the Ten-Year Summary Report. The Commission included reopener because it was not certain whether the amendment to Article 37 flow schedule and the non-flow mitigation measures would be adequate to protect salmon.

The Order adheres to this pattern. Instead of making an affirmative finding as to whether the Article 37 flow schedule and other non-flow measures are adequate to protect salmon, the Order makes only negative findings that there is not enough evidence in the record to determine what mitigative measures are necessary to protect salmon and requires further study: "Based on the results of the monitoring required in (B) and (C) above, the Commission reserves its authority to require changes in project structures and operations to protect fishery resources of the Tuolumne River, after notice and opportunity for hearing." Order, p. 30.

The 1964 License stated,

"In our judgment [fish water] releases are required ... if the project is to be found to be best adapted to a comprehensive plan for development of the waterway, since only by making the releases a condition of the license can we be sure that the project will be operated so as to utilize the available water in the best interest of all parties and provide the best plan for comprehensive development for all public uses."

1964 License, 31 F.P.C. at 515.

The Order does not make a finding that Article 37 flows are sufficient to protect salmon or steelhead. It states that salmon production under Article 37 has been mixed, but generally has been directly related to water year type:

> "The decline in the Tuolumne River fall-run Chinook salmon population since 2000 has been attributed by many respondents to the current Article 37 flow regime. Data presented in the Summary Report show that Chinook salmon escapement numbers initially increased in the Tuolumne River under the increased Article 37 flow requirements from 1996 to 2000, and then declined through 2004. The years 2001 through 2004, however, were classified as below normal or dry water years, which generally have a negative affect on salmonid production. Data since 2007, even through the expectation was for increased 2007 escapement numbers associated with the higher flows occurring in the above normal or wet 2005 Water Year in the Tuolumne River."

Order, p. 22. Thus, according to the Order, *the Article 37 flow schedule does not appear to protect salmon during all water year types*. Under the terms of the 1964 license, because the Article 37 flows are not protective of salmon, the license is not best adapted to a comprehensive plan of development. Under the Order, the Districts will operate for a 50-year term according to a license that is not best adapted to a comprehensive plan of development for all beneficial uses. This is outrageous.

Instead of making the finding incumbent upon it – i.e., what flow schedule will protect fish – the Order defies logic by finding that the "information to date does not warrant a change in the existing Article 37 flow requirements." *Id.*, p. 24. This finding not only contradicts the Order, it contradicts evidence in the record. As discussed in more detail in Argument section II, *infra*, the Chinook salmon population has declined in the 44 years since the license issued and is now facing collapse. As discussed in Argument section II, *infra,* evidence in the record demonstrates that project operations, particularly Article 37 flows, have contributed to the collapse. Plainly, the license, even as amended in 1996 and this Order, is not best adapted to a comprehensive plan for development of the Tuolumne as required under the license and FPA section 10(a)(1). The Order's failure to consider alternatives or make affirmative findings violates its obligation under FPA section 10(a)(1).

We request that the Commission vacate the Order and undertake further procedures as necessary for it to make affirmative findings regarding what mitigative measures will protect fish affected by the Project.

II. The Order Is Arbitrary, Capricious, An Abuse Of Discretion, And Otherwise Not In Accordance With Law Because It Does Not Consider Alternative Flow Schedules.

Under the APA, the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

The Order finds that changes to the Article 37 flow schedule are not warranted at this time. The Order does not state that Commission Staff analyzed any alternatives to the Article 37 flows prior to making this determination. It makes this finding despite reference to evidence that the flow schedule does not protect salmon during all water year types. *See* Order, p. 22. It makes this finding despite comments by FWS, DFG and NMFS that the Article 37 flows were a significant factor affecting the decline of anadromous fisheries in the Tuolumne and recommended a specific flow schedule and supporting documentation:

> "The USFWS and CDFG presented information on their analysis of the relationship between flow and Chinook salmon production in the Tuolumne River. *They concluded that spring river flow is the most significant factor affecting Tuolumne River juvenile Chinook salmon survival, and that the flows required by Article 37 were not sufficient to achieve the spawning escapement increases envisioned in 1996.* The proposed a new flow schedule that consistent of three flow tiers: 750 cfs; 2,000 cfs; and 4,000 cfs, depending on the type of water year. Flow for fry rearing would be held at 2,000 cfs for a specified number of days, while flows for smolt emigration would decrease in drier water years."

Order, p. 10 (emphasis added).

The agencies submitted a flow alternative as part of their *Draft Limiting Factor Analyses & Recommended Studies for Fall-run Chinook Salmon and Rainbow Trout in the Tuolumne River.*[3] The Draft Limiting Factors Analyses:

> "describes a Tuolumne River Management Conceptual Model (Model) that includes a limiting factor analysis of fall-run Chinook salmon and rainbow trout in the Tuolumne River, unanswered management questions, and recommended management actions that include monitoring studies and experimental instream flow schedules. The primary objectives of the Model are to (a) guide management actions towards accomplishing recovery of fall-run Chinook salmon (*Oncorhynchus tschawycha*), resident rainbow trout (*O. mykiss*), and Central Valley steelhead (*O. mykiss*) in the Tuolumne River

[3] Mesick, Carl, McLain, Jeff; Marston, Dean, and Tim Heyne, *Draft Limiting Factor Analyses & Recommended Studies for Fall-run Chinook Salmon and Rainbow Trout in the Tuolumne River* (Feb. 27, 2007) (on behalf of U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Game).

below La Grange Dam; (b) provide reasonable water supply equity across competitive beneficial uses, and (c) provide a technical framework enabling collaborative resource management."

Id., p. 2. The model was prepared in response to the decline of the salmon population:

> "Recent trend analyzes [sic] suggest that the Chinook salmon population has not responded to recent management efforts to restore spawning habitats and reduce the abundance of exotic fish predators in the Tuolumne River or to reduced export rates in the Delta between mid-April and mid-May. Other factors, such as ocean productivity and ocean harvest also do not explain the trends in the Tuolumne River population. Instead, the analyses indicate that management should focus on providing instream flows of greater magnitude, duration, and frequency during both the winter and spring to enhance the survival of juvenile salmonids in the Tuolumne River and improve the survival of out-migrating smolts in the Tuolumne River and Delta."

Id. In order to address this decline it recommended the following flow schedule to protect Chinook salmon:

Proposed Flow Schedule

Water Year Type	Rearing Q (cfs)	Feb-Mar Rearing Duration (days)	Smolt Q (cfs)	Apr-Jun Smolt Duration (days)	Spawning Base Flow (Oct 1 – Mar 31) (cfs)	Summer Base Flow (cfs)
Very Wet	4,000	60	5,000	60	300	250
Wet	3,000	60	4,000	60	300	250
Above Normal	3,000	30	3,000	45	200	150
Below Normal	2,000	30	3,000	45	200	150
Dry	2,000	15	2,000	30	200	150
Critical	500	15	1,000	30	200	150

Id.

In April 2008, FWS updated its flow recommendation. In *The High Risk of Extinction for the Natural Fall-Run Chinook Salmon Population Due to Insufficient Instream Flow Releases,* discussed in more detail in Argument section IV.A, *infra,* the FWS recommended the following flow schedule for both salmon and steelhead in response to the threat that the naturally produced Tuolumne River fall-run salmon population will be extirpated:

"A minimum flow schedule that should be able to sustain both naturally producing Chinook salmon and *O. mykiss* (steelhead and rainbow trout) populations includes the following three elements:

- Pulse flows of 1,330 cfs for 45 days during April and May to provide suitable conditions for migrating juvenile salmon and Central Valley steelhead.

- Fall pulse flows of 1,500 cfs for 10 days during mid-October to attract adult Chinook salmon to the Tuolumne River and minimize straying (Mesick 2001).

- Year round base flows of 235 cfs to provide suitable water temperatures throughout the summer in 12.4 miles of habitat for *O. mykiss* (unpublished results of real-time temperature management by Turlock Irrigation District and Modesto Irrigation District in 2002 and 2003) and suitable spawning and rearing conditions for fall-run Chinook salmon."

Mesick, Carl, *The High Risk of Extinction for the Natural Fall-Run Chinook Salmon Population Due to Insufficient Instream Flow Releases,* (April 30, 2008), on behalf of the FWS (Mesick 2008).[4] NMFS also recommends this flow schedule:

> "These analyses and recommendations are supported by substantial evidence and are based on the best currently available scientific information. Although the recommended flows do not necessarily avoid or mitigate for all of the effects of the Don Pedro Project, they do represent the best available information on flows and therefore, should be implemented immediately in order to provide timely relief for declining salmon and steelhead in the Tuolumne River."

NMFS, Request for Rehearing of Order on Ten-Year Summary Report Under Article 58," e-Library no. 20080505-5007 (May 3, 2008). We also understand that DFG recommends this schedule.

The Order does not indicate that Commission Staff modeled or analyzed the *Draft Limiting Factors* flow schedule for salmon or any other alternatives to the Article 37 flows. The Order does not otherwise discuss the feasibility or merit of any alternatives. The Order does not provide any explanation for this lack of alternatives analysis. While not stated directly, it appears that this analysis was not deemed necessary given the existence of other limiting factors on the salmon population. *See* Order, p. 21.

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[4] We understand that the FWS will be filing this report with the Commission, and so do not provide a copy. This is significant, new information the Commission should consider in this request for rehearing. *See* 18 C.F.R. § 713(c)(3); *Dominion Cove Pont LNG, LP, Dominion Transmission, Inc.*, 118 FERC ¶ 61,007 (2007); *California Independent System Operator Corporation*, 120 FERC ¶ 61,271 (2007).

The Order does require additional monitoring. However, it does not explain how an additional 5-8 years of monitoring will yield the information necessary to modify the Article 37 flow schedule and other project operations for the protection of fish when the 44 previous years of study did not provide such information.

We acknowledge that neither the Commission nor the Districts are obligated to mitigate adverse impacts over which they have no jurisdiction or control, e.g., marine conditions. However, the existence of limiting factors beyond the Commission's jurisdiction does not defeat its obligation to regulate factors within its reach as necessary to assure the Project is best suited to a comprehensive plan of development and in the public interest under FPA section 10(a)(1), 16 U.S.C. § 803(a)(1).

As discussed Argument section I, *supra,* the Commission conditioned its finding that the Project would be best adapted to a comprehensive plan of development on instream flows adequate to protect the fish in the Tuolumne. However, when it issued the 1964 License, the Commission put off a final decision regarding instream flow. It committed to undertake such decision following 20 years of study. When it issued the 1996 Order, the Commission again declined to make affirmative findings regarding appropriate mitigative measures, instead providing for reopener after 10 years of further study. The measures provided in the original and amended license have not achieved their respective objectives, namely to maintain an average of 40,000 salmon, or to increase naturally occurring salmon populations. The Commission has allowed the Project to operate for 44 years under conditions, including flow schedule, which have not achieved the measurable objectives for salmon protection, even though fish flows were central to the Commission's public interest finding under FPA section 10(a)(1). Not only does the Order propose to continue this pattern for the next eight years until the existing license expires, it does so without analyzing any alternative flow schedules. Given the stark decline of the salmon fishery, the Order's failure to make affirmative findings as to what flow schedule and other mitigative measures will protect fish may contribute to there being no salmon left to monitor.

We request that the Commission vacate the Ten-Year Order and implement the flow schedule recommended in Mesick 2008 on an interim basis, pending further procedures and analysis of other reasonable alternatives.

III. The Order Is A Major Federal Action For Which the Commission Must Comply with NEPA.

The Order does not address NEPA. It does not explain the basis for its not complying with NEPA for this proceeding, even though it complied with NEPA for the previous reopener proceeding. *See* 76 FERC ¶ 61,117, p. 7, fn. 22.

NEPA requires FERC to prepare an Environmental Impact Statement (EIS) for all major actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c). Such an EIS must address (1) the "environmental impact of the proposed action;" (2) any "adverse environmental effects which cannot be avoided;" (3) "alternatives to the proposed action;" (4) the balance between "local short-term use of [the human] environment and the maintenance of long-term productivity;" and (5) "any irreversible and irretrievable commitment of resources." 42 U.S.C. § 4332(c)(i)-(v).

The Commission has adopted regulations implementing NEPA at 18 C.F.R. Part 380: "The Commission will comply with the regulations of the Council on Environmental Quality except where those regulations are inconsistent with the statutory requirements of the Commission." 18 C.F.R. § 380.1. According to CEQ's regulations, "Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). One category of action is "Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." 40 C.F.R. § 1508.18(b)(4).

This action, a proceeding to "determine whether to require further monitoring studies and changes in project structures and operations to protect fishery resources in the Tuolumne River, after notice and opportunity for hearing" (1996 Order, p. 15), constitutes an action for purposes of NEPA.[5] The Order is a discretionary approval of a plan of operation for the New Don Pedro Project pursuant to the reopener provided in the 1996 Order. Thus, it is an action which triggers NEPA.[6]

Further the Order meets many of CEQ's standards for significance of impact.[7] The impacts will be variously "beneficial" (requiring the Districts to conduct further studies) and "adverse" (by failing to mitigate the continuing impacts of the Project). *See* 40 C.F.R. § 1508.27(b)(1). The Order is "highly controversial" as demonstrated by the comments

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[5] The Order does not fall under any of the categorical exemptions identified at 18 C.F.R. § 380.4.

[66] "NEPA aims to establish procedural mechanisms that compel agencies, such as the Corps, to take seriously the potential environmental consequences of a proposed action. We have termed this crucial evaluation a 'hard look.'" *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2005) (quoting *Kern v. United States Bureau of Land Mgmt.,* 284 F.3d 1062, 1066 (9th Cir.2002).

[7] "[T]he presence of one or more of these factors should result in an agency decision to prepare an EIS." *Pub. Citizen v. Dep't of Transp.,* 316 F.3d 1002, 1023 (9th Cir.2003) ("If agency's action is environmentally 'significant' according to any of these criteria [set forth in 40 C.F.R. 1508.27(b)], then DOT erred in failing to prepare an EIS."); *see also Anderson v. Evans,* 314 F.3d 1006, 1021 (9th Cir.2002) (holding, after consideration of a single "significance factor," that an EIS was required); see also *Ocean Advocates v. U.S. Army Corps of Engineers* 402 F.3d 846, 864 -865 (9th Cir. 2005).

already filed to date about appropriate mitigation measures for salmon and *O. mykiss* – and as will be shown again by the rehearing requests. *Id.,* § 1508.27(b)(4). The Order is "related" to other actions (*id.*, § 1508.27(b)(7)), such as formal consultation for CV steelhead under ESA section 7(a)(2), NMFS's closure of the Chinook salmon fishery. It may[8] adversely affect threatened CV steelhead (*e.g.*, by failing to adopt modifications to the Article 37 flow schedule for purposes of mitigating the project's impacts on river temperatures).

By not preparing an EIS which analyzes potential impacts and considers a reasonable range of alternatives, the Order violates NEPA. We request that the Commission vacate the Order and preparing an EIS consistent with 42 U.S.C. § 4332(c). At the very least, the Commission should have prepared an Environmental Assessment which demonstrated the Order would not have a significant impact on the environment.[9] *See* 40 C.F.R. §§ 1501.3, 1508.9.

IV. The Order's Findings that Changes in Article 37 Flows Are Not Warranted and Steelhead Are Not Present Are Not Supported By Substantial Evidence.

A final decision must be supported by substantial evidence. *See* 16 U.S.C. 825*l*(b). As required by FPA section 313(b) and APA sections 556(d), 557 and 706(2), substantial evidence is record evidence which is expressly found to be: (A) reliable and probative for the purpose of supporting a finding and (B) superior to competing evidence with respect to a given finding. *See* Fed. Rules Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993); *Motor Vehicle Manufacturers Association v. State Farm Insurance*, 463 U.S. 29 (1983); *Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962). Thus:

> "[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive."

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[8] "To trigger this requirement [to prepare an EIS] a 'plaintiff need not show that significant effects *will in fact occur,*' [but] raising 'substantial questions whether a project may have a significant effect' is sufficient.'" *Id.* at 1150 (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir.1992)). *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 -865 (9th Cir. ,2005).

[9] "Where an EIS is not categorically required, the agency must prepare an Environmental Assessment to determine whether the environmental impact is significant enough to warrant an EIS. 40 C.F.R. §§ 1501.3, 1508.9; *Metcalf v. Daley,* 214 F.3d 1135, 1142 (9th Cir.2000). If the action will significantly affect the environment, an EIS must be prepared, while if the project will have only an insignificant effect, the agency issues a FONSI. 40 C.F.R. §§ 1501.3, 1501.4." *Ocean Advocates v. U.S. Army Corps of Engineers* 402 F.3d 846, 864 (9th Cir. 2005).

Securities & Exchange Commission v. Chenery Corporation 332 U.S. 194 at 196-7 (1947); *see also FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Columbia Gas Transmission Corporation v. FERC*, 628 F.2d 578, 593 (D.C. Cir. 1979). Similarly:

> "We noted in [a prior case] that we do not pretend to have the competence or the jurisdiction to resolve technical controversies in the record, or … to second-guess an agency decision that falls within a 'zone of reasonableness.' Rather, our task is to 'ensure public accountability,' by requiring the agency to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument."

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

Further, the Commission's obligations under the FPA include that of independent investigation:

> "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 620 (2nd Cir. 1965).

As discussed below, the Order's primary findings that changes in Article 37 flows are not warranted based on information presented to date, and steelhead are not present in the Tuolumne River, do not comply with these mandates.

A. <u>The Order Does Not Cite Any Evidence that the Project Has Not Contributed to Decline of Salmon Fishery</u>.

The Order finds that factors other than the Article 37 flow schedule are having adverse impacts on salmon, and so changes to Article 37 are unnecessary:

> "The recent findings by both the NMFS and the PFMC indicate conditions in the marine environment are having adverse impacts on Chinook salmon populations along the entire West Coast. The information presented to date does not indicate that the flow requirements of Article 37 are responsible for the decline of Chinook salmon in the Tuolumne River. Therefore, the recommended increases in flow requirements are not warranted and the current flow requirements under Article 37 should continue to be maintained."

Order, p. 23.

As stated in Argument section I, *supra,* the effort to establish a permanent fisheries flow schedule has been ongoing for more than 44 years. Since the Districts issued their Ten-Year Summary Report there have been several rounds of public comments and two public meetings. Given the history of this proceeding, it is a gross understatement to say that the Order's reference to "information presented to date" is vague. Further, the Order does not cite any evidence in support of a finding that the Article 37 flow schedule has not contributed to the decline of salmon in the Tuolumne. Rather, the discussion in the Order shows that the Article 37 flow schedule does not protect salmon in all water year types. *See id.*, p. 22. The existence of other limiting factors does not in and of itself support a finding that flows under Article 37 did not contribute to the decline, or excuse the Commission from mitigating the impacts that are project-related.

Based on our review of the record since the Ten-Year Summary Report was submitted, there is significant evidence in the record which shows that the Article 37 flow schedule has contributed to the decline of salmon.

In its comments on the Ten-Year Summary Report, FWS stated its concern than two of the primary objectives of the 1995 Settlement Agreement had not been met:

> "These are: 1) the fall-run Chinook salmon population ... has not increased in response to the FSA actions..., and 2) the District's monitoring program has been inadequate to determine why the FSA actions have failed to increase the salmon population and thereby prevents the implementation of the prescribed adaptive management strategy..."

FWS, "Comments and Recommendations for Terms and Conditions for the New Don Pedro Hydroelectric Project," e-Library no. 20050725-0071 (July 25, 2005), p. 1. According to FWS, "A comparison of production ... indicate that the population of fall-run Chinook salmon in the lower Tuolumne River has not improved since the FSA was implemented in 1996." *Id.*, Enclosure I, p. 1. The FWS explained that the lack of improvement could not be attributed solely to factors outside of the Districts' control because many of these factors were more beneficial to salmon production between 1995 and 2005:

> "Although the Districts correctly point out that there are many factors that can affect the Tuolumne River salmon populations that are beyond their control, most of these factors were more beneficial to the salmon during the post-FSA period than during the pre-FSA period, and so an increase in salmon production should have been observed if the FSA actions were sufficient to improve habitat conditions.

- The post-FSA period was wetter than the pre-FSA period….

- Spring pulse flows were released in all three San Joaquin River tributaries to improve outmigrating smolt survival beginning in spring 1997.

- Fall pulse flows were released in all three San Joaquin River tributaries to help attract upstream migrating adults beginning in spring 1994.

- Since the FSA began in 1996, State and Federal Delta Water Exports were reduced for 31 days typically between mid-April and mid-May when approximately 50% of the smolts were outmigrating.

- …[D]uring the post-FSA period, a full [Head of Old River Barrier] was installed in 1996 and it was installed with two culverts that allowed a small portion of the flow to enter the Old River in 1997 and with six culverts from 2000 to 2004. Studies with coded-wire tagged hatchery smolts from the Merced River Fish Facility suggest that the barrier may substantially improve smolt survival by reducing entrainment into the Old River and by increasing flow through the deep-water ship channel.

- Most of the pre-FSA period occurred when ocean conditions were unproductive whereas most of the post-FSA period occurred when ocean conditions were relatively productive. Cool productive ocean cycles prevailed from 1947 to 1976 and a new cycle began in 1998, whereas warm unproductive cycles dominated from 1977 to 1997. Therefore, the Tuolumne River population should have been somewhat higher during the post-FSA period compared to the pre-FSA period even if the FSA had not been implemented."

Id., Enclosure I, p. 3.

In its comments on the Ten-Year Summary Report, NMFS also stated concern regarding the lack of improvement in salmon production: "It is clear that the naturally occurring salmon population in the Tuolumne River has not increased as required by the FSA …." NMFS, "Comments and Recommendations Regarding Ten-Year Summary Report, Don Pedro Project," e-Library no. 20050725-5056 (July 25, 2005), p. 3. NMFS identified "troubling trends" regarding salmon escapement on the Tuolumne versus the Stanislaus and Merced Rivers:

> "Escapement on the Stanislaus and Merced Rivers has surpassed the Tuolumne River escapement during [2003 and 2004]. In addition, peak escapement patterns in the Tuolumne River during wet water cycles since 1971 have both decreased in magnitude

and duration. The peak during the wet cycle in 2000 (approximately 17,000) was less than half the peak in 1986 (approximately 40,000), and mean escapement during the most recent wet year cycle (1996-2004) was smaller than the previous wet year water cycle (1981-1989). The Report does not recognize the relative decrease in recent escapements on the Tuolumne River compared with the Stanislaus and Merced Rivers. Both the Stanislaus and Merced River Chinook salmon populations are exposed to the same environmental conditions found in the Sacramento-San Joaquin Delta and Ocean as the Tuolumne River populations."

Id., p. 4. NMFS recommended, "All adaptive management measures of the FSA should be utilized in order to incorporate the most recent flow and non-flow measures currently incorporated in other tributaries in the San Joaquin basin to improve escapement of the Chinook salmon population." *Id.*, p. 5.

In its comments on the Ten-Year Summary Report, DFG stated:

"The Department finds that the Report is significantly flawed due to an improper focus on factors other than those associated with the operations of the Project. Specifically the Report has focused on: 1) ocean salmon harvest rates; 2) Delta pumping (e.g. exports)' 3) effects of fish hatchery rearing programs; 4) effects of out-of-watershed water quality; 5) spawning red super-imposition; 6) intra-gravel flow permeability; and 7) flood control, and a number of other factors which the Department finds, on the basis of several decades of direct observations, to either be of no consequence or to be related but only of peripheral importance as salmon or steelhead limiting factors."

DFG, "Comments Concerning the Ten Year Summary Report," e-Library no. 20050725-5055 (July 25, 2005), p. 3. Further, "…[T]he Report fails to sufficiently evaluate and summarize the effects of project-operation-induced in-stream flows, Project-induced water temperature regimes (i.e., in-tributary water quality), which many years of information have show to be materially related to annual salmon smolt survival and long term adult escapement in the Tuolumne River." *Id.* According to DFG, "*streamflow factors under the control of the Licensees can explain at least 78 percent of the variability in the Tuolumne River salmon population.*" *Id.*, p. 5 (emphasis added); *see also id.*, p. 6 ("it appears that in-river flow, a factor under control of the Licensees, primarily explains the fluctuation of salmon escapement into the Tuolumne River over time."). DFG stated it "strongly believes that the Licensees' project operations have resulted in the cyclic, and at times catastrophic, nature of salmon escapement abundance in the Tuolumne River." *Id.,* p. 14.

According to the agencies' *Draft Limiting Factors Analysis*:

> "Recent trend analyzes [sic] suggest that the Chinook salmon population has not responded to recent management efforts to restore spawning habitats and reduce the abundance of exotic fish predators in the Tuolumne River or to reduced export rates in the Delta between mid-April and mid-May. Other factors, such as ocean productivity and ocean harvest also do not explain the trends in the Tuolumne River population. Instead, the analyses indicate that management should focus on providing instream flows of greater magnitude, duration, and frequency during both the winter and spring to enhance the survival of juvenile salmonids in the Tuolumne River and improve the survival of out-migrating smolts in the Tuolumne River and Delta."

Draft Limiting Factors Analysis, p. 2.

Indeed, trends in Chinook salmon escapement from the Tuolumne River in recent years have been downward, from a high of approximately 17,000 returning adults in 2000 to approximately 211 returning adults in 2007. Ford, Tim and Kirihara, Steve, "2007 Lower Tuolumne River Spawning Report, Spawning Survey Summary Update," (Mar. 2008), at 1 (Ford & Kirihara 2008). There are no signs that the population will recover in the near-term. *See id.* Lindley identifies salmon populations of fewer than 250 fish and that are experiencing precipitous decline to be at High Risk of extinction. *See* Lindley, Steven et al., "Framework for Assessing Viability of Threatened and Endangered Chinook Salmon and Steelhead in the Sacramento-San Joaquin Basin," San Francisco Estuary and Watershed Science, Vol. 5, Issue 1, Art. 4 (Feb. 2007), available at http://repositories.cdlib.org/jmie/sfews/vol5/iss1/art4/ (Lindley 2007). The run size estimate for Tuolumne River Chinook for 2007 is 211 fish. Ford & Kirihara 2008, at 1. Over the past four seasons, the run size has decreased by 60 % (between 2002-2003), 30% (between 2003-2004), 64% (between 2004-2005), 13% (between 2005-2006), and 66% (from 2006-2007). *See* Lindley 2007. The current run size of 211 fish with the declines experienced over recent years clearly show the Tuolumne River Chinook to be at High Risk of extinction. *See id.*

More recently, FWS issued a preliminary analysis which indicates that the Tuolumne River fall-run Chinook salmon population of naturally produced fish "is at a high risk of extinction because the instream flow releases are too low." Mesick 2008, *supra*. The report finds that "the Tuolumne River fall-run Chinook salmon population is at a high risk of extinction because the population of naturally produced fish was probably less than 83 for three consecutive years (2005 to 2007), there was precipitous decline, and the fall 2007 escapement was a catastrophe considering the spring 2005 wet year conditions." *See id.* It identifies the Project's control of instream flow to be a significant limiting factor affecting natural salmon production: "The number of naturally produced adult salmon that return to the Tuolumne River is primarily a response of the juvenile salmon to the flows released at La Grange Dam during the winter and spring …." *Id.* Further,

> "[T]he abundance of natural Tuolumne River recruits at a given flow declined by about 50% at a statistically significant level between the 1980 to 1995 pre-Settlement

> Agreement period and the 1996 to 2004 post-Settlement Agreement period … These results provide additional evidence that the Tuolumne River natural salmon population would be considered to be at a moderate to high risk of extinction according to the criteria recommended by Lindley and others (2007)."

Id., p. 2.

On April 10, 2008, the Pacific Fisheries Management Council[10] (PFMC), adopted a complete closure of commercial and sport Chinook fisheries off California and most of Oregon "in response to the unprecedented collapse of Sacramento River fall Chinook." PFMC, "News Release: Record Low Salmon Fisheries Adopted," (April 10, 2008), available at *http://www.pcouncil.org/newsreleases/PFMC_FINAL_PressRel.pdf*. PFMC stated, "Many biologists believe a combination of human-caused and natural factors will ultimately explain the collapse, including both marine conditions and freshwater factors such as in-stream water withdrawals, habitat alternations, dam operations, construction pollution, and changes in hatchery operations." *Id.*, p. 2. The PFMC has requested a multi-agency task force led by NMFS' West Coast Science Centers to research about 50 potential causative factors and report back to the PFMC in September. *See id.* On May 1, 2008, the Secretary of Commerce adopted the PFMC's recommendations and closed the commercial salmon fishery for all of California. *See* National Oceanic and Atmospheric Association, "'Fishery Failure' Declared for West Coast Salmon Fishery," (May 1, 2008), available at http://www.nwr.noaa.gov/Newsroom/Current/upload/05_01_2008.pdf; *see also* "Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; 2008 Management Measures and a Temporary Rule," 73 Fed. Reg. 23971 (May 1, 2008).

The California Department of Fish and Game has also followed suit. On April 18, 2008, the Fish and Game Commission voted unanimously to prohibit commercial and recreational salmon fishing in state ocean waters, which extend three miles off the coast. The Commission took the unprecedented action because runs of fall-run Sacramento chinook salmon are experiencing a sharp decline. *See* California Department of Fish and Game, "Salmon Fishing Update," (April 18, 2008), available at http://www.dfg.ca.gov/news/salmon-news.html. The Fish and Game Commission will consider the seasons for Central Valley in-river fisheries on May 9, 2008.

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[10] The PFMC "is one of eight regional fishery management councils established by the Magnuson Fishery Conservation and Management Act of 1976 for the purpose of managing fisheries 3-200 miles offshore of the United states of American coastline. The Pacific Council recommends management measures for fisheries off the coasts of California, Oregon, and Washington." PFMC, "News Release: Record Low Salmon Fisheries Adopted," (April 10, 2008), available at *http://www.pcouncil.org/newsreleases/PFMC_FINAL_PressRel.pdf*.

B. The Order Does Not Cite Any Evidence that Existing Flow Schedule Is the Only Feasible Flow Alternative.

As stated above, the Order finds that "the recommended increases in flow requirements are not warranted and the current flow requirements under Article 37 should continue to be maintained." Order, p. 23.

As stated in Argument section II, *supra*, the Order does not indicate that Commission Staff modeled or analyzed the agencies or any other alternatives to the Article 37 flows. It does not include a discussion as to whether the agencies' or any other alternative flow schedule is feasible. It does not explain these omissions.

Flow schedule was the primary variable in the original licensing proceeding and is the primary variable now. The Commission's finding that the Project was best suited to a comprehensive plan of development was predicated on an instream, fisheries flow schedule that has been 44 years in the making. In addition to representing poor administration of the license, the Order's lack of any alternatives analysis with regard to flow violates the Commission's obligation for independent investigation. *See Scenic Hudson,* 354 F.2d at 620.

C. The Order Relies on Disputed Evidence Without Explanation.

The Order cites various evidence in support of its findings. In most cases the evidence cited by the Order is opposed. However, the Order makes no attempt to reconcile competing evidence or explain why it found certain evidence more reliable than competing evidence.

1. Article 37 Flows as a Limiting Factor on Salmon

The Order cites evidence regarding the adverse impact of ocean conditions on Chinook salmon production: "Ocean conditions are monitored by the NMFS and since 2004 it found water temperatures to be too warm for good salmon production." Ten-Year Order, p. 22. Further, "The PFMC reported a decline has also occurred in Oregon, Columbia River, and British Columbia stocks. The PFMC could not identify a cause for the significant declines of both hatchery and wild Chinook salmon stocks, but believes it is related to ocean conditions." *See id.,* p. 23. However, it does not explain why this evidence is more reliable or outweighs other evidence submitted that Article 37 flows contribute to the decline of Chinook salmon.

We herein incorporate by reference the evidence cited in Argument sections II and IV.A, *supra,* that shows the Article 37 flow schedule is the primary, or at least a significant, limiting factor affecting salmon production. In their respective comments on the Ten-Year Summary Report, FWS, NMFS and DFG all identified the flow schedule as a significant

limiting factor. For example, DFG stated that project flows were the primary factor in the decline of salmon escapement, "it appears that in-river flow, a factor under control of the Licensees, primarily explains the fluctuation of salmon escapement into the Tuolumne River over time." DFG's Comments re Ten-Year Report, *supra,* p. 6.

In explaining the closure of the salmon fishery, the PFMC stated, "Many biologists believe a combination of human-caused and natural factors will ultimately explain the collapse, including both marine conditions and freshwater factors such as in-stream water withdrawals, habitat alternations, *dam operations*, construction pollution, and changes in hatchery operations." PFMC, "News Release: Record Low Salmon Fisheries Adopted," (April 10, 2008), p. 2 (emphasis added). This statement directly contradicts the Order's assertion that ocean conditions are the only relevant factor causing the decline of the salmon fishery. It indicates that the Commission did not seek to consult with PFMC or NMFS prior to relying on PFMC's January 29, 2008 press release to discredit evidence gathered over several years and submitted by FWS, DFG and NMFS that Article 37 flows were affecting adversely salmon production. This is inconsistent with the Commission's obligation to articulate why, in the circumstance of competing evidence, it relied on the evidence it did.

In support of its finding that modifications to the Article 37 flows are not warranted, the Order also states, "Information included in the Summary Report indicated that total flow in the river before and after project construction has not changed significantly (756,000 acre-feet between 1955 and 1970, or 40 per cent of the unimpaired runoff of 1,876,000 acre-feet; and 773,000 acre-feet between 1971 and 2005, or 39 per cent of the unimpaired runoff of 1,992,000 acre-feet)." Order, p. 21. This contradicts evidence submitted by NMFS:

> "The hydrology of the Tuolumne watershed is highly impaired. Pre-Project average annual unimpaired watershed yield was 1,497,500 acre-feet (AF) and post-Project hydrograph (1971-1949) was only 318,971) AF, roughly a 78.9% impairment of the unimpaired flow (Bay Institute of San Francisco 1998). This is a large reduction in flow downstream of the project dams."

NMFS, "Additional Comments on the Fisheries Study Plan," e-Library no. 20071001-0057 (Sept. 18, 2007), p. 3. The Order does not try to reconcile this competing evidence, or explain why it found the evidence submitted by the Districts more reliable.

2. Spawning Escapement Estimates

The Order states, "The Summary Report, annual reports, and other available information showed declines in Chinook salmon escapement in the Tuolumne, Stanislaus, and Merced Rivers between 2000 and 2007, thus indicating that factors outside of the rivers were having an impact on the returns." Order, p. 14. The Order does not discuss evidence submitted by NMFS that the escapement estimates from the Tuolumne had declined more

than the estimates for the Stanislaus and Merced Rivers, indicating that inadequate instream flow was limiting escapement on the Tuolumne:

> "Escapement on the Stanislaus and Merced Rivers has surpassed the Tuolumne River escapement during [2003 and 2004]. In addition, peak escapement patterns in the Tuolumne River during wet water cycles since 1971 have both decreased in magnitude and duration. The peak during the wet cycle in 2000 (approximately 17,000) was less than half the peak in 1986 (approximately 40,000), and mean escapement during the most recent wet year cycle (1996-2004) was smaller than the previous wet year water cycle (1981-1989). The Report does not recognize the relative decrease in recent escapements on the Tuolumne River compared with the Stanislaus and Merced Rivers. Both the Stanislaus and Merced River Chinook salmon populations are exposed to the same environmental conditions found in the Sacramento-San Joaquin Delta and Ocean as the Tuolumne River populations."

NMFS's Comments re Ten-Year Summary Report, p. 4.

3. Article 37 Flows as a Limiting Factor on *O. mykiss*

The Order states, "No *O. mykiss* anadromy has been identified in the Tuolumne River; however, reproductive contribution of non-anadromous parents to anadromous offspring can occur when the anadromous run size is small, suggesting a genetic compensation between the anadromous and non-anadromous life-history forms." Order, p. 26 (citation omitted). It acknowledges the presence of resident *O. mykiss* in the project area*:* "The origin and nature of rainbow trout downstream of La Grange Dam is unclear, and it is unclear if steelhead occur in the Tuolumne River downstream of La Grange Dam." *Id.* Nevertheless, it declines to provide additional flow for resident or anadromous *O. mykiss* on the basis of inadequate evidence of anadromous *O. mykiss*: "At this time, we find no basis for requiring additional instream flow studies. *O. mykiss* monitoring should first be completed in order to determine if steelhead are present in the Tuolumne River." *Id.*, p. 27.

The Order states, "There are opposing views regarding the presence or absence of steelhead in the Tuolumne River, and whether anadromy exists in the resident population of *O.* mykiss downstream of La Grange Dam." Order, p. 24. It cites to NMFS' letter dated April 23, 2004, which "included fish counts from Dennett Dam at RM 17 on the Tuolumne River in 1940. A total of 66 adult steelhead were counted at the Dennett Dam weir between October 1 and November 30, 1940." Order, p. 25. It also states,

> "According to the NMFS's Status Review of West Coast Steelhead, there are reports of a remnant steelhead run in the Stanislaus River, and steelhead were observed in the Tuolumne River in 1983. NMFS also reports the natural population of California

> Central Valley steelhead is unlikely to be self-sustaining, given the loss of habitat and reductions in streamflow due to water allocations."

Id. The Order goes on to discount this evidence of steelhead on the basis of NMFS's statement at the July 25, 2006 meeting that it had not documented *recent* presence of anadromous O. mykiss in the Tuolumne River. The Order acknowledges that this is likely due to project facilities and operations: "...the loss of habitat due to dam construction, and the reduction of summer flows between 1972 (completion of the Don Pedro Project) and 1996 (when the flows required by Article 37 were increased) may explain the lack of data regarding the presence of steelhead in the Tuolumne River." *Id.*, p. 25.

The Order does not cite other evidence in the record that steelhead are present and are adversely impacted by the Project. It does not explain why this evidence is not reliable. For example, the Order cites the 1940 data reported in NMFS's April 2004 letter, but ignores the more recent data NMFS provided in its November 20002 request for consultation:

> "From 1995 to 2001, data from a four month rotary screwtrap surveys reported a total of three rainbow trout/steelhead in the between RM42 and RM 3.6 (Enclosure B). June and September model surveys from 1996 -2001 seining surveys recorded forth-five rainbow trout (26-77 mm fork length) caught in the upper reaches of the Tuolumne River (FERC draft 2001). In 2001, a genetics study project sampled two times at eight different sites along a 12-mile river stretch in the upper reaches using an electrofisher and caught 54 juveniles (Enclosure C). During a five-mile (RM 46.5 to RM 50.2) carcass survey in November and December 2000, 18 adult steelhead were recorded (Enclosure D)...."

Letter from Rodney R. McInnis, NMFS, to FERC, e-Library no. 20030220-0293 (Nov. 19, 2002), p. 3 (attached to NMFS's Comments re Ten-Year Summary Report, *supra*). The November 2002 letter described factors impacting CV steelhead:

> "Primary stressors affecting CV steelhead in the Tuolumne River are mostly related to water development, water management, and lack of habitat (TRTAC 2000). Because juvenile steelhead must rear in fresh water for one year or longer, water temperatures must remain suitable year-round. For the most part, this occurred naturally only in the mid to high elevation reaches and tributaries, which necessitated the adult steelhead migrate higher into the drainage to spawn than most races of Chinook salmon. Because 82% to 95% of their historical spawning and rearing habitat has been lost (Yoshiyama et al. 199; CACSST 1988), mostly due to dam construction, juvenile steelhead rearing is generally restricted to lower elevation reaches where high water temperature during late-summer and fall limits their survival....

> Central Valley anadromous fish management and research has been primarily focused on Chinook salmon and this has lead to inadequate efforts to monitor and restore steelhead. Restoration actions identified in many anadromous fish restoration plans are largely directed at Chinook salmon recovery with little emphasis on specific actions needed to recover steelhead ….Activities to protect steelhead in the Tuolumne River need to address the substantial loss of spawning and rearing habitat due to blockages by dams, such as, providing suitable water temperatures year-round in reaches comprising steelhead rearing habitat.
>
> In the Tuolumne River, minimum releases from [NDPP], as stipulated pursuant to License Article 37, allows summer water temperatures in steelhead habitat to rise above lethal thresholds. This impacts rearing juvenile steelhead, given than temperatures are above the preferred upper limit for steelhead rearing …. In fact, reports from private individuals and complaints from recreational fishing groups describe fish kills resulting from previous project related flow reductions."

Id., p. 4.

The Order does not address NMFS's request for an interim flow schedule for purposes of study and for protection of *O. mykiss* from project impacts related to river temperature:

> "NOAA Fisheries specifically recommends that summer flow releases from La Grange Dam for 2004 be sufficient to assure water temperatures from La Grange dam to Robert's Ferry Bridge RM 40 do not exceed 65 F, and should at no time be less than 150 [cfs]. … In addition to facilitating data collection, interim flows may prevent harm stemming from elevated water temperatures to o. mykiss present in the area."

Letter from Rodney R. McInnis, NMFS, to FERC (April 23, 2004), p. 4 (attached to NMFS' Comments and Recommendations, e-Library 20060724-5041 (July 24, 2006)).

The Order does not address our comments on the Ten-Year Summary Report, in which we stated:

> There is evidence that the steelhead fishery in the Tuolumne River is self-sustaining and may not be adequately protected by the Article 37 MFS. Significant factors which limit the amount of suitable habitat for CV steelhead on the Tuolumne are elevated water temperatures coupled with low dissolved oxygen content during late spring through early fall (May-October). Data demonstrates that flow releases from NDPP are inversely related to water temperatures in the river. *See* Conservation Groups' Brief, pp. 11-12. According to NMFS,

> "In the Tuolumne River, minimum releases from the New Don Pedro Project, as stipulated pursuant to License Article 37, allows summer water temperatures in steelhead habitat to rise above lethal thresholds. This impacts rearing juvenile steelhead, given that temperatures are above the preferred upper limit for steelhead rearing (Reiser and Bjornn 1979; Barnhart 1982; Rich 1997). In fact, reports from private individuals and complaints from recreational fishing groups describe fish kills resulting from previous project related flow reductions."

Letter from Rodney R. McInnis to Magalie R. Salas (Nov. 19, 2002), pp. 4-5; *see also* NMFS's 2003 Petition, p. 8.

> It appears water temperatures at or below 65º F provide suitable habitat for adult or juvenile steelhead in the lower Tuolumne River. *See* Conservation Groups' Brief, Attachment 7, p. 2. When water temperatures are below that threshold, adult steelhead have been documented throughout an 11-mile reach between Old La Grange Bridge (River Mile (RM) 50.5) and 7-Eleven Aggregate Company (RM 38). *See id.*, Attachment 7, p. 3. However, water temperatures have exceeded that threshold during summer months of recent years. he combined effect of stress from high water temperatures and other limiting factors, such as low dissolved oxygen concentrations, may have caused reported fish kills in June 2001. *See id.*, pp. 11-12.
>
> In July 2004, CRRF staff collected, pursuant to a collection permit NMFS issued to DFG, a dead *O. mykiss* in the lower reaches of the steelhead reach near the Roberts Ferry Bridge. The water temperature taken at the site was 78º Fahrenheit. While it is not certain that increased temperature or low dissolved oxygen content killed the fish, we are concerned that an *O. mykiss* was found dead in an area within the steelhead reach and that river conditions were unsuitable for salmonids in that area.

Conservation Groups' Comments re Ten-Year Summary Report, *supra*, pp. 19-20.

As discussed in Argument section V, *infra*, the Order does not mention or consider new evidence in the form of a March 2008 report completed by DFG and U.S. Geological Survey[11] which establishes the presence of steelhead in the Tuolumne River.

Apparently, the Commission does not consider historical presence or presence of a few steelhead to be adequate to warrant protective measures. However, it does not articulate the threshold that must be met. It provides no legal basis for its rejection of NMFS's opinion

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[11] Zimmerman, Christian; Edwards, George; and Kathleen Perry, March 2008. *Maternal origin and migratory history of Onchorynchus mykiss captured in rivers of the Central Valley, California.* U.S. Geological Survey and California Department of Fish and Game.

that it has been met, as stated in NMFS's letters and Petition seeking formal consultation under ESA section 7(a)(2).

Regardless of the presence of steelhead, the Order does not provide any legal basis for its finding that *O. mykiss* do not warrant protection. Under FPA section 10(a)(1), the license must "be best adapted to a comprehensive plan for improving or developing a waterway … for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, *for the adequate protection, mitigation, and enhancement of fish* and wildlife (including related spawning grounds and habitat), and for other beneficial public uses." 16 U.S.C. § 803(a)(1 (emphasis added). The term "fish" as used in FPA section 10(a)(1)is not qualified on listing under the federal ESA or any other basis. Similarly, the 1964 License did not include any such limitation. While the focus was on Chinook salmon, the Article 37 flow schedule was for "fish purposes." 1964 License, 31 F.P.C. at 515.

4. Disagreements re Study Design

The Order states, "No party sought to raise any disagreements concerning the study elements or their design during the 10-year study period." Order, p. 13. This statement, which we infer is based on the Districts' Ten-Year Summary Report, ignores the comments by Conservation Groups and other TAC members regarding disputes raised in the TAC, which were not reported by the Districts or resolved. *See, e.g.,* FWS's Comments re Ten-Year Summary Report, p. 7 ("The FSA requires an assessment of *Juvenile Distribution and Temperature relationship* (FSA Section 13e). As with the fry distribution studies, the TAC never approved the validity of using beach seine surveys to define the density and distribution of juveniles.")

In our comments on the Ten-Year Summary Report, Conservation Groups' stated that the lack of documented disputes was in large part due to the dysfunction of the TAC:

> "To date the TRTAC essentially has been run by the Districts, and as a result has not consistently provided a fair and objective form for discussion and decision. We find fault with the arrangement whereby the Districts, who plainly have a stake in the outcome of any TAC decision, direct the meetings. The lack of an objective, independent facilitator is compounded by the fact that there are no formal process or communication protocols for the TAC meetings. There are no procedures for taking or approving meeting minutes, developing or approving the agenda, resolving disputes, confidentiality, participants' conduct, etc."

Conservation Groups' Comments re Ten-Year Summary Report, e-Library no. 20050725-5060 (July 25, 2005), p. 14; *see also* Conservation Group's Comments re Commission Staff's Preliminary Analysis," e-Library no. 20070716-5028 (July 16, 2007) ("[W]e wish to express

our objection to Staff's preliminary recommendation that the [TAC] is the venue to resolve many of the outstanding study issues.").

However, the Order references such comments only to dismiss them:

> "Most comments have expressed the need for some change to the organization of the committee to ensure decisions are properly made and that information is timely disseminated. However, the Commission has no TRTAC oversight, and therefore cannot ensure that the TRTAC's processes and decisions are the best possible for ensuring compliance with the environmental requirements of the Don Pedro license."

Order, p. 29. The Order does not state that Commission made any attempt to discuss with the Districts the adoption of procedural protocols for the TAC. If the Commission were unwilling to order such changes, the Order does not state why it declined to recommend such changes in its capacity as a signatory to the 1995 Agreement.

5. The Order Contradicts Previous Commission Issuances Without Explanation.

The Order references the Commission's December 20, 2006 letter to the Districts directing them to prepare a fisheries study plan to address data needs identified during the review process. *See* Ten-Year Order, p. 11. However, the Order does not provide any explanation for issues on which Commission Staff have changed its positions since the December letter was issued. This omission violates the Commission's obligation to articulate the evidence, logic, and policies which underlie its final decision.

a. Instream Flows

The December 2006 letter directed the Districts to collect additional data to "better define the flow to survival relationship; in particular, data points are needed for higher flow years (i.e., greater than 4,000 cfs). ..." Letter from FERC to Districts (Dec. 20, 2006), p. 3. However, the Order does not recommend any changes to the Article 37 flows, even for purposes of study. It does not provide any reason for this significant change in position. It is not clear whether Commission Staff no longer consider this additional data necessary, or whether it intends for the District to collect such data by other means.

b. Habitat Restoration

The December 2006 letter directed the Districts to complete the remaining habitat projects and assess their effectiveness. *See id.* However, we understand the Order to require no further action by the Districts with regard to habitat restoration projects:

> "The Commission, in ordering paragraph (G) of the 1996 order, only required the Districts to file in their annual report with the Commission a description of the non-flow mitigative measures implemented in the previous year and planned for implementation in the coming year. The Commission also required that the final study report identify all non-flow mitigative measures implemented to date, and the results of all monitoring studies related to the non-flow mitigative measures. The Districts met all of these Commission filing requirements. The Districts should continue to cooperate with the resource agencies and other parties on the completion of the habitat restoration projects in the Tuolumne River."

Order, p. 19. The Order provides no explanation for why it reversed its finding that completion of the ten habitat restoration projects and effectiveness monitoring was needed, to a finding that the Districts had met their obligations under the 1996 Order. Such explanation is necessary given the comments in the record that the Districts have not met their obligation to implement non-flow mitigative measures. *See, e.g.,* Conservation Groups' Comments re Ten-Year Summary Report, pp. 16-17 ("…[W]e are concerned that habitat restoration projects completed to date have not shown the anticipated benefits …[¶] … We recommend that restoration work continue as an integral component in the overall rehabilitation of fishery resources and that a total of ten restoration projects be completed before relicensing."

c. Fry Survival

The December 2006 letter directed the Districts to provide a "statistically valid estimate of fry production per female spawner and of fry distribution." Letter from FERC to Districts (Dec. 20, 2006), p. 3. The Order does not expressly reject its previous direction. However, the discussion appears to find that the existing fry data is adequate. *See* Order, pp. 15-16. Again, no explanation is provided for the inconsistency between the direction in the December 2006 letter and the discussion in the Order.

d. River Temperature

The December 2006 letter directed the Districts to assess the Project's impacts on river temperatures, and the effect of river temperatures on fisheries resources. *See id.* The Order appears to accept temperature data previously provided by the Districts and determine that no further assessment is needed: "[The Districts] concluded that because daily water temperature between March 1 and May 31 rarely exceeded 13 °C, and because few juvenile salmon remained in the river is not well-correlated with water temperature." Order, p. 16. The Order does not explain why Staff reversed their previous finding that further information regarding the nexus between the Project and river temperatures and the impacts of river temperature on fisheries is needed. Further, the limited discussion of river temperature impacts focuses exclusively on salmon. It does not address the considerable evidence, *see*

section IV.C., *supra*, in the record that the Project causes increases in river temperatures which adversely impact over-summering *O. mykiss*.

V. The Order Does Not Comply with FERC's Obligation to Consult with NMFS to Insure its Actions Will Not Jeopardize the Continued Existence of Threatened Steelhead or their Critical Habitat.

The Order states that NMFS's 2003 Petition seeking formal consultation for Central Valley steelhead "is currently pending before the Commission and will be addressed in a subsequent order." Order, p. 7. It provides no forecast for when it will consider the pending petition.

The Order's refusal to address NMFS's Petition directly is disingenuous. The Commission's decision regarding flows for one species is inextricably linked to flows for the other species:

> "Under Article 58, the Districts, in consultation with the CDFG and the FWS, are implementing a program to monitor Chinook salmon populations and habitat in the Tuolumne River. Article 58 requires that study results will be published in annual reports. The final study results will be filed by April 1, 2005. Based on these study results, the Commission will determine whether to require further monitoring studies and changes in project structures and operations to protect fishery resources in the Tuolumne River, after notice and opportunity for hearing. Because any modification in the Article 37 MFS or other project operations to prevent harm to the steelhead fishery may affect the Chinook salmon fishery, formal consultation as requested in the NOAA Petition should be undertaken in conjunction with the preparation of the Article 58 report."

Conservation Groups' Brief in Support of NMFS' Petition, p. 17 (internal citations omitted). Here, the Commission appears to have issued a de facto ruling on NMFS's Petition by refusing to increase flows for salmon or steelhead, or to implement any other mitigative measures for the protection of steelhead or its designated critical habitat.

The Order cites the lack of evidence regarding the presence of steelhead in the Tuolumne in support of its findings that changes to the Article 37 flow schedule are not warranted, but further monitoring is: "At this time, we find no basis for requiring additional instream flow studies. *O. mykiss* monitoring should first be completed in order to determine if steelhead are present in the Tuolumne River." Order, p. 27. This finding is based on the lack of what the Commission considers to be conclusive evidence of the presence of steelhead:

> "It is apparent that monitoring efforts, to date, have been inconclusive in determining the presence or absence of steelhead populations in the Tuolumne River. The origin and nature of rainbow trout downstream of La Grange Dam is unclear, and it is unclear if steelhead occur in the Tuolumne River downstream of La Grange Dam."

See id., p. 26. As described below, this finding is not based on the best scientific evidence available as required by ESA section 7(a)(2). *See also* 50 C.F.R. § 402.14(d) ("The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat.").

The Order does not mention or consider a March 2008 report completed by DFG and U.S. Geological Survey[12] which analyzed otolith strontium-to-calcium (Sr:Ca) ratios to determine maternal origin (anadromous v. non-anadromous) and migratory history (anadromous v. non-anadromous) of rainbow trout (*Oncorhynchus mykiss*) collected in tributaries of the Sacramento-San Joaquin River system in the Central Valley of California between 2001 and 2007. The study analyzed 964 otoliths from *O. mykiss* caught in streams throughout the Central Valley, including 148 otoliths from *O. mykiss* taken from the Tuolumne River. The authors determined that 10 of the Tuolumne fish were determined to be the progeny of anadromous rainbow trout (i.e., steelhead) females and one of the 10 was determined to be an adult steelhead. While this study does not establish abundance of steelhead, it does establish their presence in the Tuolumne River within waters affected by the Project.[13]

Further, the Order does not provide any factual or legal findings in support of its lack of consideration of recommendations for steelhead and its designated critical habitat based on evidence and best professional judgment of NMFS, FWS, and DFG. We herein incorporate by reference the evidence cited in Argument section IV.C.3, *supra*.

Section 7(a)(2) provides: "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action[14] authorized, funded, or carried out by

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[12] Zimmerman, Christian; Edwards, George; and Kathleen Perry, March 2008. *Maternal origin and migratory history of Onchorynchus mykiss captured in rivers of the Central Valley, California.* U.S. Geological Survey and California Department of Fish and Game. This is significant, new information the Commission should consider in this request for rehearing. *See* 18 C.F.R. § 713(c)(3); *Dominion Cove Pont LNG, LP, Dominion Transmission, Inc.*, 118 FERC ¶ 61,007 (2007); *California Independent System Operator Corporation*, 120 FERC ¶ 61,271 (2007).

[13] Adults with mature gonads were not sacrificed for otoliths and so neither the absolute abundance of anadromous *O. mykiss* nor the relative abundance of anadromous vs. resident trout can be determined from this study.

[14] NMFS' regulations broadly define a federal action to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02.

such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical ...." 16 U.S.C. § 1536(a)(2). "Substantial compliance" with the consultation procedure is essential to effect the statutory purpose of conservation. *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987); *see also Pacific Rivers v. Thomas*, 30 F.3d 1050, 1056-57 (9th Cir. 1994); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

> "Congress has assigned to the agencies and to the Fish & Wildlife Service the responsibility for evaluation of the impact of agency actions on endangered species, and has prescribed procedures for such evaluation. Only by following the procedures can proper evaluations be made. It is not responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed."

Thomas, 753 F.2d at 765.

The threshold for formal consultation is set lower than NEPA threshold of significance -- "sufficiently low to allow Federal agencies to satisfy their duty to 'insure' under section 7(a)(2)." FWS, "Interagency Cooperation--Endangered Species Act of 1973, as Amended; Final Rule," 51 Fed. Reg. ¶ 19,926 (June 3, 1986) (emphasis added). Thus, "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character," triggers formal consultation. *Id.* Formal consultation is required if evidence exists that a listed species "may be present in the area of the proposed action." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1215 (9th Cir. 2004) (emphasis added); *Pacific Rivers*, 30 F.3d at 1054. Further, the fact that the project area is within the designated critical habitat for CV steelhead provides an independent basis for formal consultation, regardless of actual presence.

The circumstances of the instant proceeding satisfy the threshold for formal consultation. This proceeding, a reopener of the license "to determine whether to require further monitoring studies and changes in project structures and operations to protect fishery resources in the Tuolumne River, after notice and opportunity for hearing,"(1996 Order, p. 15), constitutes a "federal action" under the ESA. The 1964 License *required* that the license be reopened and a determination made regarding flow schedule for fish purposes after 20 years of study. The 1996 Order carried over this requirement. The agency action of granting a license is not complete. *See* 50 C.F.R. § 402.03 ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."). Indeed, given that FERC exercises "discretionary Federal involvement or control" over the MFS, which has the "ability to inure to the benefit of protected species," it must comply with Section 7. *See Turtle Island Restoration Network v. National Marine*

Fisheries Service, 340 F.3d 969, 974 (9th Cir. 2003); *cf. California Sportfishing Protection Alliance v. FERC*, 472 F.3d 593, 598 (9th Cir. 2006). Thus, this proceeding goes beyond the Commission's normal, continuing administration of the valid, existing license. It is a new look at how the Project should be operated so as to be best adapted to a comprehensive plan of development, and specifically to protect fish resources.

A federal agency must reinitiate consultation "if a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16(d). Here, the 1995-6 consultation that preceded the 1996 Order also preceded the 1998 listing of steelhead fishery in the lower Tuolumne and the 2005 designation of critical habitat. Evidence subsequent to that consultation demonstrates that the listed fish are present in the Tuolumne below La Grange Dam, and that the Article 37 MFS and other aspects of project operations may adversely affect such fish and its habitat.

We submit that there is conclusive evidence in the record before FERC for a finding that steelhead are present in the Tuolumne. Now, ESA section 7(a)(2) requires formal consultation to determine the likelihood of impacts and evaluate reasonable and prudent alternatives.

> "No formal consultation is required if the action agency finds, with the Services written concurrence, that the proposed action 'may affect, but is not likely to adversely affect' listed species or critical habitat....This finding can be made only if ALL of the reasonably expected effects of the proposed action will be beneficial, insignificant, or discountable."

FWS, *ESA Section 7 Consultation Handbook* (1998), p. 4-1 (emphasis in original).

Further, the Commission and the Districts alike have a duty under ESA section 9 to avoid taking steelhead as a result of project operations. *See* 16 U.S.C. § 1538(a)(1); "Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs)," 65 Fed. Reg. 42422, 42475 (July 10, 2000). Under the ESA, "take" is defined broadly to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct." 16 U.S.C. § 1532(19). The Commission must review its actions at the earliest possible time to determine whether any action it takes "may affect" listed species or their critical habitat.[15] 50 C.F.R. § 402.14(a).

Given NMFS's repeated requests for formal consultation, the monitoring results and comments filed in the record over the last five years, and the 2008 Study by DFG and

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[15] The Ninth Circuit has held that the Secretary's request for consultation is an interpretation of its own regulations entitling it to substantial deference. *Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987).

USGS, the Commission should delay no further a proceeding for formal consultation to address the impacts of project operations on the steelhead fishery.

VI. The Order Does Not Comply with FERC's Obligation to Carryout Programs for the Conservation of Threatened Steelhead.

Further, the Order does not comply with the Commission's duty under ESA section 7(a)(1), which requires that this federal action "actively" contribute to the conservation of members of listed species that are in the project vicinity. *See* 16 U.S.C.§ 1536(a)(1); *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984). *Conserve* means: "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

MOTION TO INTERVENE

Pursuant to the Commission's Rule 214, 18 C.F.R. § 385.214, CSPA, GWWF, and TU move for late intervention in this proceeding. Rule 214(d)(1) lists five factors that the judge may consider when deciding whether to grant a motion to intervene:

> (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:
>
> > (i) The movant had good cause for failing to file the motion within the time prescribed;
> >
> > (ii) Any disruption of the proceeding might result from permitting intervention;
> >
> > (iii) The movant's interest is not adequately represented by other parties in the proceeding;
> >
> > (iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and
> >
> > (v) The motion conforms to the requirements of paragraph (b) of this section.

18 C.F.R. § 385.214(d)(1).[16] In addition, according to Rule 214(b)(3), a late motion for intervention must also "show good cause why the time limitation should be waived." 18 C.F.R. § 385.214(b)(3).

[16] Paragraph (b) of section 385.214 states:

Filing a motion to intervene in this matter three years after the deadline and after a final order has been issued is not something the above organizations do lightly. For the reasons described below, each of the above factors weighs in favor of granting the motion of the proposed intervenors. Further, the change in circumstances, namely the collapse of the salmon population, constitutes good cause that is more than sufficient for the Commission to waive the time limitation. CSPA and GWWF therefore respectfully request that the Commission grant their motion to intervene.

I. California Sportfishing Protection Alliance

As described above, CSPA is a non-profit, public benefit fishery conservation organization incorporated in 1983 to protect, restore and enhance the state's fishery resources and their aquatic ecosystems. CSPA works to ensure these renewable public fishery resources are conserved to enable public sportfishing activity. As an alliance, we represent several thousand members that reside in California. Since our inception, CSPA has been actively involved in the conservation of the San Francisco Bay - Delta estuary's fishery resources and those of the Central Valley with local, state and federal government. We have been particularly concerned about the prolonged and extensive decline of the estuary's anadromous fish species, including steelhead, winter-run Chinook salmon, and spring-run Salmon, all listed under the federal Endangered Species Act, that result from development activities conducted in waters utilized by these species of fish. CSPA has worked with many

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(1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:

(A) Consumer,
(B) Customer,
(C) Competitor, or
(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

18 C.F.R. § 385.214(b).

government agencies to take action to stop the fishery declines and restore these populations to self-sustaining levels, as the decline of these species has negative impacts on recreational fishing opportunity while significantly reducing sportfishing effort and impacting the state's sportfishing industry which supplies goods and services to more than 2 million anglers. CSPA is signatory to the 1995 Settlement Agreement. It also joined CRRF, the Trust and CalTrout in filing the Conservation Groups' Brief.

CSPA seeks to intervene in this matter to support the joint request for rehearing and obtain the relief requested, *see* Requested Relief, *infra*. Given its mission to protect, restore and enhance California's fishery resources and their aquatic ecosystems, CSPA has a clear interest this proceeding, which will be directly affected by its outcome. Further, CSPA's participation in this matter would be in the public interest because it will bring a unique viewpoint on an important natural resource before the Commission. Indeed, CSPA has a long-standing history of involvement on the Tuolumne, it has members who know the river extensively, and it has successfully represented the interests of the angling public in multiple venues over the last twenty-five years.

The Rule 214(d) factors all weigh in favor of granting the motion to intervene with respect to CSPA. To begin with, good cause exists for not filing for intervention within the time prescribed. *See* 18 C.F.R. § 385.214(d)(1)(i). At the time that interventions were called for in June 2005, CSPA had three paid staff. Its hydro consultant was not full time, and he was involved in an extremely contentious license implementation in Northern California. The organization did not have the manpower or financial resources to formally engage in a proceeding that dealt largely with studies. Salmon escapement on the Tuolumne in 2004 had trended downward, but did not appear to CSPA to require emergency action.

In the three years since the deadline for motions to intervene, circumstances have not only changed, they have changed catastrophically. The central question now is not one of studies but of potential extirpation. Though still limited in manpower and resources, CSPA is less limited that it was three years ago, and the dramatic change in circumstances leads it to believe that the Tuolumne River is in immediate need of those resources.

While CSPA is represented by the same firm as CRRF, TRPT, and CalTrout, and it shares the same goals, it cannot rely on them to represent the interests of all of its members. *See* 18 U.S.C. § 385.214(d)(1)(iii). CSPA has a broader angler constituency than the other conservation group intervenors, two of which represent local groups, one of which is a river conservation organization, and the last of which represents largely trout anglers, who are predominantly fly fishers. CSPA represents all anglers statewide, and has stepped forward to make a stand on the Tuolumne.

Finally, granting the motion to intervene as to CSPA is unlikely to disrupt this proceeding or prejudice any of the existing parties because CSPA seeks the same relief as

CRRF, TRPT and CalTrout, all have which have undisputed standing to bring the above rehearing request. *See* 18 U.S.C. § 385.214(d)(1)(ii), (iv).

II. Golden West Women Flyfishers

GWWF is a twenty-five year old angling club with approximately 150 members throughout Northern and Central California. GWWF has been very active in conservation projects over the past several years and is affiliated with the Conservation Network of the Northern California Council, Federation of Fly Fishers. Past fisheries conservation projects have included the GWWF as an Intervenor on a proposed hydropower project on Modoc County which would have put Redband Trout, a Species of Concern, at risk. GWWF is actively involved in the steelhead restoration of Alameda Creek, working with agencies and other organizations on a fish passage barrier removal project. It has been involved in a steelhead trout restoration project on the lower Merced, working with the California Department of Fish and Game and the Merced Fly Fishing Club. GWWF is often called to participate in meetings with legislators about fisheries issues in California and regularly works with fish conservation organizations, including CalTrout, Trout Unlimited and Save Our Wild Salmon.

GWWF seeks to intervene in this matter to support the joint request for rehearing and obtain the relief requested, *see* Requested Relief, *infra*. Given its focus on conserving of California's fishery resources for the enjoyment of its members, GWWF has a clear interest this proceeding, which will be directly affected by its outcome. Further, GWWF's participation in this matter would be in the public interest because it will bring a unique viewpoint on an important natural resource before the Commission. Indeed, GWWF's Conservation Chairperson has personally fished the lower Tuolumne River several times during the months of January, March and October over the past three years and therefore has been a witness to varied flow and fishery conditions. GWWF has seen the habitat under high and lower water years and seen that in higher water years, there is a significant difference in the quality of fishing.

As with CSPA, the Rule 214(d) factors all weigh in favor of granting the motion to intervene with respect to GWWF. The sudden and unanticipated collapse of the Pacific salmon fishery constitutes good cause exists for not filing for intervention within the time prescribed. *See* 18 C.F.R. § 385.214(d)(1)(i). Further, while GWWF is represented by the same firm as CRRF, TRPT, and CalTrout, and it shares the same goals, it cannot rely on them to represent the interests of all of its members. *See* 18 U.S.C. § 385.214(d)(1)(iii). GWWF represents recreational anglers who are extremely concerned with the threatened CV steelhead population as well as the diminished Fall Run Chinook Salmon numbers despite years of monitoring and ineffective restoration efforts.

Finally, granting the motion to intervene as to GWWF is unlikely to disrupt this proceeding or prejudice any of the existing parties because CSPA seeks the same relief as CRRF, TRPT and CalTrout, all have which have undisputed standing to bring the above rehearing request. *See* 18 U.S.C. § 385.214(d)(1)(ii), (iv).

REQUESTED RELIEF

We respectfully request the following relief.

1. The Commission should amend the license to adopt the flow schedule proposed by the FWS in April 2008 (Mesick 2008), and supported by NMFS and DFG, (Argument section II, *supra*), for the interim period until the further steps below are completed. The FWS based this proposal on substantial, and best scientifically available, evidence of sufficiency of protection of the Chinook salmon and steelhead fisheries. By contrast, Staff acknowledge that the record does not show the sufficiency of protection provided by the Article 37 flow schedule. In other words, substantial evidence does not exist that the Article 37 flow schedule is best adapted to a comprehensive plan of development of the Tuolumne for protection of fisheries in concert with power generation, water supply, and other beneficial uses.

2. Staff should undertake formal consultation under ESA section 7(a)(2) as to Project impacts on the steelhead fishery and its designated critical habitat. The Order is a discretionary federal action required by the 1964 license and subsequent orders to determine the sufficiency of protection of the downstream fisheries. There is undisputed evidence in the record that individual fish of Central Valley steelhead fishery have been caught in the lower Tuolumne. NMFS has designated the lower Tuolumne as critical habitat for this fishery. The threshold for formal consultation is the possibility that the federal action may cause any effect (whether positive or negative) on the listed species or its critical habitat.

3. Staff should prepare an Environmental Impact Statement or Assessment to analyze Article 37, the agencies' Feb, 2007 flow schedule, and reasonable alternatives, before deciding what schedule to establish for the remaining term of the license.

4. Staff should conduct an evidentiary hearing on disputed issues of fact appropriate for resolution by an Administrative Law Judge. Forty-four years into this license, Staff conclude that the record does not show the sufficiency of the Article 37 flow schedule for protection of the anadromous and other fisheries. Staff may not continue to reply on notice-and-comment procedures which have failed to develop the record necessary for the long-awaited decision which flow schedule will

provide sufficient protection. Specifically, the hearing procedure provided by 18 CFR Part 500 is designed to resolve conflicts and ambiguities in scientific evidence that cannot be resolved simply on the basis of review of the notice-and-comment record. Further, such a hearing procedure may include settlement discussions pursuant to Part 601.

CONCLUSION

We request that the Commission vacate the Order and provide the relief requested.

Respectfully submitted,

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ALLIANCE, and GOLDEN WEST
WOMEN FLYFISHERS

CERTIFICATION OF SERVICE

Modesto and Turlock Irrigation Districts, New Don Pedro Project (P-2299-060)

I hereby certify that I have this day served the foregoing document, "Conservation Groups' Request For Rehearing Of Order On Ten-Year Summary Report Under Article 58 And Motion For Late Intervention," upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: May 5, 2008

By:

_____

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