

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

Turlock and Modesto Irrigation Districts, New Don Pedro Project))))	P-2299
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**MOTION BY CALIFORNIA RIVERS RESTORATION FUND, TUOLUMNE RIVER
PRESERVATION TRUST, CALIFORNIA TROUT, INC., AND FRIENDS OF THE
RIVER TO ESTABLISH PROCEDURES AND SCHEDULE FOR HEARING**

Pursuant to 18 C.F.R. § 385.212, California Rivers Restoration Fund, Tuolumne River Preservation Trust, California Trout, Inc., and Friends of the River (Conservation Groups) hereby request that the Commission establish further procedures and schedule for a hearing on Turlock and Modesto Irrigation Districts’ (Districts) “2005 Ten Year Summary Report,” which was filed April 1, 2005 pursuant to Article 58 and Paragraph G of the Commission’s “Order Amending License and Dismissing Rehearing Requests” (July 31, 1996).

The Conservation Groups acknowledge and are grateful for the considerable efforts by the Districts to implement the 1995 Agreement and amended license articles 37 and 58. We are generally pleased with both the form and substance of the Ten Year Report and appreciate the significant work that went into its preparation.

INTRODUCTION

1. In 1964 the Commission granted the Districts a major license for a term of 50-years under Section 4(e) of the Federal Power Act (FPA) to construct, operate, and maintain the project on the Tuolumne River. 31 FPC 510 (1964). Article 37 established a minimum flow schedule (MFS) “for fish purposes” for the first 20 years of project operation. 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.”

2. In 1995 the Districts and other parties entered into the “New Don Pedro Proceeding P-2299-024 Settlement Agreement” (1995 Agreement). The 1995 Agreement proposed a “strategy for recovery of Tuolumne River Chinook salmon” below La Grange Dam. *Id.*, ¶8. On February 5, 1996, the Districts filed a conforming application to amend the project license to establish a new MFS based on the results of the Article 39 study. The Commission determined that the new MFS would benefit the Chinook salmon fishery. 76 FERC ¶ 61,117 (1996), 1996 FERC LEXIS 1617, **21. It approved the license amendment, and the MFS in Article 37 and monitoring requirements in Article 58 were revised accordingly.

3. Article 58 required the Districts, after consultation with the Department of Fish and Game (DFG) and U.S. Fish and Wildlife Service (FWS), to implement a program to monitor Chinook salmon populations and habitat in the Tuolumne River. Pursuant to Article 58 the Districts were required to file annual monitoring reports by April 1 of each year which included monitoring data and a description of the non-flow mitigative measures implemented in the previous year and planned for implementation in the coming year. In Paragraph G of the Order Amending License the Commission further provided,

“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 nonflow mitigative measures. [¶] Based on the information provided in the Licensee’s 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.”

4. On April 1, 2005, the Districts filed the 2005 Ten Year Summary Report. The Districts solicited input as to what should be included in the Ten Year Report, but did not circulate a draft copy of the report to the Tuolumne River Technical Advisory Committee for review and comment prior to filing with the Commission. To date the Commission has not established procedures or schedule for hearing regarding the Ten Year Report, and the Order Amending License is silent as to procedures and schedule for hearing.

5. Since the 1995 Agreement and 1996 Order Amending License, the National Marine Fisheries Service (NMFS) has listed the Central Valley steelhead ESU as threatened under the Endangered Species Act (ESA).¹ See 63 Fed. Reg. 13,347 (March 19, 1998). NMFS also has proposed designation of the lower Tuolumne River as critical habitat and further investigation of habitat availability and suitability in the middle and upper reaches of the river. See 69 Fed. Reg. 71880 (Dec. 10, 2004). On May 2, 2003, NMFS filed, “Petition of the National Marine Fisheries Service For Modifying Project Structures and Operations,” requesting the Commission initiate formal consultation under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), to prevent harm to CV steelhead present in the Tuolumne River below the Project. On June 6, 2003, the Conservation Groups filed a brief in support of NMFS’ Petition. Action on NMFS’ Petition currently is stayed. The adequacy of the Article 37 MFS to protect CV steelhead is unresolved.

¹ NMFS recently proposed that CV steelhead remain listed as a threatened species. See 69 Fed. Reg. 33102

ARGUMENT

6. The Commission should establish procedures and schedule for hearing regarding the Ten Year Report filed by the Districts. Clearly defined hearing procedures and a schedule are necessary to assure adequate opportunity for participation by parties to the 1995 Agreement and other interested stakeholders, and timely decision by the Commission regarding whether to require additional measures or modifications of Project operations or structures are necessary to protect fishery resources in the Tuolumne River.

7. The parties to the 1995 Agreement agreed, “to an adaptive management strategy that would initially employ measures considered feasible and have a high chance of success.” 1995 Agreement, p. 2. The 1995 Agreement also provided, “[t]he success of these initial measures would be evaluated and, based on the results of evaluation, the measures would either be fine-tuned to improve success or alternative measures would be taken.” *See id.* Consistent with this adaptive management strategy, the parties to the 1995 Agreement now must review the ten years of monitoring and study results to recommend for the Commission’s approval whether the measures as implemented improved salmon habitat and increase salmon populations to the extent required, or whether revised or additional measures may be necessary. Consistent with the intent of the parties in the 1995 Agreement, Paragraph G of the Licensing Order provides that the Commission will make a decision only “after notice and opportunity for hearing.”

8. We request that the Commission issue Notice of Hearing for the Ten Year Report, which specifies procedures and schedule for hearing. We recommend the following procedures

(June 14, 2004).

and schedule: (1) informational questions by parties to the 1995 Agreement and other interested stakeholders regarding the data, methods, and findings which the Districts included in the report within 30 days of the Commission's Notice of Hearing; (2) Districts' responses to questions timely received within 60 days of the Notice of Hearing; (3) comments and recommendations by parties to the 1995 Agreement and other interested stakeholders for appropriate measures to protect fishery resources in the Tuolumne River until relicensing in 2014 within 90 days of the Notice of Hearing; and (4) decision by Commission within 180 days of the Notice of hearing.

CONCLUSION

We respectfully request that the Commission grant this Motion.

Dated: May 3, 2005

Respectfully submitted,

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DECLARATION OF SERVICE

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

I, Shane Conway, declare that I served the attached “MOTION BY CALIFORNIA RIVERS RESTORATION FUND, TUOLUMNE RIVER PRESERVATION TRUST, CALIFORNIA TROUT, INC., AND FRIENDS OF THE RIVER TO ESTABLISH PROCEDURES AND SCHEDULE FOR HEARING,” on each party on the official service list maintained by the Secretary in this proceeding.

Dated: May 3, 2005

By: _____

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