

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

Turlock Irrigation District and)	Project Nos. 2299-065
Modesto Irrigation District)	2299-053

**TURLOCK AND MODESTO IRRIGATION DISTRICTS' ANSWER TO THE
STATEMENT OF THE RESOURCE AGENCIES AND CONSERVATION GROUPS ON
THE NOVEMBER 20, 2009 FINAL REPORT OF THE PRESIDING JUDGE ON
INTERIM MEASURES**

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213), Turlock Irrigation District ("TID") and Modesto Irrigation District ("MID") (collectively, "Districts"), licensees of the New Don Pedro Project No. 2299 ("Project"), hereby submit their answer to the Statement regarding Presiding Administrative Law Judge Charlotte J. Hardnett's November 20, 2009 Final Report On Interim Measures ("Final Report") filed jointly in this proceeding by the Resource Agencies¹ and Conservation Groups² on January 5, 2010 ("Statement").

The Districts recognize that the Commission's July 16, 2009 *Order On Rehearing, Amending License, Denying Late Intervention, Denying Petition, And Directing Appointment Of A Presiding Judge For A Proceeding On Interim Conditions*, 128 FERC ¶ 61,035 ("2009 Order"), did not specifically state that answers to comments on the Final Report could be submitted. However, the Districts' submittal of this answer, and the Commission's consideration of it, are warranted. First, "an answer may be made to any pleading." 18 C.F.R. § 385.213(a)(3). Second,

¹ The United States Fish and Wildlife Service ("USFWS"), the National Marine Fisheries Service ("NMFS"), and the California Department of Fish and Game ("CDFG").

² The Tuolumne River Preservation Trust, Friends of the River, California Trout, Inc., and California Rivers Restoration Fund.

as demonstrated at pp. 85-86 of the Statement, the Resource Agencies and Conservation Groups are seeking affirmative relief from the Commission. Thus, their Statement constitutes a motion under 18 C.F.R. § 385.212, to which the Districts are unequivocally entitled to respond. 18 C.F.R. § 385.213(d)(1).

INTRODUCTION

Having failed once again to convince a Commission decisional authority that flows in the Tuolumne River -- and only flows in the Tuolumne River -- will determine the fate of the entire populations of San Joaquin River Basin Chinook salmon and Central Valley steelhead ("CV steelhead"), the Resource Agencies and Conservation Groups in their Statement resort to attacks on Presiding Judge Hardnett's findings and the Districts' witnesses and predictions of the impending demise of the fish populations to attempt to convince the Commission to act precipitously and impose on the Districts the flow regime contained in the Interim Measure Elements that the Resource Agencies disclosed for the first time on September 14, 2009. The Commission must not be swayed by these attacks and scare tactics. As the Commission correctly determined in its 2009 Order, additional IFIM studies and water temperature modeling must be conducted in order to provide the Commission with information sufficient to make an informed decision on potential interim measures at the Project. And, despite these entities' dire predictions to the contrary, they most certainly have not demonstrated that the failure to immediately impose the Resource Agencies' new flow regime on the Districts will result in the demise of the San Joaquin River Basin Chinook salmon and CV steelhead populations.

DISCUSSION

I. The Attacks On Judge Hardnett's Findings Of Fact Have No Merit

The Resource Agencies and Conservation Groups devote nearly 50 pages of their Statement (pp. 33-82) attacking Judge Hardnett's specific findings of fact, primarily by reiterating

the arguments advanced by their witnesses in their written and oral testimony and citing the exhibits relied upon by those witnesses. They preface their attacks by first denigrating the witnesses of the Districts and the City and County of San Francisco (“CCSF”) and inferring that only the Resource Agencies’ witnesses can be relied upon. *See, e.g.*, p. 24 of the Statement, where they dismiss the opinions of the Districts’ and CCSF’s witnesses because they allegedly reflect “their respective vested interests;” *id.*, accusing the Districts’ and CCSF’s witnesses of engaging in “unsupported supposition;” and p. 22 of the Statement, accusing the Districts’ and CCSF’s witnesses of relying upon “unproven conjectures.” *Compare to* p. 22 of the Statement, where the Resource Agencies and Conservation Groups reference “the wisdom of deferring to the Resource Agencies’ expertise in matters affecting their own trust resources.”

As the Districts indicated in their January 5, 2010 Comments on the Final Report, they believe that Presiding Judge Hardnett’s findings are generally correct and are amply supported by the testimony and other exhibits presented in this proceeding by the Districts’ and CCSF’s witnesses. That testimony and those other exhibits also clearly refute the arguments advanced by the witnesses of the Resource Agencies and Conservation Groups in this proceeding that are reiterated in the Statement. Instead of repeating that testimony in a point-by-point rebuttal to the attacks on Presiding Judge Hardnett’s findings contained in the Statement, the Districts suggest that the Commission, in considering the merits of the attacks and deciding what further action, if any, should be taken in this proceeding, review the testimony and other exhibits presented by the Districts’ and CCSF’s witnesses with respect to the matters raised in the attacks. The Districts believe that such review will lead the Commission to conclude that Presiding Judge Hardnett’s findings were generally appropriate.

The contention of the Resource Agencies and Conservation Groups that the witnesses of the Districts and CCSF are somehow suspect because they purportedly represent “vested interests” and that the Commission must defer to the “wisdom” of the Resource Agencies’ witnesses is both demeaning and the height of arrogance. The Resource Agencies’ witnesses are not endowed with any superior “wisdom,” and becoming an employee of one of the Resource Agencies does not magically make a person's views sacrosanct. Further, many of the Resource Agencies’ witnesses on fishery issues have backgrounds and experiences similar to those of the witnesses presented by the Districts and CCSF on fishery issues,³ but had less Tuolumne River-specific experience.

The inappropriateness of automatically according heightened deference to the “wisdom” of the witnesses of the Resource Agencies is clearly demonstrated by the fact that the Commission has already determined that the Limiting Factor Analysis, whose lead author was USFWS witness Dr. Mesick, was seriously flawed. *See* 2009 Order at ¶s 70-78.

The bottom line here is that Presiding Judge Hardnett obviously found that the positions advanced by the witnesses testifying on behalf of the Districts and CCSF were more credible and persuasive than the theories advanced by the witnesses of the Resource Agencies and Conservation Groups. Since Presiding Judge Hardnett during the hearing was able to observe the demeanor of the witnesses who were required to testify at the hearing, including all of the witnesses of the Resource Agencies and Conservation Groups, to help her assess what weight to

³ For example, Carl Mesick, who presented testimony on behalf of the USFWS, ran his own consulting firm for approximately 13 years, including just prior to his reemployment by the USFWS in 2009, and worked at another consulting firm for seven years. *See* Exh. No. FWS-5. Michelle Workman, another witness for the USFWS, worked for East Bay Municipal Utility District for 16 years before joining the USFWS in 2009. *See* Exh. No. FWS-3. NMFS employee Erin Strange, who testified on behalf of NMFS, has been the co-owner of a private consulting business since 1997. *See* Exh. No. NMF-3.

be given to each witnesses' testimony, her assessments and the findings premised thereon are entitled to deference by the Commission in conducting its review of the testimony and other exhibits as to the findings disputed by the Resource Agencies and Conservation Groups.

II. The Complaint About Consideration Of Out-Of-River Factors Is Misplaced

The Resource Agencies and Conservation Groups complain in their Statement (at pp. 31-32) that “a significant portion of the testimony and evidence presented by the Districts and CCSF inappropriately concerned impacts beyond the Tuolumne River and the effects to the species caused by factors other than those within the Project’s direct sphere of influence” and state that such matters are “clearly beyond the scope of this proceeding and thus should not be considered by the Commission.” This complaint is misplaced.

First, as recognized in the 2009 Order, fish populations in the Tuolumne River are significantly affected by factors lying outside of the Tuolumne River. Consideration of these other factors is clearly pertinent to the Commission’s consideration of whether any additional measures should be imposed on the Districts in the interim period prior to relicensing, given that these other factors could negate any possible benefit to the fish populations provided by such interim measures.

Second, if the Resource Agencies and Conservation Groups found portions of the testimony and exhibits of the Districts and CCSF to be inappropriate because they pertained to factors outside of the Tuolumne River, they should have objected to that testimony and those exhibits and moved to strike them before they were entered into the record. However, they did not do so.

Third, much of the *direct* testimony and exhibits proffered by the Resource Agencies and Conservation Groups on September 14, 2009 (the same day the Districts and CCSF proffered their direct testimony and exhibits) also pertained to factors outside of the Tuolumne

River. *See, e.g.*, Direct Testimony of Carl Mesick (Exh. No. FWS-4 at pp. 9, 16); Exh. No. FWS-50; Direct Testimony of Steven T. Lindley (Exh. No. NMF-6 at pp 8-10). Clearly, it is more than a bit disingenuous for the Resource Agencies and Conservation Groups to complain about the Districts and CCSF presenting testimony and exhibits on such factors when they themselves did so.

III. The Contention Regarding “An Impossible Scenario” Misses The Point

The Districts’ and CCSF’s witnesses, in describing the financial, human, and other costs of providing higher instream flows below the Project in the interim period prior to relicensing, assumed that the 1987-1992 drought would be repeated during the next five water years (commencing October 1, 2009). Presiding Judge Hardnett found that the use of this assumption was reasonable and prudent, since it is not possible to predict future droughts with absolute accuracy. *See* Final Report at ¶ 278. The Resource Agencies and Conservation Groups in their Statement decry the use of this assumption, contending that it was “improbable” and “unsupported.” Statement at pp. 24-28.

The contention of the Resource Agencies and Conservation Groups on this matter misses the point. As all parties generally agree, providing instream flows for fishery purposes during the wetter water years generally should not be a significant problem, at least with respect to the flow schedule proposed by the USFWS and NMFS in their May 2, 2008 requests for rehearing, since the existing Article 37 fish flow schedule provides all the water requested in Above Normal and Wet water years. *See* the Direct Testimony of Walter P. Ward (Exh. No. DIS-39 at p. 3).⁴ Difficulties in terms of meeting the needs of agricultural and other water users arise,

⁴ As the Answering Testimony of F. Wesley Monier indicated, the flow regime embodied in the IME could require the Districts to release a significant amount of water above that required by Article 37 in the wetter water years. *See* Exh. No. DIS-53 at pp. 3-6.

however, when the Districts are required to release flows higher than those required by Article 37 in the drier water years for fishery purposes.

Both the flow schedule proposed by the USFWS and NMFS in their May 2, 2008 requests for rehearing, which the Districts' witnesses addressed in their September 14, 2009 direct testimony, and the flow regime contained in the Interim Measure Elements ("IME") the Resource Agencies disclosed for the first time with the filing of their direct testimony on September 14, 2009,⁵ which the Districts' witnesses addressed in their September 22, 2009 answering testimony, require flows in the 50% drier water years that are significantly higher than those currently required by Article 37. Further, neither of these sets of flow proposals contain any mechanism to allow the flows to be suspended or reduced because of adverse impacts on agricultural or other water users.⁶ Consequently, in terms of ascertaining the adverse impacts of these flow proposals on human users of the Tuolumne River, it was entirely appropriate for the Districts and CCSF to have presented testimony regarding, and for Presiding Judge Hardnett to issue findings of fact assuming, the drier water years scenario (*i.e.*, drought). Further, as explained by the Districts'

⁵ The IME flow proposal was designated as Exh. Nos. NMF-1, FWS-1 and DFG-1; a copy thereof is appended to the Statement as Appendix A.

⁶ In apparent recognition of the fact that their flow proposals would cause the adverse impacts to human users of Tuolumne River water identified by the Districts and CCSF in the drier water years and thus must be considered by the Commission in any assessment of potential interim measures, the Resource Agencies and Conservation Groups in their Statement reference a new "Agencies' proposal for an emergency conferencing procedure, moderated by FERC, to determine an acceptable water rationing and allocation plan under drought conditions." Statement at p. 28. This is the first time these entities have ever mentioned such a mechanism. Indeed, during the hearing, USFWS witness Dr. Mesick indicated that if a drought occurred, "we could work out emergency measures to make sure that there was no harm to the *fishery*." Tr. 296:21-24 (emphasis added). In other words, these entities' only concern in a drought situation has been impacts to fishery resources. In any event, the Districts would not support any measure requiring them to release the higher flows demanded by the Resource Agencies and Conservation Groups during the drier years where the only possible relief to the Districts, agricultural users, and other human users of Tuolumne River water was an uncertain and unguaranteed "emergency conferencing procedure."

witnesses,⁷ if a drought were experienced and the Districts were required to release the higher flows requested by the Resource Agencies and Conservation Groups, Don Pedro Reservoir would be out of water, and the adverse impacts to users of Tuolumne River water would begin to be felt, by the second water year.

IV. The Complaints Regarding The Lack Of Quantification Of Impacts Are Specious

The Resource Agencies and Conservation Groups complain at various places in their Statement that the Districts/CCSF in their testimony, and Presiding Judge Hardnett in her findings, did not quantify the impacts of the IME flow proposal (labeled “Interim Measures” in the Statement) on agriculture and other resources or quantify those impacts in different water year types. These complaints are specious.

The Resource Agencies and Conservation Groups conveniently forget to mention that they did not first disclose their IME flow proposal until they filed their direct testimony at the close of business on September 14, 2009. Thus, the Districts and CCSF had a total of only seven days to examine this new flow proposal and prepare their answering testimony addressing it, which had to be filed on September 22, 2009. Clearly, it would have been impossible for the Districts and CCSF to have provided Presiding Judge Hardnett with additional details as to the quantification of impacts of the new flow proposal on these other resources in such a short period of time. Compounding the problem was the fact that the new IME flow proposal is primarily temperature based; *i.e.*, would require the Districts to release whatever water turned out to be necessary to meet various water temperature standards many miles downstream. The Resource Agencies and Conservation Groups, however, did not provide in their prepared testimony *any* projections as to how much water would be required to be released to meet these various

⁷ See the Direct Testimony of F. Wesley Monier (Exh. No. DIS-11 at p. 4); Exh. No. DIS-13; and the oral testimony of F. Wesley Monier (Tr. 82:3-15).

temperature requirements. Without that information, accurate assessments of impacts on other resources cannot be derived. Nevertheless, the Districts, in the few short days they had to evaluate the IME flow proposal, were able to develop some rough estimates of the amount of water needed to meet this new flow proposal. *See* the Answering Testimony of F. Wesley Monier (Exh. No. DIS-53).

The Resource Agencies and Conservation Groups have no one but themselves to blame for any perceived lack of quantification of impacts. The Districts, beginning at the August 6, 2009 prehearing conference, repeatedly requested that the Resource Agencies and Conservation Groups provide their proposals for interim measures early in the process, so that the Districts' and CCSF's witnesses would have an opportunity to review those proposals in sufficient time to address them in their direct testimony. However, the Resource Agencies and Conservation Groups, in an apparent effort to gain an advantage in the proceeding, rejected each such request, choosing instead to keep their new flow proposal secret until the filing of their direct testimony on September 14, 2009. They are in no position to complain about the consequences of their own actions.

The Districts note that they were able to quantify the extent to which their agricultural customers and the City of Modesto would be deprived of Tuolumne River water if the Districts were required to release the flows requested in the USFWS' and NMFS' May 2, 2008 requests for rehearing during drought conditions: a 35% reduction. *See* the Direct Testimony of F. Wesley Monier (Exh. No. DIS-11). They were also able to quantify the impacts of providing such flows on power resources. *See* the Direct Testimony of Gregory E. Salyer (Exh. No. DIS-45) and related exhibits. Given the fast track of this proceeding, the Districts did not have sufficient time to develop the computer models with the thousands of variable inputs that would

have been necessary to more accurately quantify the impacts of a reduced water supply on agricultural users, the City of Modesto, recreational users, and other resources. Finally, with respect to the Resource Agencies' and Conservation Groups' complaints about lack of quantification of impacts in different water year types, the Districts note, as they did above, that it is the drier years scenario that is of most concern in this proceeding.

V. The Attacks On The Districts' Studies Are Misplaced

At p. 87 of the Statement, the Resource Agencies and Conservation Groups state that past "District-sponsored" studies were "poorly designed." However, they forgot to inform the Commission that all of the studies the Commission, in its 1996 order, required the Districts to implement via Article 58 of the license were designed by the *CDFG*. See the Direct Testimony of Robert M. Nees (Exh. No. DIS-1 at pp. 11-12). In their zeal to attack the Districts' studies, they also fail to mention the fact that NMFS has refused to allow the Districts to perform two studies ordered by the Commission in 2008 to better evaluate the abundance of *O. mykiss* in the Tuolumne River even though NMFS, in listing the CV steelhead in 2006, indicated that "the lack of any monitoring efforts designed to assess *O. mykiss* abundance and trends" remained a major concern. Statement at p. 7. See the Direct Testimony of Robert M. Nees (Exh. No. DIS-1 at p. 21) and the Rebuttal Testimony of Erin Strange (Exh. No. NMF-53 at pp. 1-2).

VI. The Commission Should Reject The Late Attempts To Supplement The Record

At pp. 28-29 of their Statement, and in Appendix D thereof, the Resource Agencies and Conservation Groups attempt to supplement the record by providing information regarding the economic and social value of the loss of the fishery. Similarly, at p. 84 of the Statement, and in Appendix B thereof, they attempt to add data which they contend indicate that there is more water available for instream flows.

The Commission should reject these attempts to supplement the record. The record in this proceeding closed at the end of the hearing on October 7, 2009. *See* Presiding Judge Hardnett's November 20, 2009 Order Denying Conservation Groups' Motion to Adduce New Evidence. Further, with respect to the information regarding the economic and social value of the loss of fishery, it is not relevant, since the Resource Agencies and Conservation Groups have not demonstrated that anything that occurs or does not occur at the Project will cause a loss of the fishery resources. As to the information on the status of the current water situation, it is far too early to ascertain what type of year the current water year will become; the information does not yet indicate that the Tuolumne River is coming out of the dry period.⁸

VII. The Statement Contains Misstatements Of Law And Inappropriate Requests

In addition to containing the previously-described misguided attacks and complaints as to Presiding Judge Hardnett's Final Report and the Districts, the Statement contains a number of misstatements of law and inappropriate requests. Among others:

- **Page 68**: The Resource Agencies and Conservation Groups state that the legal standard applicable here is that the Districts "must mitigate impacts on life stages and habitat within the river reach under project influence." They are clearly mistaken; this is most definitely not the applicable legal standard. As the Commission has explained on countless occasions, licensees are not required to compensate for every adverse impact attributable to their projects, since the Federal Power Act ("FPA") does not impose a "no net loss" standard on hydropower projects; rather, the Commission's responsibility is to determine how best to balance a project's developmental values and environmental measures

⁸ Since the record is closed, the Commission should also reject the irrelevant information the Resource Agencies and Conservation Groups attempt to submit about four-minute showers in Southeast Queensland, Australia. Statement at p. 77 and Appendix C thereof.

under § 10(a)(1) of the FPA, 16 U.S.C. § 803(a)(1). *See, e.g., City of Tacoma*, 86 FERC ¶ 61, 311 at p. 62, 093 (1999).

- **Page 85**: They state that they “understand the burden of proof for this proceeding to be less than that required for a license amendment.” They are again mistaken. This proceeding is no different than any other potential license amendment proceeding. Whether the Commission proceeds to exercise its authority to impose additional or modified requirements on the Districts will depend on the Commission’s balancing of developmental and non-developmental interests under § 10(a)(1) of the FPA and satisfaction of the substantial evidence standard of § 313(b) of the FPA, 16 U.S.C. § 825(b).
- **Page 85**: The Resource Agencies and Conservation Groups state that the “Commission must now render a definitive decision on the request for rehearing of the license Articles and interim relief measures proposed by the Agencies and Conservation Groups.” To the extent these entities are implying by this statement that the Commission’s 2009 Order was not a final order definitively resolving the legal issues raised in their rehearing requests, they are incorrect. The 2009 Order was a final order resolving all legal issues raised by them in their requests for rehearing. Since these entities did not seek judicial review of the 2009 Order, they are bound by the determinations made therein and cannot re-litigate such matters.
- **Pages 85-86**: The Resource Agencies and Conservation Groups request that the Commission “state what evidentiary standard it applies to the inherently uncertain science regarding project impacts on fish, and whether it will apply that same standard on relicensing.” This request, which appears to be a petition for

declaratory order in disguise, is nonsensical. The Commission, both in this proceeding and at relicensing, must apply the substantial evidence standard of § 313(b) of the FPA.

VIII. The Commission Must Not Act Precipitously In This Proceeding

Contending that the Project has been causing “significant impacts” on the fishery resources of the Tuolumne River and that the Project is a “primary causative factor” in the decline of West Coast salmon stocks (Statement at pp. 18 and 30), and predicting that the Chinook salmon and CV steelhead will be “extirpated” or face “extinction” if the Commission does not act quickly (Statement at pp. 62, 82, 86-87), the Resource Agencies and Conservation Groups request that the Commission reopen the license, conduct a NEPA analysis, and make a final decision on interim flows by December 2010 (Statement at p. 86).

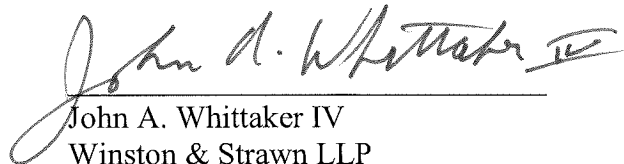
The Commission must not act precipitously as demanded by the Resource Agencies and Conservation Groups. Their contentions that the Project is having “significant impacts” and is a “primary causative factor” in the decline of fishery populations are the same contentions they make as to the participants in every federal and state proceeding involving the San Joaquin River Basin or the Delta. More importantly, these contentions were clearly refuted by the Districts’ and CCSF’s witnesses in the proceeding. Their dire predictions as to the demise of the San Joaquin River Basin Chinook salmon and CV steelhead populations if the Commission does not quickly impose their flow proposal were also clearly refuted by those witnesses. As they explained, and as clearly shown by the numerous exhibits entered into the record by the Districts and CCSF, the populations of these species are clearly cyclical and experience boom and bust periods. The Resource Agencies and Conservation Groups clearly have not demonstrated that immediate action is required by the Commission.

The Districts also note that the Commission already determined in its 2009 Order that it does not have sufficient information to make any determination with respect to additional flows and that the additional IFIM studies and water temperature modeling that the Commission required the Districts to perform must be completed in order for the Commission to have a sufficient record to determine what flow and habitat measures will benefit salmon and steelhead. *See, e.g.*, 2009 Order at ¶s 85-86, 92-93. The Districts submitted their study plans for those two studies on October 14, 2009. Although the Commission has not yet acted on those plans, it is clear that the studies will not be completed until late 2011 or early 2012. Consequently, the Commission will not have a sufficient record before it to act until that time. In light of this, the request of the Resource Agencies and Conservation Groups that the Commission take final action by December 2010 is clearly inappropriate and therefore must be rejected.

CONCLUSION

The Districts' respectfully request that the Commission (1) consider the matters discussed herein in contemplating its further actions in this proceeding and (2) not act precipitously in response to the scare tactics employed in the Statement.

Respectfully submitted,



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Dated: January 20, 2010

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 20th day of January, 2010.



John A. Whittaker, IV