



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

NATIONAL MARINE FISHERIES SERVICE
Southwest Region
777 Sonoma Ave., Room 325
Santa Rosa, CA 95404-4731

In response refer to:
150304SWR2001SR8648

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Re: National Marine Fisheries Service Response to Motion to Clarify Record submitted by Modesto and Turlock Irrigation Districts under P-2299-065

Dear Secretary Bose and Deputy Secretary Davis:

Enclosed for filing in the above-referenced proceeding is the National Oceanic and Atmospheric Administration, National Marine Fisheries Service, response to a "Motion to Clarify Record of Modesto and Turlock Irrigation Districts", which was filed on July 7, 2008, by the Modesto and Turlock Irrigation districts, licensees of the Don Pedro Project (P-2299).

If you have any questions regarding our filing, please contact Mr. Eric Theiss at 916-930-3613, or Eric.Theiss@noaa.gov.

Sincerely,

Richard Wantuck
Fisheries Bioengineering Team Supervisor

Enclosures

cc: Maria Rea, NMFS, Sacramento
Service List



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

Modesto Irrigation District)	FERC Project No. 2299-065
Turlock Irrigation District)	
Don Pedro Project)	
_____)	

**NATIONAL MARINE FISHERIES SERVICE’S RESPONSE TO DISTRICTS’ MOTION
TO CLARIFY**

Pursuant to 18 CFR § 385.213(a)(3), and for the reasons described herein, the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) responds to a “Motion to Clarify Record of Modesto and Turlock Irrigation Districts”, which was filed on July 7, 2008, by the Modesto and Turlock Irrigation districts (Districts), licensees of the Don Pedro Project (P-2299) (Project).

Among other agencies and non-governmental organizations, on May 2, 2008, NMFS timely filed a request for rehearing of the Federal Energy Regulatory Commission (Commission) “Order on Ten-Year Summary Report” for the Project dated April 3, 2008. The Districts subsequently filed an answer to the requests for rehearing (cast as a “Motion to Clarify Record”) on July 7, 2008. Under 18 CFR § 385.213(a)(2), this answer is prohibited, and we request the Commission reject it. 18 CFR § 385.213(a)(2) provides, in pertinent part, “An answer may not be made to . . . a request for rehearing, unless otherwise ordered by the decisional authority.” In addition, the Districts failed to timely file the answer under 18 CFR § 385.213(d)(2). Therefore, this answer should not be considered by the Commission.

If the Commission considers the Districts’ answer despite the procedural issues described above, there are several substantive errors and unsupported conclusions in the answer.

The answer attempts to downplay the conclusive nature of Zimmerman *et al.* 2008, which NMFS included with its request for rehearing, by claiming that “low numbers of anadromous *O. mykiss* found in samples from the San Joaquin tributaries indicate little evidence of a successful ocean-type life history strategy” (page 4). The Districts’ confusing use of the term “ocean-type” with reference to *O. mykiss* reveals a lack of understanding of *O. mykiss* biology. The term “ocean-type” with reference to *O. mykiss* is not recognized by NMFS in its listing of Central Valley steelhead under the Endangered Species Act (ESA), and it is not a term that is commonly used in scientific literature. In addition, the Districts allege conclusions about potential origins of steelhead in the Tuolumne River that are not supported by evidence on the record. The important conclusion from Zimmerman *et al.* 2008 is that eleven fish sampled from the Tuolumne River were identified as having anadromous (steelhead) maternal origin, and one of these fish displayed an anadromous migratory history; thus, these fish are considered steelhead. Nobody should be required to disprove all of the Districts’ unsupported conclusions.

By claiming that “low numbers” of *O. mykiss* were found in Zimmerman *et al.* 2008, the Districts attempt to impose a significance bar for addressing Project effects on Central Valley steelhead and compliance with the ESA. This line of reasoning is a Catch-22 dilemma which leads to continued indefinite delays for the protection of Central Valley steelhead. In effect, the Districts are choosing not to address their Project’s impacts on Central Valley steelhead because of perceived “low numbers” in the Tuolumne River; while simultaneously ignoring the reality that their Project is a major cause of those low numbers. In light of recent scientific information, the operative fact that Central Valley steelhead are present in the Tuolumne River is now clearer

than before. Therefore, NMFS requests that the Commission reject the Districts' arguments related to Zimmerman *et al.* 2008 in their entirety.

The Stillwater Sciences analysis provided by the Districts contains factual errors which lead to the erroneous conclusion that low water releases do not result in reductions of anadromous fish populations. For example, Dr. Allen Hubbard of the University of California at Berkeley verified the work in Mesick (2008) (submitted by NMFS with its request for rehearing); and Dr. Mesick provided NMFS the following response regarding Dr. Hubbard's review:

Stillwater Sciences raised the issue that the significance levels of the regressions used in Mesick (2008) are not valid because they violate assumptions that the recruitment response "observations" be independent and identically-distributed. However, Dr. Allan Hubbard, Assistant Professor of Biostatistics (Division of Biostatistics, School of Public Health, University of California, 101 Haviland Hall, MC 7358, Berkeley, CA 94720), subsequently conducted additional statistical analyses, Newey-West Regressions and Permutation Tests, to address the issues of autocorrelation and distribution with the observations used by Mesick (2008). His analyses corroborated the results presented in Mesick (2008): (a) the mean flow near La Grange from February 1 to June 15 was strongly correlated ($P < 0.0001$) with Chinook salmon recruitment in the Tuolumne River; and (b) the intercept of the regression between flow and adult recruitment from 1997 to 2004 was about 50% lower than it was from 1980 to 1990 at a statistically significant level ($P = 0.01$).

The most apparent reasons for the low numbers of anadromous fish currently inhabiting in the Tuolumne River are: 1) the Project's dams are completely blocking access to their native upstream habitats, and 2) the Project's operations are significantly reducing flows, increasing temperatures, and generally destabilizing the natural hydrograph below the dams. The Districts' position that increased flows "could lead to adverse impacts to the very fishery resources the entities submitting the requests for rehearing purportedly want to assist" is not supported by substantial evidence on the record.

Due to the compressed time-schedule to respond to the Districts' July 7 answer, NMFS is only able to respond in part to its errors and unsupported conclusions.

For the above-stated reasons, NMFS respectfully requests that the Commission reject the Districts' answer filed on July 7, 2008.

DATED this 21st day of July, 2008, on behalf of the National Marine Fisheries Service.



Richard Wantuck
Fisheries Bioengineering Team Supervisor

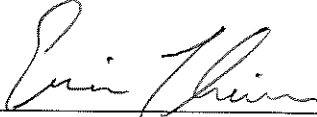
**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Modesto Irrigation District)	FERC Project No. 2299-065
Turlock Irrigation District)	
Don Pedro Project)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by first class or electronic mail, the National Marine Fisheries Service's cover letter, Response to Motion to Clarify, and this Certificate of Service for the Don Pedro Project No. P-2299-065, to Secretary Bose and Deputy Secretary Davis of the Federal Energy Regulatory Commission, upon each person designated on the official service list compiled by the Commission in the above-captioned proceeding.

Dated this 21st day of July, 2008



Eric Theiss
Fisheries Biologist

Service List for P-2299-000 TURLOCK & MODESTO IRRIGATION DIST.

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