

Contractual Relationships between PG&E, NID, and PCWA

DRAFT

By Megan Anderson, Environmental Advocates

On behalf of the
Foothills Water Network

December 7, 2005

Table of Contents

I. Introduction	1
II. Physical Connections between Projects 2266 and 2310	2
<i>A. NID Project 2266 and PG&E Project 2310</i>	2
III. Contracts	4
<i>A. Contract Provisions</i>	4
1. Yuba-Bear Project Power Purchase Contract	5
2. Yuba-Bear Water Operation Contract	6
3. Water Supply Contract between Pacific Gas and Electric Company and Placer County Water Agency	10
III. Water Rights	11

I. Introduction

Nevada Irrigation District's (NID) Project 2266 and Pacific Gas and Electric's (PG&E) Project 2310 are linked naturally, through extensive plumbing, and by contractual relationships. In addition, PG&E sells water passing through these projects to Placer County Water Agency. As work on the Federal Energy Regulatory Commission (FERC) relicensing proceedings begins on these projects, it is helpful to understand these relationships. This memo will first provide a physical description of the projects as a background for the contractual requirements. Next, it

will outline the PG&E's, NID's and PCWA's contractual agreements and obligations. Third, this memo will discuss the parties' respective water rights in the context of these contracts. Finally, this memo will seek to clarify the impact of those relationships on the FERC relicensing proceedings.

II. Physical Connections between Projects 2266 and 2310

NID's Project 2266 and PG&E's Project 2310 are hard to separate. Generally speaking, NID's project includes dams, reservoirs, powerhouse systems¹, and related conduits on the Middle Yuba River and its tributaries, Bear River, Jackson Creek, and Canyon Creek in Nevada, Placer, and Sierra counties. NID Process Plan and Schedule, 2 (Draft 7/20/05) (NID PP&S). PG&E's project includes dams, reservoirs, powerhouse systems, and related conduits on the South Yuba River and its tributaries, Bear River, Deer Creek, and in the American River basin in Placer and Nevada counties. PG&E Hydrodivestiture Draft Environmental Report (Divestiture DEIR) 2-100 (11/2000).

The projects will be described in tandem from the top of the affected watersheds moving downstream. The various points of re-regulation of water and power will be discussed next. Several schematics are attached to provide a visual representation of this narrative description.

A. NID Project 2266 and PG&E Project 2310

NID's Project 2266 includes four developments: Bowman, Dutch Flat, Chicago Park, and Rollins Developments. NID PP&S, 2, 6. PG&E's Project 2310 consists of 12 interconnected facilities. Divestiture DEIR 2-100.

The first development in NID's system, the Bowman Development, includes dams and reservoirs on the Middle Yuba River, Jackson Creek, and Canyon Creek. NID PP&S at 2. The water from these developments converges in Bowman Lake by way of natural flow down Jackson and Canyon creeks and by way of the Milton-Bowman Diversion Conduit from the Middle Yuba River. Id. Power is produced at the Bowman Powerhouse, located at the base of Bowman Dam, and transferred via the Bowman 60 kV transmission line to PG&E's Spaulding No. 3 Powerhouse. Id.

The Bowman-Spaulding Conduit transfers water from Bowman Lake to Lake Spaulding. Id. The Bowman-Spaulding Conduit also picks up water from diversions on Texas Creek and Fall Creek, owned by PG&E, but operated by NID. There are eleven storage lakes on the Texas and Fall Creek drainages. Divestiture DEIR 2-100. All of the lakes are natural lakes with increased storage capacity as a result of earth and rock-filled dams. The water NID's Bowman-Spaulding Canal is carried to the Spaulding No. 3 Powerhouse system, and then released into

¹ I will refer to the forebay, penstock, powerhouse, and afterbay as simply a "powerhouse system", except where necessary to differentiate between those parts.

Lake Spaulding. Id. In addition to the water arriving from the Middle Yuba and Texas and Fall Creek drainages, seven storage lakes located in the upper reaches of the Yuba River and Fordyce Creek deliver water to Lake Spaulding. Id.

Lake Spaulding is the primary storage reservoir for PG&E's Project 2310. Id. at 2-101. Five dams impound Lake Spaulding and several tunnels and canals exiting Lake Spaulding supply water to the rest of the system. Although NID water passes through Lake Spaulding, NID has no storage rights in that reservoir.

A 963-foot-long tunnel conveys water from Lake Spaulding to PG&E's Spaulding 1 and 2 Powerhouses. Id. The tunnel is 8.7 feet in diameter and has a flow capacity of 750 cfs. Id. These powerhouses are located adjacent to one another and share electrical transformers and circuit breakers, thus essentially functioning as one powerhouse. Water from the two powerhouses, however, goes in different directions.

Water exiting the Spaulding 2 Powerhouse is funneled into the Main South Yuba Canal, which takes water to the PG&E Deer Creek Powerhouse. Water from the Deer Creek Powerhouse is then returned to the South Fork Deer Creek. Id. at 4.3-87.

Spaulding 1 Powerhouse deposits its water in the Drum Canal. Id. at 2-101. Kelly Lake and Lake Valley Reservoir, located upstream on the North Fork of the North Fork of the American River also contribute water from that drainage to the Drum Canal through Lake Valley Canal. Id. at 4.3-87. The Drum Canal then delivers water to the Drum Forebay. From there, some water is diverted to Canyon Creek and then into Towle Canal to the Alta Powerhouse system. Id. at 2-102. The Alta Powerhouse delivers water to both the Little Bear River, which flows into the Bear River. Id. The rest of the water is delivered to the Drum 1 and 2 Powerhouses. Below Drum 1 and 2 Powerhouses, water is routed to the Drum Afterbay, also referred to as the Dutch Flat Forebay, located on the Bear River. Id. The Dutch Flat Forebay serves both Dutch Flat 1 Powerhouse, PG&E's facility, as well as NID's Dutch Flat 2 Powerhouse. Id.

NID's Chicago Park Development, is located immediately downstream from the Dutch Flat Powerhouse. NID PP&S 6. The Chicago Park Conduit diverts water from the Dutch Flat No. 2 Afterbay into the Chicago Park Powerhouse system on the Bear River. Id.

Below Chicago Park Powerhouse, water is impounded in NID's Rollins Reservoir. Id. Some of the water from Rollins is diverted to Rollins Powerhouse, located at the base of the dam. Id. Water from that powerhouse is returned to the Bear River and either flows downstream to NID's Lake Combie or is diverted into PG&E's Bear River Canal. Divestiture DEIR 4.3-88.

The Bear River Diversion Dam, downstream of Rollins Reservoir, diverts water into the Bear River Canal. The Bear River Canal delivers water to PG&E's Halsey Powerhouse, which discharges water into the Wise Canal. Id. Water can then be diverted from the canal, around Rock Creek Reservoir, into the Rock Creek Diversion, which empties into Middle Fiddler Green Canal (for use by PCWA) and eventually into the Wise Forebay. Id. Rock Creek Reservoir

regulates water in Wise Canal. Wise Forebay delivers water to Wise 1 and 2 Powerhouses, PG&E facilities. Those Powerhouses discharge directly into the South Canal. Id.

The South Canal carries water to the last PG&E Project 2310 facility, Newcastle Powerhouse. Id. at 2-102. Water from that powerhouse arrives at Folsom Lake, not included within PG&E's Project. Id. at 2-102, 4.3-88.

This description provides a background of what electrical facilities and plumbing are available for power generation and water transport. How these facilities are operated is determined in large part by contracts between NID and PG&E.

III. Contracts

PG&E and NID have entered into several contracts that control the delivery of water and power under both NID's Project No. 2266 and PG&E's Project No. 2310. Generally, these contracts formalize an exchange of water and power: NID conveys power from its hydroelectric facilities to PG&E and PG&E, after using its water for power generation, offers that water for sale to NID and PCWA, among others, for consumptive uses. This arrangement is achieved using the infrastructure of both projects to move water and power as needed to satisfy those ends. Thus, both parties achieve the maximum benefit from the Yuba-Bear system. This section will first outline the provisions of these contracts. Next, it will consider the issues that may arise from these contracts in the relicensing proceedings.

A. Contract Provisions

Several contracts have worked to intertwine NID's and PG&E's projects on the Yuba-Bear system. Under its initial license for Project 2266, NID expanded upon an older project, Project No. 338, which consisted of a series of dams and reservoirs, which delivered water to PG&E's Spaulding Rim Power Plant. There, the water was first used for power generation and was then delivered by NID as irrigation water. Federal Power Commission, Order Issuing License (Major), Project 2266 (June 24, 1963).

With the new license, NID expanded on that project by building additional storage and power facilities. NID financed the new project by the issuance of revenue bonds, underwritten by NID's long-term contract, the 1963 Consolidated Contract, with PG&E. Under that contract, PG&E purchases the power generated by Project No. 2266 as well as payment for additional storage created by Project No. 2266 that PG&E uses for its Project No. 2310. Id. At the time the license was issued, the Federal Power Commission (now FERC) found that, "[I]f it were not for the fact that PG&E has agreed to pay for the power generated by the project works and for the water delivered from all project reservoirs on a long-term basis, the Applicant would be unable to proceed with the project" Id. Thus, Project 2266 rested squarely on PG&E's involvement.

The essence of the relationship between PG&E and NID is set forth in the 1963 Consolidated Contract, which outlines the overall plan for operations between NID and PG&E.² 1963 Consolidated Contract between Nevada Irrigation District and Pacific Gas and Electric Company, July 12, 1963 (hereinafter Consol. Contract). The Consolidated Contract is divided into two parts: I. Yuba-Bear Project Power Purchase Contract, and II. Yuba-Bear Water Operation Contract.

In addition to its contracts with NID, PG&E has entered into several contracts with Placer County Water Agency (PCWA). Those contracts provide for the sale of consumptive water to PCWA.

1. Yuba-Bear Project Power Purchase Contract

The first part of the Consolidated Contract, the Power Purchase Contract, sets forth the parties' agreement regarding the purchase of power produced by NID's Project No. 2266. Consol. Contract, Part I, ¶ 2; App. A, A-1. Under the Consolidated Contract, NID agrees to sell and deliver all electric power generated by its hydroelectric facilities to PG&E, excepting power and energy delivered for project power plant use. *Id.* at ¶ 7.

Before the power sale could happen to the extent envisioned in the contract, NID agreed to construct additions to its older project, thus allowing for additional water storage and power generation. In turn, PG&E agreed to install switching facilities and to construct, own, and operate transmission lines to deliver the power from the project. *Id.* at ¶ 4-5. Additionally, PG&E agreed to enlarge its Drum Canal and Power Plant to no less than 700 cubic feet per second (cfs), with some of the space in that canal reserved for NID water. *Id.* at ¶ 15. The capacity of the Drum Canal is now 850 cfs.

PG&E pays for this power both at a semi-annual rate and a monthly rate. *Id.* at ¶ 9. PG&E can offset the monthly payments for several reasons set forth in the contract³, including in the case of a breach of contract on the part of NID. *Id.* at ¶ 11(b). NID financed the project through the issuance and sale of revenue bonds, which rested on the security of the contract with PG&E. *Id.* at ¶ 16. The contract required NID to pay PG&E \$9,240,000 from funds derived from the sale of the project bonds to reimburse PG&E for its expenditures on the enlargement of PG&E's Drum Canal and Power Plant.

The Power Purchase contract remains in effect "so long as [NID] holds a license under the Federal Power Act and other necessary rights for the project permitting full performance . . . , but not beyond July 1, 2013. *Id.* at ¶ 17. Thus, although FERC does not have jurisdiction over the contract between the parties, the parties have made the contract expressly conditional on the

² Several other contracts amend that agreement, and other agreements define relationships with other relevant entities such as Placer County Water Agency (PCWA), Yuba County Water Agency (YCWA). I will focus on the Consolidated Contract as it is the most pertinent to this system, amending where appropriate and where I have the necessary information to do so.

³ REASONS FOR REDUCING PAYMENT.

existence of a FERC license. Additionally, NID agrees to defend its water rights necessary or useful to operation of the project. Id. at ¶ 12.

The Power Purchase contract also sets forth operation and maintenance requirements for the project. Id. at App. C. Generally, NID shall operate the project to satisfy its requirements for domestic and irrigation purposes. Id. at App. C, ¶ C-1. “[I]nsofar as is consistent with [NID’s] requirements of water for domestic and irrigation purposes and with agreements between [NID] and Federal and State agencies,” NID shall operate the project in accordance with schedules furnished by PG&E for “impounding, release and use of water through power plants of the project up to their full generation capabilities.” Id. Thus, the system will be operated to with a delineated priority of use: first, consumptive water demands of NID’s customers located within its service area as well as PG&E’s other contractual water obligations will be satisfied; second, power generation needs will be met; third, water will be provided to meet consumptive demands of NID’s other customers. Memorandum of Understanding between Pacific Gas and Electric Company and Nevada Irrigation District, August 30, 2002, ¶ 1.6 (hereinafter MOU between PG&E and NID).

NID operation will keep reservoir levels at maximum levels, consistent with schedules for water releases. Consol. Contract at App. C, ¶ C-1. Spilling at each dam “shall be kept to a minimum.” Id. Moreover, NID “shall limit diversions for the support of fish life to the various flows specified” in an agreement between NID and California Department of Fish and Game dated May 10, 1963. Id. at ¶ C-2. That agreement sets forth flows that NID must provide at various points in the system as well as minimum reservoir levels that must be maintained in wet and dry years. Consol. Contract, Part II, Exb. B to App. 1-C. The flows to be released from different points range from 1½ cfs to 10 cfs for fish flows. Id. NID also agrees not to impair or interfere with PG&E’s water releases “for the maintenance of fish life.” Id.

NID shall have no obligation to perform under the contract, operate the project, or to repay sums due to PG&E, except insofar as it can do so with money received from the monthly payments from PG&E or with money deposited in an operation and maintenance fund.⁴ Id. at ¶ c-5. If NID fails to operate the project, or is unable to do so, PG&E may enter and operate the project for and on behalf of NID, but at PG&E expense. Id. However, PG&E may recover its costs of operation from the operation and maintenance fund. Id. at ¶ C-11.

2. Yuba-Bear Water Operation Contract

The second part of the Consolidated Contract, the Yuba-Bear Water Operation Contract, focuses on where the water in the system will be routed. In the contract, the parties recognize that their waters will be intermingled, and that both parties will have contractual rights to flow waters through the other’s conduits and reservoirs. Consol. Contract, Part II. Given that physical reality, the contract seeks to delineate the boundaries of the parties; waters. With some

⁴ NID is required by the contract to establish and maintain an Operation and Maintenance Fund under a trust agreement. NID must deposit into this fund the remainders of certain PG&E payments and certain other excesses and payments. See Consol. Contract, Part I, App. C, ¶ C-8-C-16.

exceptions, the parties state that their general plan is that NID “will receive for its consumption and use approximately the quantity of water its rights and facilities create and [PG&E] will receive for its consumption and use and the consumption and use of others approximately the quantity of water its rights and facilities create.” Id.

Fundamental to the system, the parties agree that each “shall acquire and maintain ownership of all lands, easements, flowage rights, water rights, federal and state licenses and permits, and all other rights and privileges necessary for the performance of its obligations” under Part II of the contract. Id. at ¶ 2. Neither party shall gain any right in any properties of the other or dedicate any of its properties to any public use in charge of the other. Id. at ¶ 9. Furthermore, the parties agree that they “shall maintain and defend its respective water rights necessary or useful to the performance of this Part II and shall not voluntarily convey, transfer or in any manner encumber any of such rights without the written consent of the other.” Id. at ¶ 10. Despite the general agreement that the parties should protect their water rights, the parties also agree that “the relative rights of PG&E and NID in the waters of Texas Creek, Lindsey Creek, Fall Creek, Fuller Lake and adjacent watersheds have not been determined as between them and it is mutually understood that nothing herein contained and no action taken by either party hereunder shall enlarge, decrease or otherwise affect either party’s rights or claims to said waters as against the rights and claims of the other party.” Id. at ¶ 8.

The parties agree that each party shall have complete control over operation and maintenance of its properties and appurtenances thereto, and its decision with respect to the operations and maintenance shall be final and conclusive, except as expressly provided in this or any other written contract. Id. at ¶ 6.

More specifically, the Water Operation Contract also provides guidance on the operation and maintenance requirements of the system. Consol. Contract, Part II, App. I-B.

First, NID must deliver all available NID water arising from NID’s water rights in the upper Yuba River drainage area as well as all of PG&E’s Texas-Fall Creek water to Lake Spaulding, except for stream flow maintenance or as otherwise provided. Id. at ¶ B-2. NID must operate and maintain PG&E’s Texas-Fall Creek system pursuant to the conditions set for in PG&E’s FERC license for Project No. 2310. NID shall deliver this water at approximately uniform rates of flow, up to an average monthly delivery of 290 cfs during the power period⁵ and up to 300 cfs during the non-power period.

A Mountain Division storage index, which specifies certain levels for storage in Jackson Meadows, Milton, French Lake, Faucherie Lake, Sawmill Lake, Jackson Lake, and Bowman reservoirs, further controls deliveries to Lake Spaulding. Id. at ¶ B-2(a); App. I-A, ¶ A-44. During the power period, NID shall limit its deliveries to Lake Spaulding to certain listed amounts, except when that storage index is exceeded for the month. Id. at App. I-B, ¶ B-2(a). In that way, NID can preserve storage in its upper reservoirs. Alternatively, NID can deliver such other amounts requested by PG&E, “which in NID’s judgment can be delivered without

⁵ The power period is “that nine-month period commencing July 1 of any year and extending through March 31 of the following calendar year. The non-power period is “the months of April, May and June of each year. Consol. Contract, Part II, App. A, ¶ A-38-A-39.

adversely affecting NID's use of water for domestic and irrigation purposes. Id. Delivery of PG&E's Texas-Fall Creek water shall constitute part of the deliveries specified and shall be made between July 1 and November 30 at a rate not to exceed 30 cfs.

During the non-power period, NID shall deliver to Lake Spaulding all such water available to NID in the upper Yuba River drainage area; provided, however, that it shall not reduce its Mountain division storage below the storage index. Id. at ¶ B-2(b). Exceptions to that general rule will be made where necessary to float snow or prevent the formation of ice in the canals. Additionally, PG&E and NID may agree that the water content in the snow pack is such that even with lesser amounts retained in the Mountain Division reservoirs, there will be sufficient water yield to fill the Mountain Division storage by the end of the run-off period. NID also may reduce its deliveries by agreement of the parties "when Lake Spaulding is spilling and full delivery would constitute a waste of water." Id. at ¶ B-2(b).

PG&E will be required to deliver to NID a quantity of water equivalent to the amount of NID water delivered to Lake Spaulding. Id. at ¶ B-8. PG&E may deliver water to NID from Lake Spaulding into the Bear River when Rollins Reservoir is spilling, but it shall not be obligated to do so unless such spill can be stored in NID's Combie Reservoir. When Rollins and Combie are both spilling, any NID water stored in Spaulding shall become PG&E water. However, when Lake Spaulding would spill if Drum Canal delivery were reduced to 500 cfs, NID shall be given a conveyance credit up to 200 cfs of such excess water and PG&E shall deliver it into Bear River above Rollins to the extent it can be stored therein. If Drum Canal is reduced below 700 cfs, NID shall be given a conveyance credit for all NID water up to 335/700 of the canal capacity available. All such water so delivered shall be NID water.

PG&E shall deliver to NID at Deer Creek powerhouse tailrace certain quantities of NID specified depending on whether deliveries are in the power or non-power period. Id. at B-9. When the total water delivered to Lake Spaulding during the entire non-power period is less than 114.3 percent of the total water delivered at Deer Creek powerhouse tailrace, NID may request the difference to be made up with PG&E water for which NID will pay \$4.58 per acre foot. In addition, PG&E will sell and deliver to NID each month between 1,616 acre feet and 4,998 acre feet depending on the month and whether dry year water conditions exist. The rate for that water shall also be \$4.58 per acre foot. Rates of flow of water delivered at the Deer Creek powerhouse tailrace shall be pre-arranged by the parties prior to the beginning of each month. Id. at ¶ B-10. PG&E shall not be required to deliver water in excess of 107 cfs.

From time to time, portions of NID water allocated for NID's use at Deer Creek powerhouse tailrace may not be required by NID at that location. Id. at ¶ B-14. To the extent that capacity is available to Drum Canal and Bear River Aqueduct, and to the extent that PG&E can beneficially utilize the electric energy resulting therefrom, such water shall be routed through the Drum Canal and redelivered to NID at Rollins Reservoir or from the Bear River Aqueduct or at mutually agreed points of delivery. Id. PG&E shall credit NID at rates ranging from \$0.32 to \$2.64 per acre foot for each plant where such water was beneficially utilized. Deductions shall be made for losses from Spaulding No. 2 and Deer Creek power plants. Re-delivered water will also be subject to transit losses at varying percentages depending on where delivery is finally made. Id.

Rollins Reservoir serves as a regulating point, and PG&E water which is foreign to the Bear River⁶ shall be released by NID as and when requested by PG&E. However, no more than 30,000 acre-feet of PG&E shall be stored in Rollins Reservoir. Any water in excess of that amount shall be NID water.

Except when NID water stored in Rollins Reservoir exceeds certain amounts, NID shall limit the flow into the Bear River downstream of the intake to the Bear River Aqueduct to not more than the greater of the stream flow maintenance required for Rollins Reservoir and approximately uniform flows that will produce certain amounts, as listed, for irrigation and domestic use for NID. NID shall not release PG&E's water below Rollins Reservoir into the Bear River except at PG&E's request.

In order for NID to exercise its water right under Application No. 6229, Permit No. 5804, a water right on the Bear River of 120 cfs, PG&E shall make available to NID up to 120 cfs capacity in the Bear River Aqueduct. NID, in turn, shall release up to 120 cfs of "Nevada Rollins water"⁷ shall be required to deliver not less than certain monthly totals. Id. at ¶ B-11. When NID does not have any water in storage at Rollins, or when NID deliveries to the Bear River and Bear River Aqueduct will reduce NID usable storage in Rollins to zero, NID has the right to allocate the remaining "Nevada Rollins water" to best suit NID's irrigation needs. Id. However, for each acre foot deficiency in required NID Bear River Aqueduct diversions in any month, NID shall pay PG&E \$2.13 per acre foot. For excess deliveries into the Bear River Aqueduct that PG&E decides it can use beneficially, PG&E will credit NID up to \$1.55 per acre foot. Id. When NID water in the Bear River Aqueduct is less than 120 cfs, PG&E may convey its own water in the unused capacity. Id.

If and when requested by NID, PG&E will sell and deliver PG&E water to NID at Rollins Reservoir, up to 5,000 acre feet per year, but not more than 2,000 acre feet per month. Id. at B-13. NID shall pay \$3.50 per acre foot for this water, provided that NID shall pay a minimum amount each year equal to \$3.50 per acre foot times the maximum amount so purchased in any previous year. When PG&E has a surplus of PG&E water available at Deer Creek powerhouse tailrace, Bear River Aqueduct, or in South Canal, PG&E will sell and deliver such quantity of water to NID as NID shall from time to time request. Additionally, if and when PG&E water is available for use in Bear River below Bear River head dam, PG&E will allow NID a first right to purchase, during each month, all or any part of such water. Id. at B-13.

Upon NID's request, PG&E will also sell and deliver PG&E water out of the Auxiliary Canal at Wise Powerhouse tailrace or Rock Creek Reservoir at a maximum flow not exceeding

⁶ The foreign water subject to re-regulation in Rollins Reservoir is determined by complicated formula detailed in App. I-B, ¶ B-3.

⁷ Summarizing a lengthy description, "Nevada Rollins Water" is: (a) the amount of NID water delivered to Lake Spaulding each day (not including Texas-Fall Creek water) minus 114.3 percent of NID delivered to it at Deer Creek Powerhouse tailrace each day, reduced by a conveyance loss of 7.8 percent; (b) the amount of NID water available under the provisions of ¶ B-8, which would otherwise spill at Lake Spaulding minus 7.8 percent conveyance loss; (c) the amount of reduction of NID water in Rollins Reservoir; (d) NID's portion of Bear River natural flow then available.

40 cfs and up to certain monthly aggregate quantities. *Id.* at ¶ B-12. NID shall pay PG&E \$1.25 per acre foot at Wise powerhouse tailrace and \$2.74 per acre foot delivered at Rock Creek Reservoir. *Id.*

3. Water Supply Contract between Pacific Gas and Electric Company and Placer County Water Agency

In addition to its obligations to NID, PG&E also supplies water to other entities, including Placer County Water Agency (PCWA). In 1968, PG&E and PCWA entered into a contract that allowed for the sale of some of PG&E's facilities to PCWA as well as for the sale of consumptive water to PCWA from the Drum-Spaulding system. Motion to Lodge Responsive Data to Correct Inaccurate Assertions, filed with FERC April 12, 2002.

Under the Water Supply Contract between Pacific Gas and Electric Company and Placer County Water Agency, PG&E supplies water to PCWA. June 18, 1968 (Attachment C to Motion to Lodge (hereinafter PCWA W.S. Contract)). This contract was amended March 3, 1996 (a.k.a. 1995 Agreement).⁸ These agreements allocate water deliveries in PCWA's Zone 1.⁹ They state that PG&E will make a yearly total of 104,000 acre feet of water available for purchase by PCWA at certain Points of Delivery and PCWA will pay PG&E for that water at rates specified in the contracts. PCWA W.S. Contract; Pacific Gas and Electric Company Hydrodivestiture Draft EIR (November 2000).

Under these contracts, PG&E agrees to make available for purchase at certain points of delivery up to 100,000 acre feet each year prior to July 1, 1991. PCWA W.S. Contract at ¶ 4(a). After July 1, 1991, PG&E must make available a total quantity of water equal to the greater of: (1) 50,000 acre feet, (2) the arithmetic average of the quantities of water purchased or paid for by PCWA in 1988, 1989, and 1990, or (3) that quantity of water, not exceeding 100,000 acre feet, which PCWA wishes to assure itself of receiving in future years and as it specifies in a written notice given to PG&E in 1992.¹⁰ *Id.* at ¶ 4(b). PG&E shall deliver this water at three points of delivery: Above Halsey Powerhouse, Above Wise Powerhouse, and Below Wise Powerhouse. *Id.* at ¶ 4(c). PCWA shall specify the rates of flow for these deliveries, up to the maximum capacities at the respective points of delivery.

PCWA shall pay for this water at rates ranging from \$1.45 per acre foot to \$3.93 per acre foot depending on the point of delivery. *Id.* at ¶ 5(a).

⁸ This agreement is listed in the PG&E Hydrodivestiture Draft EIR. I do not have a copy of this agreement, so I am not sure of the specific modifications. Generally, it modified the 1968 agreement and also transferred to PCWA the Middle Fiddler Green canal below Rock Creek Reservoir and the Upper Bowman Canal and Ragsdale Tunnel, along with several delivery gages, thus relieving PG&E of its obligation to deliver irrigation water.

⁹ PCWA has a Zone 1 and a Zone 2. I believe PG&E supplies water to both zones, but specifics are unclear.

¹⁰ We do not yet have record of how much water PCWA decided to purchase; at the Spaulding tour, Kevin Goishi of PG&E indicated that PG&E sells at least 100,000 acre feet to PCWA.

III. Water Rights

PG&E and NID both have extensive water rights to the upper reaches of the Yuba, Bear, and American River watersheds. The vast majority of those rights are pre-1914 rights, meaning that they were rights acquired before California implemented a mandatory permit system for the acquisition of water rights. Before 1914, actual diversion and use were the only requirements for a valid appropriation. The State Water Resources Control Board (SWRCB), created in 1914, has no jurisdiction over these rights; consequently, pre-1914 rights are virtually free from regulation. Conversation with Brain Coates, SWRCB employee, 12/1/05. Generally, a pre-1914 water right holder files a Statement of Water Diversion and Use, so that the SWRCB can manage those rights when regulating the rest of the system. Id. However, this statement does not definitively establish these rights.

Pre-1914 rights can be challenged if the rights have not already been subject to a stream-wide adjudication finally establishing the rights in a watershed. A challenger can file a complaint with the SWRCB asking that the holder of the right prove their claim to the water. The SWRCB then investigates the claim. If the SWRCB believes that the challenge is legitimate, it will hold a hearing. Eventually the matter could go to the court, the arbiter of such disputes. The water rights holder then must prove that the water has been continuously used since the date of appropriation. The water rights holder must also show that the water has been used for the claimed use, whether that be consumptive or non-consumptive.

Water rights can be storage rights or rights to direct diversion. Storage rights allow water to be stored during the storage season, generally from November 1 to June 1. Direct diversion can be stored as regulatory storage for up to 30 days. Conversation with Laura Vasquez, SWRCB Employee, 12/7/05. Thus, the holder has either 30 days to use the water or release it. Both storage rights and direct diversions can be held for either consumptive or non-consumptive uses.

The water rights of PG&E and NID will certainly be an issue in the relicensing. NID can purchase up to 100,000 acre feet per year from PG&E.¹¹ In addition, PG&E offers at least 100,000 acre feet for sale to PCWA.¹² A brief review of PG&E's water rights in Placer and Nevada counties shows that PG&E has licensed storage rights of approximately 30,000 acre feet per year and 118,000 acre feet of unlicensed pre-1914 storage rights for various uses, including domestic, irrigation, industrial, and power uses.¹³ In addition, PG&E has rights to 1500 cfs of licensed direct diversion for power, 82 cfs licensed direct diversion for power, and 1600 cfs unlicensed direct diversion for power. PG&E also holds rights to about 1000 cfs direct diversion for various uses.

¹¹ Kevin Gioshi on tour

¹² Also double check.

¹³ These figures are taken from the SWRCB Water Rights Information Management System Query Tool, <http://165.235.31.51/login.html>. Some of the rights listed may be "sister" or the same right listed in different ways. This information should definitely be double checked with the actual records.

These figures illustrate that the majority of PG&E's rights are pre-1914 storage rights, which ostensibly can be used for non-consumptive power production as well as consumptive uses such as irrigation and municipal uses. Because PG&E eventually sells the majority of its rights for consumptive uses, the validity of these rights becomes important.