

To: Mr. Jeffrey Parks
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Regarding: Comment Letter – Kilarc-Cow NOP

Dear Mr. Parks –

Thank you for the opportunity to give input to the scoping and EIR process undertaken by your agency for the Kilarc-Cow PG&E hydroelectric projects. I am a resident of the South Cow Creek valley, where my household maintains a riparian water right from South Cow Creek for our domestic use, and we hold an adjudicated water right from South Cow Creek for our agricultural irrigation use. We chose this location as our home with specific reliance on the availability of these water resources, and appreciate your agency's mandate to ensure the fair and beneficial uses of these water resources for all involved.

Specific Water Quality Concerns –

First I would like to quickly address my concerns for my riparian/domestic water use. The quality of the water in South Cow Creek is critical to my household and my neighbors who rely on the water from the creek for our domestic use. Any possible detriment to the quality of that water would directly impact us through our consumption of that water. Though we take necessary measures to filter and treat our domestic water, the materials currently impounded behind the South Cow Creek diversion structure have been in place for over 100 years, and therefore have built up over decades of various conditions throughout the upper watershed, including mining activities that were either unregulated, or regulated to a lesser degree, as to the chemicals used and allowed runoff into the stream system.

While the true presence and extent of possibly noxious materials impounded behind the dam is unknown, all possible measures should be taken to ensure that thorough testing of the impounded materials is done, and continuous and vigilant monitoring of the water quality, if the dam should be removed, must be performed to ensure that no degradation of the water quality in South Cow Creek occurs, or if it occurs that 1) we are notified immediately so that we may protect ourselves from its effects, and 2) the condition is corrected as immediately as possible.

Multiple core samples of the impounded materials from various location behind the dam should be taken and analyzed so that no significant pocket of undetected noxious material might be released. If the dam is removed, continuous monitoring at various locations downstream of the impounded material should be undertaken and those results compared to water quality from above the impounded material's location – at least until the impounded materials have been released from the channel of the stream and made their way throughout the natural watercourse.

I realize this is a significant amount of effort, however, this is a primary concern not just to those of us who drink the water, but to your agency as this is its directive and purpose. Clean drinking water is what this is about. This is an issue which goes directly to the health and welfare of my family and my neighbors and deserves serious consideration and action – addressing this possibility after it might happen would be an enormous disservice to us who rely on your agency to ensure our safe use of our water resources.

Proposed Decommissioning Plan, Alternatives and No Action –

There is an imminent and over-riding issue concerning the proposed decommissioning plan and many of the alternatives examined to date. That issue is the adjudication covering water rights in the Cow Creek drainage. The Cow Creek Adjudication Decree of the Superior Court of California for Shasta County, California In the Matter of the Determination of Rights of the Various Claimants to the Water of Cow Creek Stream System Excepting Clover Creek, Oak Run Creek and North Cow Creek in Shasta County California – No. 38577 – Decree Entered August 25, 1969, in Book 89 of Judgments, page 484 – attached and hereinafter ‘The Adjudication’ – has managed and maintained the various water rights throughout this watershed since its creation. It is very specific in its description and definition of the water supplies and uses, and was well informed by your agency through the Cow Creek Adjudication Report on Water Supply and Use of Water on Cow Creek Stream System Shasta County, California of May 1965 – attached and hereinafter ‘the Water Supply Report.’

Both of these documents relate the interconnected nature of PG&E’s South Cow Creek facility with the water supply available to other members of the Adjudication. The Adjudication is not ambiguous in its dictum that no member of the Adjudication is allowed to take any action, direct or indirect, that will obstruct or interfere with the rights of the other parties to the Adjudication (the Adjudication at para. 30, pg. 190.)

PG&E’s proposed decommissioning plan and the FERC (and your) Alternative 1 both openly contemplate the removal of the PG&E diversion structure on South Cow Creek. That removal would directly impact the adjudicated diversion number 73 at the base of Hooten Gulch – also known as the Abbott Ditch diversion (see Superior Court Judge Halpin’s decision of January 31, 2012 attached). It is well documented in the Water Supply Report that the water available at diversion 73 consists primarily of the tailrace water from the South Cow Creek powerhouse as well as a small amount of irrigation runoff (The Water Supply Report, Table A-4 Description of Diversion Systems – pgs. A-95 and A-96.) Your agency’s Water Supply Report, and therefore the Adjudication as well, foresaw and contemplated these (still current) water supply conditions and they are part and parcel of the Adjudication. Therefore they are subject to the effect of the decree, which bars any party from interfering with the rights of any other party to the Adjudication.

This being the case, both PG&E’s proposed decommissioning plan, and the Alternative 1 from FERC and your scope should be removed from consideration. Instead, alternatives must be developed which respect the effect of the decree as a first condition, and then work towards the stated goal of releasing PG&E from their license to generate hydropower with these facilities. To waste time, money and resources investigating proposals that are on their face insufficient and contrary to the stated law in the decree only exacerbates an already complicated situation.

In addition, any 'No Action' alternative that may be developed should also ensure that the current decreed water supply remains in place – while I do not eliminate the possibility that the water right at diversion 73 might be made whole through a means other than the current delivery method, that situation, or the assumption of that situation, obviously would not meet the requirements of a 'No Action' alternative. An accurate and feasible 'No Action' alternative must be developed, first and foremost, so that the remaining alternatives can be realistically measured against that baseline condition – without a proper measure by which we can judge and compare decommissioning plans and alternatives, your process quickly devolves, albeit unintentionally, into relativistic arguments among the many agencies, NGOs and private parties involved in this process. We have all been through that already with the FERC.

Many alternative proposals were forwarded throughout the FERC process (see the attached synopsis of FERC filings provided by the Tetrick Ranch and the FERC filings to which it refers, as well as the entire FERC record), and in private negotiations. Due to what can only be categorized as the agencies' pre-decisional adherence to the original proposed destruction of the South Cow Creek diversion they were all rejected immediately without any assessment what so ever. Agencies openly claimed that they would never allow any such alternative to come into being without so much as studying whether or not their assumptions (or the claims of the alternatives for that matter) were valid. They threatened obstruction through their state mandated conditioning authority over any new project that might seek to use the water resources currently producing hydropower. If this isn't pre-decisional activity, I'm not sure what is. Even despite the obvious legal ramifications of their proposed action the agencies and PG&E steadfastly refused to consider any alternative other than the proposed decommissioning plan.

Given the agencies' arbitrary intransigence the public offered an array of alternatives, each giving up more and more public benefit while trying to maintain at least the bare minimum of respect for legally mandated public use of the resources – the latest of which is attached as the Tetrick Ranch Technical Solution. All have been rejected immediately by the agencies. It is time to start anew with the proper respect due these publicly proposed alternatives.

We participated, with Shasta County, Evergreen Shasta Power, Tetrick Ranch and Sierra Pacific Industries, in a coalition that provided an alternative that was ignored by the FERC (see the FERC synopsis referred to above), and pre-decisionally rejected by the agency's with threats of obstruction through their conditioning authority over the use of water resources. However, nothing bars the SWRCB from taking that proposal up, and requiring legitimate analysis of the claims from both sides of the issues in order to arrive at a valid assessment of such a plan. The agencies must come into the open, and participate in the process before the board, in order for their claims (and the public's) to be legitimately and fairly assessed.

I would encourage the SWRCB to take a fresh look at each alternative, and to indulge in the creation of alternatives that might combine various elements of previously offered alternatives and solutions. Only alternatives that are feasible should merit the work of analysis and serious consideration – feasibility is key, and a true, lasting solution to the decommissioning must be feasible in the short and long term – that is to say, that all considerations, including any short term and ongoing costs, must be accurately estimated and assigned in an equitable manner.

Effects on Adjudicated Diversion 73 and Project Scope –

During the FERC's process a serious flaw in scope emerged. While the agency considered the decommissioning plan and alternatives that left diversion 73 without a water supply, that agency failed to consider the follow on effects that action would have. Diversion 73 irrigates 400+ acres of land through the summer months, which makes the year round operation of ranching possible on the larger ranches which surround their irrigated sections. By removing irrigation on these smaller sub-sections of these ranches, you effectively eliminate the possibility of maintaining year round ranching operations, and introduce enormous expenditures in finding and leasing other irrigated land in order to maintain any operations. This effect cannot be ignored or underestimated. The increased expenditure would result in the cessation of ranching, and therefore the livelihood, of most of the ranches served by diversion 73.

While the impacts to agriculture and ranching are egregious, they are not the worst effect. Diversion 73 also directly serves the domestic water supply to several households in the South Cow Creek valley. While the FERC chose to 'assume' a well or other replacement supply, they were mistaken about the feasibility of that assumption. Serious study of the hydrology of the South Cow Creek valley shows that the Chico formation that lies just under the valley floor traps the percolated runoff from irrigation and allows for some of that water to be re-pumped to the surface for either domestic or secondary irrigation use. This is accomplished via shallow wells. Without the original supply from diversion 73, this would not be possible. In addition, wells that have been drilled through the Chico formation have encountered saltwater, among other elements, which renders replacement of domestic water supply infeasible.

The scope of the SWRCB examination of this decommissioning process needs to include these easily foreseeable effects, and give them appropriate weight – these are not mere inconveniences to our lifestyle and livelihood - they are more than significant impacts – these effects would destroy the lifestyle and livelihood of many residents here in the valley, deteriorate the lifestyle and livelihood of those that remain, drastically reduce the value of the land in the valley, and have follow-on effects in the larger community's tax base, etc. While the FERC chose to minimize and ignore these effects, they arbitrarily and glibly praised and over-weighted tenuous 'benefits' from obliterating the water supply to this valley. They committed a serious disservice to the residents of this valley by engaging in the relativistic arguments I mentioned earlier, and fomenting only one perspective. The FERC ignored the very environmental impacts they were tasked with identifying and assessing. Your agency is afforded an opportunity to rectify that disservice and deal fairly and equitably with all sides of this issue.

Environmental Effects of Discontinued Water Service to Adjudicated Diversion 73

While most agencies involved have quickly *assumed* environmental benefits from the decommissioning plan, no agency to date has assessed the environmental impact to the entire ecosystem in the South Cow Creek valley and Hooten Gulch. The robust riparian habitat here is maintained in Hooten Gulch by the natural flow of the hydroelectric tailrace water, while the habitat throughout the rest of the South Cow Creek valley is maintained by runoff from the irrigation practices served from diversion point 73. The removal of this critical supply during the summer months would obviously disturb that balance that has been in place for well over 100 years. The protection of these habitats is well within, indeed the target of, our state's water regulating laws.

While some agencies might still claim that the destruction of the current ecosystem is fine, it cannot be overlooked as an impact of the decommissioning plan; the probable requirement to at least mitigate for this disaster must be measured where possible and estimated where measurement is not possible. It must be assessed and given equal standing and weight in measuring the overall impact of this plan. In an era when irrigators who wish to repair water wasting leakage in their ditches and flumes are denied that ability because the trickling waters have created 'wetland', I find it grotesquely capricious and arbitrary that agencies would ignore the drying up of Hooten Gulch, of hundreds of acres of pasture and hundreds of acres of riparian habitat. Fairness and equity demand that these obvious impacts be dealt with consistently. Mitigation laws were not created so that government agencies can use them capriciously against anyone who disagrees with their assumptions – they were created to protect the rights to, and beneficial uses of, our state's limited resources by the people, and to discourage or correct the damages inflicted by actions such as those proposed by PG&E.

PG&E's Abandonment Problem –

PG&E has modified their original intention to change the nature of their non-consumptive, power generation only, water right to one for in stream use only. This clearly would have required redress and modification of the Adjudication. They now state that they intend to abandon their water right and thereby achieve the same goal. However, the core issue is still at hand: modification of the natural flow of the South Cow Creek watercourse is not to be taken lightly or without consequences.

PG&E's tailrace waters are returned to Hooten Gulch, not directly into the flow of South Cow Creek's main channel. Hooten Gulch is a tributary to South Cow Creek in the same watershed. PG&E's tailrace water is therefore clearly natural flow. In addition, the Adjudication clearly defines natural flow:

5. Natural Flow

The term "natural flow" means such flow as will occur at any point in a stream from the runoff of the watershed which it drains, from springs and seepage which naturally contribute to the stream, and from waste and return flow from dams, conduits, and irrigated lands, as distinguished from water released directly from storage for rediversion and use, or water imported from another watershed which is released directly to the natural channel for conveyance to place of beneficial use (the Adjudication, pgs. 3-4, Definitions-Natural Flow.)

Outside of the Adjudication it is also well settled in California water law that a watercourse, though initially made artificially, or initially increasing an existing tributary watercourse as in this case, may by long continued use become a natural watercourse and that others have all the rights to the waters therein as they would in a natural watercourse (see *Chowchilla Farms v. Martin*, 219 Calif. 1, 18, 25 Pac. (2d) 435 (1933) and *Smith v. Los Angeles*, 66 Calif. App. (2d) 562, 579 153 Pac. (2d) 69 (1944) as referenced in The California Law of Water Rights, Wells A. Hutchins (1956) with Harvey O. Banks, State Engineer of California, and in cooperation with the United States Department of Agriculture – loc. Watercourses – Watercourse Originally Made Artificially, pg. 32) .

Clearly, the watercourse in Hooten Gulch as it stands today is a natural watercourse, and must be treated as such when assessing the foreseen impacts of this public agency's decommissioning plan. The impacts to the natural flow of the South Cow Creek watercourse contemplated in PG&E's

decommissioning plan must not be obfuscated by their contrivance to simply 'abandon' their water right.

Abandonment of an appropriative right requires intent and action on the part of the water right holder. Because PG&E holds a non-consumptive water right for hydroelectric production only, it might be construed that PG&E can abandon their water right simply by intentionally ceasing to produce hydroelectricity with that water right – however, the follow on action of destroying their diversion which maintains the natural flow in Hooten Gulch must be dealt with separately, and be made subject to the overriding laws of the state and the Adjudication.

The MOU and Agency Positions –

The March 22, 2005 MOU signed by your agency, among other agencies and non-government agencies, has many issues. Attachment A to the MOU lists subject areas and desired conditions for the decommissioning of this project. Among Attachment A's desired conditions are listed:

3. Disposition of Canals and Spillways (includes waterways, tunnels and flumes)
 - b) Preservation of riparian habitat during/after deconstruction wherever possible
7. Disposition of Water Rights
 - b) Other water right holders (sic) rights are preserved
 - c) All water rights are preserved subject to the law
 - d) Water rights are enforceable and permanent
17. Deconstruction Activities
 - a) Current water right holders continue to receive their water

In addition, the body of the MOU itself makes the following statements:

3. Decommissioning

3.2 If FERC authorizes or orders the Company (PG&E) to decommission the Project, upon a final order from FERC ending Project power operations, the Company intends to transfer its appropriative water rights held for operations of the Project ("water rights") to a resource agency or other entity that: 1) agrees to use the water rights to protect, preserve, and/or enhance aquatic resources, as authorized by applicable laws and regulations, such as water code section 1707; and 2) is acceptable to the Parties. Additionally, prior to transferring of its water rights, the Company will work in good faith with other non-Parties to resolve potential water rights issues with the goal of having the water rights used to preserve, protect and/or enhance aquatic resources.

3.6 If the Company files, or is ordered by FERC to file a surrender application and a decommissioning plan, the Parties will work collaboratively to develop the surrender schedule and decommissioning plan. The decommissioning plan will identify and refine

the actions necessary to address the subjects and desired conditions in Attachment A following decommissioning of the Project and will be consistent with legal requirements and obligations to FERC, and other applicable state and federal laws. Decisions on actions to address the subjects and desired conditions in Attachment A will be made by consensus of all Parties involved in the decommissioning plan's development.

As stated above, when conflicts were identified between paragraph 3.2 and the Adjudication (i.e., the non-consumptive nature of PG&E's water right vs the ability to transfer and or designate another use for those water rights) PG&E changed their intended disposition of those water rights and claimed a desire to abandon those rights. Please refer to my discussion of the issues with abandonment of the water rights above. However, it should be noted that to date, PG&E has not worked in good faith to address the water rights concerns I have outlined above. PG&E has instead consistently denied the existence of any impacted water right. In addition, when I petitioned the Superior Court in Shasta County to address a clerical error that misidentified the exact location of diversion 73, PG&E fought that correction in court and claimed that it was motivated by a desire to gain an advantage in the proceedings before us now (see again, Superior Court Judge Halpin's decision of January 31, 2012 attached.) This clerical description of the location did nothing to effect the actual physical location of diversion 73, which had been (and continues to be) visited by dozens of PG&E representatives when assessing the project facilities. Clearly, this is not working in good faith with impacted water rights holders. Instead it demonstrates a need for vigilance and close scrutiny of PG&E's statements and actions, and a review of whether or not the MOU agreement is being adhered to by that company. It also demonstrates a lack of consensus building (as claimed in MOU para. 3.6 above) among the Parties, as until now, there is no public record of PG&E consulting with the other parties to the MOU before taking this aggressive tack.

When the FERC did issue an order for PG&E to submit their license surrender application and develop a decommissioning plan (as foreseen in paragraph 3.6) the public was allowed to raise their concerns and bring them to PG&E's and the agencies' attention. However, again, PG&E ignored them and did not bother to refine or address the impacted desired conditions in the MOU. PG&E's repeated denial of any impacted water right is a legally disagreeable position, and has been pointed out as such to PG&E by me personally as well as through legal representation. Applicable state law and the Adjudication itself has been repeatedly pointed out to PG&E as evidence that some negotiation or redress is needed. Again, to date, no public evidence has been shown that they have taken this issue up with the parties to the MOU; and indeed your agency would surely be aware of any such efforts as one of the parties to the MOU and the chief agency concerned with water rights. In their absence, again, I can only urge the SWRCB to closely scrutinize PG&E's statements and actions in light of what was agreed in the MOU and determine that the terms of the MOU cannot be considered upheld in this process. Instead, the SWRCB must take up the charge of carefully and meticulously determining when and where they perceive possible conflicts of the decommissioning plan with state water law and the court's decree (the Adjudication) and take appropriate action to enforce and protect those laws.

The agencies that directly advocate for the decommissioning plan as it stands in its draft form (and the FERC through its refusal to address any public concerns in its draft and final EIS) have repeatedly ignored public concerns over water rights, fire suppression, disabled access to recreation (including citation of the ADA act) and environmental impacts. No plan or offer has been forwarded by any agency nor by PG&E to address any of the public's concerns. Many varying excuses have been given: 'trust us, we'll do something later', or 'it's not my agency's problem,' or 'it's not the proper time in the process to address

that, you will have to wait until the problem has occurred.’ None of these responses is in keeping with the spirit of the MOU, nor for that matter with the spirit of the laws under which these public input processes are required. The public is running out of opportunities to have their concerns addressed and will be left with only legal challenges to the entire process. None of the prospective outcomes of legal action after this proposed decommissioning might receive approval are better than addressing these hard issues now, in the process where they are intended to be addressed.

General Process Comments

While I appreciate the large amount of time, effort and money that have gone into this decommissioning process thus far, it needs to be drastically re-done. Instead of starting with foregone conclusions and assumptions about the final state of the project, all parties must come to the table and lay out their concerns and issues. The major sticking points, legal and otherwise, should be addressed first. If this is done, the rest of the pieces of the decommissioning can and will fall into place. I do not believe that it is impossible for PG&E to decommission this project, and I do support PG&E’s desire to be relieved of the project.

I also feel that the reason why all of the public’s input has been ignored thus far is because this process began with foregone assumptions about how the project would be decommissioned and the final state of the resources was ‘pre-ordained’ by PG&E and other agencies. This ‘cart before the horse’ approach must be undone if the public’s input is going to be addressed as is required by the laws that govern this process, in a fair and equitable way. Blind adherence to the original proposed decommissioning plan in the face of obvious and significant legal issues can only be seen as evidence of pre-decisional activity by the agencies and PG&E. Both the FERC process and your agency’s CEQA process specifically bar such pre-decisional activity and it must be rooted out for these processes to accomplish their public benefit goals.

Once the major issues – legal, public safety, public use, public recreation and environmental – are properly dealt with up front, the job of balancing the various special interest demands will be easier, and bound by a healthy process that treats the major public concerns with the respect they deserve. I believe that the balancing of the various trade-offs required to clear the path for PG&E’s desired outcome is the major accomplishment that your agency can reach through a fair and equitable process, including if necessary, mandatory settlement negotiations with deadlines, reliant on solid findings of fact that provide relief for the public’s valid and meaningful concerns.

Thank you for the opportunity to submit these comments, and I look forward to participation in the rest of your agency’s process towards a fair outcome for all concerned.

Respectfully submitted,

April 22, 2013

Erik Poole

Attachment A

Project 606 FERC filings by Tetrick Ranch, Shasta County, the Abbott Ditch Users, Evergreen Shasta, and Erik Poole.

Title	Date	eLibrary Accession Number
Comments on Final Environmental Impact Statement of Tetrick Ranch under P-606.	10/14/11	20111014-5044
FOIA Responses from NMFS and U.S. Fish & Wildlife Service submitted by Tetrick Ranch and Evergreen Shasta Power, LLC under P-606-027.	11/16/10	20101116-5054
Motion to Correct Erroneous Statements in PG&E "Answer" and Statement of Corrections and Request for Waiver, if Necessary; or in the Alternative, Motion of Tetrick Ranch and Evergreen Shasta Power, LLC to Reject PG&E's "Answer" under P-606-027.	10/12/10	20101012-5319
Comments on DEIS of Erik Poole / ADU under P-606.	8/25/10	20100825-5065
Motion to Intervene of Evergreen Shasta Power, LLC under P-606.	8/25/10	20100825-5089
Comments of Tetrick Ranch and Evergreen Shasta Power, LLC, on Draft Environmental Impact Statement for the Kilarc-Cow Creek Hydroelectric Project License Surrender and Proposed Decommissioning under P-606.	8/25/10	20100825-5114
Shasta County submits request to reschedule the public meeting until mid-August re: the DEIS Kilarc-Cow Creek Project under P-606.	7/6/10	20100706-0023
Shasta County Board of Supervisors' notice of public hearing under P-606.	7/6/10	20100708-0022
Comment of County of Shasta (CA) under P-606.	6/30/10	20100630-5086
Response of Tetrick Ranch under P-606.	6/24/10	20100624-5128
Reply Comments of Evergreen Shasta Power, LLC, Tetrick Ranch, Abbott Ditch Users, Shasta County, and Sierra Pacific Industries, Inc. under P-606.	2/22/10	20100222-5104
Motion to Intervene Out-of-Time of Evergreen Shasta Power, LLC under P-606.	1/22/10	20100122-5121

Title	Date	eLibrary Accession Number
Motion Requesting Settlement Process and for Prompt Action under P-606.	1/22/10	20100122-5124
Offer of Settlement of Tetrick Ranch, the Abbott Ditch Users, Shasta County, Sierra Pacific Industries, Inc., and Evergreen Shasta Power, LLC under P-606.	1/22/10	20100122-5126
Comments of Erik Poole re: Kilarc- Cow Creek License Surrender Proceedings under P-606.	1/19/10	20100119-0033
Follow-Up Comments of Erik Poole to 20091230-5001 under P-606. Letter dated: 1/8/2010.	1/14/10	20100114-5007
Response of Erik Poole under P-606.	12/30/09	20091230-5100
Response of Tetrick Ranch to Comments of California Department of Fish and Game under P-606.	12/30/09	20091230-5103
County of Shasta submits response to the Request for Information from Robert H. Grieve, of the Commission 's Division of Hydropower Administration and Compliance dated 12/16/09 re: Kilarc-Cow Creek Hydroelectric Project under P-606.	12/24/09	20100104-0103
Response to Data Request of Shasta County, California under P-606.	12/16/09	20091216-5110
Comments of Evergreen Shasta Power, LLC re: Kilarc & Cow Creek under P-606.	11/16/09	20091116-0231
Comments of an Individual re: Kilarc- Cow Creek Hydroelectric Project under P-606.	11/16/09	20091116-0237
Comment of Tetrick Ranch, et al. under P-606.	10/30/09	20091030-5063
Comment of Shasta County under P-606.	10/19/09	20091019-5093
Scoping Comments and Information submission of Tetrick Ranch and the Abbott Ditch Users re: Pacific Gas and Electric Co under P-606.	10/16/09	20091016-5088
Answer and Supplemental Comments of Tetrick Ranch and Abbott Ditch Users, etc. under P-606.	8/25/09	20090825-5082

Title	Date	eLibrary Accession Number
Comment of Tetrick Ranch, et al. under P-606.	7/14/09	20090714-5093
Motion to Intervene of Tetrick Ranch under P-606	7/13/09	20090713-5165
Tetrick Ranch requests a meeting with FERC in connection with Pacific Gas and Electric Company's Kilarc-Cow Project under P-606.	6/15/09	20090619-0071
Comments of Steve & Bonnie Tetrick re: Pacific Gas and Electric Company's Kilarc-Cow Creek Project under P-606.	6/12/09	20090612-5142
Comments on P-606 PG&E DLSA submitted by Erik Poole on behalf of the Abbott Ditch Water Users (ADU) under P-606.	11/7/08	20081107-5043
Comments of Mr. and Mrs. Steven Tetrick, owners of the Tetrick Ranch, regarding Pacific Gas and Electric's South Cow Creek power house under P-606.	9/25/07	20071016-0041
Erik Poole requests that he be added to the mailing list for information re: filings and submissions for Pacific Gas and Electric Company's Kilarc-Cow Creek Hydroelectric Project under P-606.	5/29/07	20070601-0026
Comments of Shasta County Department of Resource Management concerning the First Stage Consultation Package dated June, 2002 re: Kilarc-Cow Creek Hydroelectric Project Relicensing under P-606.	7/23/02	20020812-1261
Shasta County submits change of address to update the official mailing list re: Pacific Gas & Electric Co., et al. under P-2667, et al.	5/9/02	20020514-0157

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA**

Hon. Jack Halpin

Dept. 12/ct

#38577

IN RE COW CREEK WATER RIGHTS

NATURE OF PROCEEDINGS:

**RULING ON MOTION TO AMEND
OR MODIFY COW CREEK ADJUDICATION
DECREE, SCHEDULE 2:**

Erik Poole moves the Court for an order modifying the legal description of a point of diversion (“POD”) set forth in the August 25, 1969 Decree determining rights of various claimants to the water of Cow Creek in Shasta County. Poole, a successor in interest to a portion of the POD, contends that the legal description of the Abbott Ditch POD as set forth in “Schedule 2” attached to the Decree, is erroneous. Specifically, Poole claims that the bearing and distance from the reference corner identified in “Schedule 2” incorrectly places the Abbott Ditch POD on a hillside away from any water source, and does not comport with the Decree’s language used to describe the POD. The correct location, according to Poole, is actually located at the head of Abbott Ditch, where it intersects with Hooten Gulch. Poole claims this is the actual and current location of the POD and it has existed there since before the 1969 Decree, and this is the same location contemplated by the Decree.

In opposition to the motion, Pacific Gas and Electric Company (“PG&E”) argues that Poole’s motion seeks to move, rather than correct, the location of the Abbott Ditch POD. PG&E contends that while the legal description set forth in “Schedule 2” may be erroneous, the “correct” location proposed by Poole is not the location set forth in the Decree. Instead, PG&E contends the true purpose of Poole’s motion is to move the POD location in order to gain an advantage in ongoing disputes involving PG&E’s plan to decommission a hydroelectric power project. PG&E currently diverts water from South Cow Creek through a powerhouse and subsequently along Hooten Gulch until it reflows into South Cow Creek. According to PG&E, by moving the Abbott Ditch POD to Hooten Gulch, instead of at South Cow Creek as specifically identified in the Decree, Poole can better argue that his water rights are being impacted by the opposed decommission of the powerhouse. PG&E alternatively argues that the Court lack jurisdiction to modify the Decree because it makes substantive changes to parties’ rights by moving the POD, and it impacts the parties’ riparian and appropriative rights.

The primary issue on this motion is whether the bearing and distance set forth in "Schedule 2" to the 1969 Decree accurately reflects the Court's intended location of the Abbott Ditch POD. The declaration of engineer Ed Whitson, which identifies the POD's legal description as on a hillside a distance from any water course. PG&E's concession that the legal description "may indeed be incorrect", is sufficient to lead to the conclusion that "Schedule 2" incorrectly states the bearing and distance of the POD. The secondary, and more complex, issue is whether Poole's proposed "corrected" legal description comports with the Decree.

Paragraph 27 of the 1969 Decree entitles various claimants to divert water "from the natural flow of the east channel of South Cow Creek as set forth in Schedule 6 though Abbott Ditch, at a point designated on SWRCB map as Diversion 73, as described in Schedule 2...." The SWRCB map, judicially noticed by the Court, referred to in the Decree, places Diversion 73 (the Abbott Ditch POD) along a line that the map's legend indicates is a creek, and at the head of Abbott Ditch. Diversion 73's placement on the SWRCB map also appears to match Poole's proposed corrected location of the POD, as demonstrated on the aerial map prepared and produced by PG&E in opposition to the motion, attached as Exhibit "A" to Wilson Declaration. Nonetheless, PG&E views the line in which Diversion 73 is located on the SWRCB map, as the lower portion of Hooten Gulch just before its confluence with South Cow Creek, and *not* as a second, smaller channel of South Cow Creek. Since the Decree only entitles the claimants the right to divert water from South Cow Creek, PG&E argues that there is no right to water from Hooten Gulch, and therefore the POD could not be located along Hooten Gulch as proposed by Poole. Upon lengthy review of the SWRCB map, the 1969 Decree, and the various historical documents produced by the parties, it appears that PG&E's characterization of the SWRCB map with respect to South Cow Creek at the time of the Decree, is mistaken.

The SW $\frac{1}{4}$ of Section 6, T31N R1W on the SWRCB map depicts South Cow Creek as splitting into two channels just above Diversion 72. The easternmost channel continues on until it intersects with Hooten Gulch, and then shortly thereafter rejoins the westernmost channel as one watercourse. The head of Abbot Ditch, as well as the designated location of Diversion 73, is along a portion of the eastern channel of the creek *after* its intersection with Hooten Gulch, but *before* its confluence with the western channel. This reading of South Cow Creek's course at the time of the Decree is supported by various documents.

The October 1911 Notice of change of point of Diversion of Water Right, attached as Exhibit "A" to Holder Declaration, describes the diversion of water from South Cow Creek "in to a slough or a natural water course about 20 feet wide, thence dow[n] said slough or water course to the Junction of Hooten Gulch [...] in a southwesterly direction to a point [...]" at which the water is re-diverted into a canal.

The December 1911 map of the Abbott and Jones Irrigation Canal, attached as Exhibit "B" to the Holder Declaration, also depicts South Cow Creek as dividing into two channels, in which water is described as "diverted by means of a dam across South Cow

Creek". The eastern channel is identified on the map as a "slough" that converges with Hooten Gulch at approximately the same place that South Cow Creek Road intersects Hooten Gulch. The eastern channel/slough and Hooten Gulch continue on the same course until rejoining the western channel of South Cow Creek. Again, the head of Abbott Ditch, the purported location of the POD, is located along a portion of the eastern channel of the creek *after* its intersection with Hooten Gulch, but *before* its confluence with the western channel. This demonstrates that at the time of the SWRCB map, in the SW ¼ of Section 6, T31N R1W, South Cow Creek divided into two channels consisting of a 20-foot wide eastern channel and a larger western channel, which converge just below the head of Abbott Ditch.

Whether the east channel of South Cow Creek, above the intersection of Hooten Gulch exists today, is unknown, but irrelevant for purposes of determining the intended POD location according to the 1969 Decree. At the time of the Decree, the water course at which Abbott Ditch, and the purported POD were located, was not solely Hooten Gulch, as PG&E claims. It was also considered a natural water course extending from South Cow Creek above Hooten Gulch. The SWRB's 1965 Report on Water Supply and Use of Water, for which the Court takes judicial notice, clearly confirms this in its description of the source of water for Diversion 73: "Water available for diversion consists principally of water discharged into Hooten Gulch through the South Cow Creek Powerhouse tailrace, although a small amount is also contributed by the eastern channel of South Cow Creek..."

Having determined that South Cow Creek consisted of a west and east channel in the area in which Poole claims is the correct POD location, the Decree's description of the Abbott Ditch POD matches the location of Diversion 73 on the SWRCB's map. This also explains the Decree's specification of the right to divert water from the natural flow of the *east* channel. PG&E points out that the POD has historically been in locations other than the head of Abbott Ditch. The Court does not disagree, but concludes that those historic locations pre-dated the location of the POD that was contemplated by the SWRCB and the 1969 Court. Proof of Claim No. 64, submitted by the Abbotts and contained in the SWRCB's Abstract of Proof of Claims, attached as Exhibit "C" to Holder Declaration, does nothing to refute the location of Diversion 73 as being at the head of Abbott Ditch. In fact, it confirms that the Abbotts claimed water from South Cow Creek through Diversion 73 as identified on the SWRCB's map.

The reference to a claim for water from "South Cow Creek", as opposed to specifying which channel, does not provide proof that the POD was in a location other than at the head of Abbott Ditch. The June 1911 and August 1911 notices of appropriation, attached as Exhibit "A" to Holder Declaration, fail to refute Poole's proposed corrected location of the POD. The notices' language that the claimants take water from "South Cow Creek" at a point on the "south side of the said stream" may be describing the taking of water from the south side of the east channel of South Cow Creek. While the October 1911 Notice of change of point of diversion of Water Right, Exhibit "A" to Holder Declaration, does seek to change the POD to a location upstream where South Cow Creek splits into the west and east channels, this notice is not

referenced anywhere within the SWRCB's Abstract of Claims or the 1969 Decree, and therefore appears to not be a document considered by the SWRCB or the Court in determining the location of Diversion 73.

The 2004 letter to PG&E, attached as Exhibit "F", identifies a POD north of Diversion 73, but specifies such existed "prior to 1907." The 2009 Affidavit of Steve Tetric attached as Exhibit "J" also recognizes an "original diversion" north of the confluence of South Cow Creek and Hooten Gulch, but before the construction of the Kilarc-Cow Creek Project. The 2008 letter by Erik Poole, attached as Exhibit "H", also recognizes a "historical diversion point on South Cow Creek" but describes it having been not used in more than 100 years.

It is clear from the language of the 1969 Decree describing the location of the Abbott Ditch POD, and the location of Diversion 73 as identified on the SWRCB map incorporated by reference into the 1969 Decree, that the POD was intended to be located where Abbott Ditch diverts from the east channel of South Cow Creek, but that due to clerical error, the bearing and distance provided in "Schedule 2" was erroneous. Code of Civil Procedure section 473(d) provides that the court has the power to "correct clerical mistakes in its judgment...so as to conform to the judgment...directed."

Poole has submitted, based upon the calculation of Ed Whitson, the corrected bearing and distance for the POD.

In addition Paragraph 29 of the Decree reserves allows the court "to review this decree and to change or modify the same as the interests of justice may require." PG&E contends the proposed modification is a substantive change for which the Court lacks jurisdiction, the proposed change does not seek to move the POD. The Court concludes that the POD identified in the Decree was always intended to identify the POD location proposed by Poole. Modifying the bearing and distance in "Schedule 2" does not move the POD from South Cow Creek to Hooten Gulch (which PG&E fails to identify also as the east channel of South Cow Creek), but rather corrects the "Schedule 2" error so as to conform to the judgment directed. The correction of this error does not modify or materially alter the rights of any of the parties.

If the POD no longer provides water from South Cow Creek, so that the right to diversion no longer exists, this evidence has not been placed before the Court, and the determination of rights under the Decree is not at issue in this request to change the location of the POD.

The Court finds that the corrected bearing and distance of the POD proposed by Poole accurately reflects the location intended by the 1969 Decree.

The motion is granted. The Court will execute the Order to Amend or Modify the Cow Creek Adjudication Decree of the Abbott Ditch Point of Diversion in "Schedule 2" to reflect a N65° 0938"E bearing from reference corner, and a 1275 foot distance from reference corner.

Dated: January 30, 2012



JACK HALPIN
Superior Court Judge

CERTIFICATE OF MAILING and/or FAX

State of California, County of Shasta

I, the undersigned, certify under penalty of perjury under the laws of the State of California that I am a Deputy Court Clerk of the above-entitled court and not a party to the within action; that I mailed a true and correct copy of the above to each person listed below, by depositing same in the United States Post Office in Redding, California, enclosed in sealed envelopes with postage prepaid and/or FAX at the number(s) listed.

Dated: January 31, 2012

, Deputy Clerk

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