

COMMITTEE CONFERENCE  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of: )  
 )  
Application for Certification for ) Docket No. 09-AFC-8  
the Genesis Solar Energy Project )  
----- )

**DOCKET**  
**09-AFC-8**

DATE	<u>SEP 08 2010</u>
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CALIFORNIA ENERGY COMMISSION  
1516 NINTH STREET  
SACRAMENTO, CALIFORNIA

WEDNESDAY, SEPTEMBER 8, 2010

1:10 P.M.

Reported by:  
John Cota

Transcribed by:  
Diana Sasseen

1 APPEARANCES

2 HEARING OFFICER

3 Kenneth Celli

4 COMMITTEE MEMBERS

5 James D. Boyd, Presiding Member

6 Robert B. Weisenmiller, Associate Member

7 Sarah Michael, Advisor to Commissioner Boyd

8 Eilleen Allen, Advisor to Commissioner Weisenmiller

9 Jennifer Jennings, Public Advisor

10  
11 STAFF

12 Christine Hammond, Staff Counsel

13 Mike Monasmith, Project Manager

14 APPLICANT

15 Scott Galati, Esq., Galati Blek, LLP

16 Ken Stein, Nextera

17 Meg Russel, Nextera

18  
19 INTERVENORS

20 Rachael E. Koss, Esq., Adams, Broadwell, Joseph & Cardozo

21 Lisa Belenky, Center for Biological Diversity  
22 (via telephone)

23 ALSO PRESENT

24 Magdalena Rodriguez, California Department of Fish

25 Tannika Englehard, U.S. Fish & Wildlife Service

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1 MS. RUSSEL: Meg Russel, business development  
2 director, project director.

3 PRESIDING MEMBER BOYD: Very good. Thank you.  
4 Staff?

5 MS. HAMMOND: Christine Hammond. I'm covering  
6 for Caryn Holmes and Robin Mayer.

7 And to my right is Mike Monasmith, the project  
8 manager.

9 PRESIDING MEMBER BOYD: Thank you.

10 And how about our intervenors?

11 CURE.

12 MS. KOSS: Good afternoon. Rachael Koss for  
13 California Unions for Reliable Energy.

14 PRESIDING MEMBER BOYD: Good afternoon, Rachael.  
15 Californians for Renewable Energy, or CARE.

16 Mike Boyd, are you out there?

17 He is not.

18 Intervenor Tom Budlong, are you or Mr. Silver on  
19 the phone?

20 Well, I know the Center for Biodiversity is  
21 there.

22 Ms. Belenky, do you want to say hello?

23 MS. BELENKY: Yes, hi. This is Lisa Belenky at  
24 the Center for Biological Diversity. And Ileen Anderson  
25 was unable to attend today because she is at the DRECP

1 meeting down in Ontario.

2 PRESIDING MEMBER BOYD: Okay. How's the weather  
3 in San Francisco, Lisa?

4 MS. BELENKY: It's a lovely day here.

5 PRESIDING MEMBER BOYD: Oh, you sent it all over  
6 here then. It's cloudy and dark.

7 Okay. Are there any elected officials out there  
8 who want to be identified? State, county, local  
9 jurisdiction, elected folks?

10 How about federal government agencies such as  
11 BLM, Fish & Wildlife Service, others? Anyone want to  
12 identify themselves?

13 MS. RODRIGUEZ: Magdalena Rodriguez, Fish & Game.

14 PRESIDING MEMBER BOYD: Oh, thank you.

15 MS. ENGLEHARD: Tannika Englehard, Fish &  
16 Wildlife Service.

17 PRESIDING MEMBER BOYD: Oh, very good.

18 Could you repeat your name?

19 MS. ENGLEHARD: Tannika Englehard.

20 PRESIDING MEMBER BOYD: All right. Mr. Celli is  
21 typing your name in as fast as he can into his computer  
22 here.

23 Do we have any regional agency folks, such as the  
24 Mojave Desert Air Quality Management District  
25 representatives?

1 County folks of Riverside County?

2 City folks such as Blythe or others?

3 Other state regional folks such as the water  
4 board? And we just got Fish & Game.

5 Okay. It's a smaller group. And I was about  
6 ready to introduce our public advisor, and I don't see her  
7 back here at the moment, but Jennifer Jennings or her  
8 staff are usually around.

9 Okay. I'm going to now turn the hearing over to  
10 Mr. Celli to talk about the PMPD, its errata, and then  
11 oversee our discussion of the materials we've received on  
12 the subject.

13 Mr. Celli.

14 HEARING OFFICER CELLI: Thank you, Commissioner.  
15 Thank you, Commissioner Boyd.

16 The notice of availability of the PMPD required  
17 that the parties file written comments on or before  
18 September 20th, of 2010. The Applicant filed comments or  
19 draft comments on the PMPD on September 7th, 2010. None  
20 of the other parties have filed comments yet; is that  
21 correct?

22 Correct from CURE.

23 MS. HAMMOND: That's correct.

24 HEARING OFFICER CELLI: Staff has not filed  
25 comments. The Applicant and the Committee's comments have

1 been incorporated into a draft errata, copies of which  
2 have been made available here today for everyone on the  
3 table out in front. Hope you all got a chance to grab a  
4 copy of the errata, or the draft errata, I should say.

5 With that, how I would like to proceed today,  
6 unless the parties have something they would like to  
7 present, I just thought we would go through Applicant's  
8 proposed errata and have a discussion as needed as we go.

9 So with that, Mr. Galati.

10 MR. GALATI: Sure. First of all, we'd like to  
11 thank the Committee for wading through quite a bit of  
12 evidence and writing a PMPD in record time. We appreciate  
13 that very much.

14 Most of our comments have to do with some minor  
15 changes to the project description that weren't caught  
16 that were in the record, the idea would be to avoid the  
17 requirement to amend, so many of the changes have to do  
18 with distances or sizes of things. I didn't think we  
19 would belabor going through any of those unless the  
20 Committee had specific questions. I probably would to the  
21 changes that we really would like to discuss.

22 And that is, in the water area, we think that we  
23 proposed a change in Soil and Water, and this is on --  
24 there's a series of them that start on page 24 of our  
25 comments, our draft comments.



1 HEARING OFFICER CELLI: You know what,  
2 Mr. Galati, do you mind if I just interrupt for a sec?

3 MR. GALATI: Sure.

4 HEARING OFFICER CELLI: Before we jump that far,  
5 and I'm working off of your Genesis Solar LLC's comments  
6 on the presiding member's proposed decision. Okay?

7 There were a few places -- let's start on page 4.

8 PRESIDING MEMBER BOYD: Are you broaching the  
9 numerical difficulties we were having?

10 HEARING OFFICER CELLI: Yes. We were talking  
11 about this. There are -- and I realize now that since  
12 we're using two different documents, I'm going to have  
13 to -- your reference was page 4, Water Treatment Systems,  
14 bottom of the page, and that is on page 3 of the draft  
15 errata that everyone else has here, okay?

16 And there were changes, I believe there was  
17 highlighted by the Committee, in fact, there are a number  
18 of places throughout the PMPD where we put yellow  
19 highlights because we assume there were changes in  
20 quantities or dimensions of some sort, and needed  
21 clarification. I see that -- the one I'm addressing has  
22 to do with the 700,000 gallons of raw water, fire water  
23 storage tank, and the cite to that.

24 The question I have is, I'm fine with the updated  
25 changes, but I'm going to need a new cite, I think,

1 because the cite that we had at that section cited to the  
2 FSA or the RSA, the old numbers, and I just need whatever  
3 exhibit the new number showed up in.

4 MR. GALATI: Yeah, I will provide that to you. I  
5 believe it's in Exhibit 62, our Project Description, but I  
6 will double check that and make sure that I respond after  
7 this is over.

8 Again, we put these comments together as quickly  
9 as we could to give the Committee something to do today to  
10 go through comments. We intended to make changes and fix  
11 those and formally docket those before the 20th as a  
12 result of today's hearing. So I will make sure there's an  
13 appropriate cite there.

14 HEARING OFFICER CELLI: That's excellent. And so  
15 what's going to happen is the Applicant's going to file an  
16 updated errata that will -- if you would please, be  
17 conscientious about making sure that everything that is  
18 new or a change has a citation to the record so that we  
19 can make sure that we know where we got that number and  
20 that it's in the record. That would be great. So that  
21 was the big one.

22 So go ahead, Mr. Galati, you have the floor.

23 MR. GALATI: Two areas that we really wanted to  
24 talk with you about today, and again, we made some changes  
25 in the water section, we believe that we produced some

1 evidence that the project would not draw the static ground  
2 level water down below the theoretical accounting surface,  
3 and we noticed that the PMPD said that there wasn't any  
4 evidence on that point. We had provided that evidence and  
5 that appropriate citation, so we would like that included.

6 HEARING OFFICER CELLI: What page are we talking  
7 about?

8 MR. GALATI: Page 26 of our comments.

9 I apologize, page 25 of our comments. The  
10 caption is entitled page 12, first paragraph.

11 HEARING OFFICER CELLI: Yes.

12 MR. GALATI: And we added some language for the  
13 Committee to include in the decision that acknowledged the  
14 fact that Exhibit 62, page 19 of the Soil and Water  
15 Resources testimony that we filed, is the only evidence  
16 that we could find about whether the project would cause  
17 the static groundwater level to drop below the theoretical  
18 accounting surface, if such accounting surface were  
19 adopted. And we just want to point that out to the  
20 Committee, because the Committee's decision was that there  
21 wasn't any evidence on that point, and we believe there  
22 was, and so we'd like that identified.

23 HEARING OFFICER CELLI: Okay. But the context  
24 was there was no evidence supplied by CURE to -- other  
25 than -- they had provided Exhibit -- oh, I don't have

1 enough of an excerpt here. I think it was 524, but don't  
2 hold me to that one. 541 maybe. So this was in Soil and  
3 Water?

4 MR. GALATI: Yes.

5 HEARING OFFICER CELLI: Page 12.

6 Okay.

7 MR. GALATI: Yeah, Exhibit 541 was introduced on  
8 the update of the accounting surface along the lower  
9 Colorado River.

10 HEARING OFFICER CELLI: That's correct. So CURE  
11 put in 541.

12 MR. GALATI: Correct.

13 HEARING OFFICER CELLI: Okay. And you're saying  
14 that there was -- the methodology was applied to GSEP?

15 MR. GALATI: Yeah. If you -- what we did in our  
16 testimony is, again, and our main contention is there is  
17 no accounting surface, it does not apply to us for all of  
18 the legal reasons we briefed, but if it did, we provided  
19 testimony that we would not draw the static groundwater  
20 level below that theoretical accounting surface, and we  
21 wanted that noted as well.

22 When we read this paragraph that starts on  
23 page 11 and then ends on 12, it sounded like the Committee  
24 may not have been aware that we had provided that  
25 evidence.

1 HEARING OFFICER CELLI: Okay.

2 MR. GALATI: So that's our -- that was the change  
3 we thought might warrant additional discussion. And if  
4 you look at page 19 of our Soil and Water testimony, which  
5 is in Exhibit 62, it -- our expert testifies it would not  
6 draw down the static water level.

7 HEARING OFFICER CELLI: Let me ask you this: Up  
8 on the top of page 11 where it says "Applicant's reply  
9 brief argues that the U.S. doesn't recognize the wells as  
10 pumping the Colorado River and that Applicant further  
11 argues that even if the GSEP would not cause the static  
12 groundwater table to drop below" -- I'm sorry, "further  
13 argues that even though the accounting surface methodology  
14 is applied to GSEP, it is undisputed that GSEP would not  
15 cause the static groundwater table to drop below the  
16 theoretical accounting surface."

17 MR. GALATI: Right, and I certainly argued that  
18 in the brief, but in this section where you're pointing to  
19 the evidence, I just wanted you to point to the evidence  
20 as well. It wasn't just Mr. Galati's argument which --

21 HEARING OFFICER CELLI: That's reasonable.  
22 Anything from Staff on that point?

23 MS. HAMMOND: I have a placeholder, that's  
24 something that Staff would comment on that the accounting  
25 surface discussion appears to lack a discussion about

1 water levels, so that discussion would be added with  
2 reference to evidence. Yeah, that's a point that we would  
3 want to make as well.

4 HEARING OFFICER CELLI: Okay. I guess what I'm  
5 going to see is something in Staff's errata. When am I  
6 going to get Staff's errata?

7 MR. MONASMITH: On its due date.

8 HEARING OFFICER CELLI: On the 20th.

9 MR. MONASMITH: Correct.

10 HEARING OFFICER CELLI: Well, timing being what  
11 it is, this was the only date we could get for a  
12 conference, I'm afraid.

13 MR. MONASMITH: If the Committee would wish it  
14 earlier, we can try, but given all the constraints on  
15 Staff, it's -- the 20th is what we're looking at. We can  
16 try to bring it in a few days earlier. I believe that's a  
17 Monday.

18 HEARING OFFICER CELLI: Well, I'm concerned about  
19 how substantial a change this might be. If Staff has --  
20 is pointing out that there's omitted evidence on the issue  
21 of the water table.

22 MR. MONASMITH: Water levels. I believe it's  
23 just a clarification that our Staff will be making, and in  
24 response to that, a component of the PMPD where we already  
25 have draft comments that are circulating among management

1 and within the technical staff and within the senior and  
2 the OM, but nothing that we have ready for you all to look  
3 at.

4 HEARING OFFICER CELLI: One moment. I'm going to  
5 have to mute people here because we can hear some --

6 PRESIDING MEMBER BOYD: Ms. Belenky is having too  
7 much fun in the background.

8 MS. BELENKY: Oh, no, I thought I was still on  
9 mute not having any fun.

10 HEARING OFFICER CELLI: All right.

11 MS. BELENKY: Here, I'll make sure -- I don't  
12 know what happened when I changed to my headset because I  
13 had to leave the room for a second.

14 PRESIDING MEMBER BOYD: Your laughter is  
15 unmistakable, Lisa.

16 HEARING OFFICER CELLI: Doesn't make you a bad  
17 guy.

18 Okay. So I guess we will have to see what Staff  
19 comes up with. Let's hear from CURE.

20 MS. KOSS: Yes, thank you.

21 The project's use of Colorado River water is one  
22 of the two issues that CURE wishes to discuss today. And  
23 I'd like to take a step back and just look at the broader  
24 picture here related to the Colorado River.

25 The Colorado River is a critical source of water

1 for the United States. The river nourishes 15 percent of  
2 our nation's crops. It provides drinking water for one  
3 out of every twelve Americans. The river is already  
4 besieged by climate change, overuse, and drought. And one  
5 study called the Colorado River the nation's most  
6 endangered waterway.

7           Researchers from the Scripps Institution of  
8 oceanography warn that due to climate change and overuse,  
9 the river's reservoirs may run dry within 12 years.

10           Every drop of Colorado River water to which  
11 California has rights to under the law of the river is  
12 allocated. And the United States Supreme Court in  
13 Arizona v. California requires every drop of the  
14 4.4 million acres of Colorado River water used by  
15 Californians each year to be accounted for.

16           In addition, under the Supreme Court decree, all  
17 consumptive use of Colorado River water requires an  
18 entitlement. Consumptive use includes water drawn from  
19 the mainstream by underground pumping. And there's just  
20 no way around that; federal law requires it.

21           Now, the U.S. Geological Survey determined that  
22 the Chuckwalla Valley Groundwater Basin lies within a  
23 ground basin tributary to the Colorado River. That is  
24 evidence in the record presented by CURE. It is  
25 Exhibit 541. That evidence also needs to be included in



1 the PMPD.

2           The USGS also indicated that the Chuckwalla  
3 Valley Groundwater Basin is hydraulically connected to the  
4 Colorado River. That is also evidence in this record.  
5 USGS determined that wells drawing groundwater within the  
6 Chuckwalla Valley Groundwater Basin are considered to be  
7 pumping Colorado River water. That is also evidence in  
8 this record that need to be included in the PMPD.

9           Staff concluded that wells extracting water in  
10 the Chuckwalla Valley Groundwater Basin are extracting  
11 water from the Colorado River. That is also evidence in  
12 this record that needs to be included in the PMPD.

13           Staff also concluded that the project's reduction  
14 in outflow from Chuckwalla Valley Groundwater Basin to  
15 Palo Verde Mesa Groundwater Basin, which we discussed  
16 quite extensively at hearings, would be made up at least  
17 in part by inflow from the Colorado River, and, therefore,  
18 Staff concluded that proposed project pumping would result  
19 in a significant impact to the Colorado River by inducing  
20 flow from it. That is evidence in this record as well.

21           Now, there are several other agencies that agree  
22 with USGS and Staff. Metropolitan Water District agrees  
23 that the project proposes to pump groundwater from a  
24 groundwater basin that is hydraulically connected to the  
25 Colorado River. That is evidence in this record. The

1 Colorado River Board also agrees that the project is  
2 located within an area considered to be hydraulically  
3 connected to the Colorado River and, therefore,  
4 groundwater pumped from wells located on the project site  
5 would be replaced by Colorado River water. That is also  
6 evidence in this record.

7 In addition, the Bureau of Land Management  
8 recently published its Final Environmental Impact  
9 Statement. And in the FEIS, BLM concluded that all  
10 groundwater production at the project site would be  
11 considered Colorado River water.

12 Also, we recently received a FOIA response from  
13 the Bureau of Reclamation, the water master for the  
14 Colorado River. And according to Reclamation, the  
15 Applicant's conclusion that the project would not impact  
16 the Colorado River or require an entitlement is  
17 unjustified.

18 Now, the Commission, considering all of this  
19 evidence, must require an entitlement for the project.  
20 Federal law requires it, the Commission cannot fudge it,  
21 the Commission cannot ignore it. And the Commission  
22 should not be concerned about it. The Metropolitan Water  
23 District submitted a letter to the Energy Commission, it's  
24 evidence in this record, stating that it was willing and  
25 able to supply the Applicant with water that would be

1 accounted for pursuant to the Supreme Court decree. It's  
2 really as simple as that.

3 Now CURE, based on all the evidence, has proposed  
4 changes to some language in the PMPD, conditions in the  
5 PMPD.

6 HEARING OFFICER CELLI: Are we going to get this?

7 MS. KOSS: I would be happy to distribute it now,  
8 if that's all right.

9 HEARING OFFICER CELLI: Is this going to be your  
10 final errata?

11 MS. KOSS: No. This is just preliminary proposed  
12 changes to the PMPD regarding just Soil and Water  
13 Resources. I do have some from cultural as well that I'll  
14 hand out when we get there. But now?

15 HEARING OFFICER CELLI: Please.

16 Thank you.

17 MS. KOSS: I'd be happy to run through it, answer  
18 questions, however you prefer.

19 HEARING OFFICER CELLI: Let's give everyone a  
20 chance to read this and see what it contains, and then we  
21 will give the Applicant a chance to respond, and Staff.

22 My recollection, just as -- I haven't finished  
23 reading this, but as I'm reading this was that the  
24 conclusion of Staff that there was an impact on the  
25 Colorado River was arrived at before the switch to the dry

1 cooling alternative. And so I'm concerned that there  
2 might be some confusion there with regard to the amount of  
3 water use.

4 MS. KOSS: At that evidentiary hearing, Staff  
5 said that even with dry cooling they do still consider the  
6 project to significantly impact the Colorado River.

7 HEARING OFFICER CELLI: Okay. Clear.

8 And Exhibit 532 was the Metropolitan Water  
9 District's letter?

10 MS. KOSS: Yes, I believe so.

11 HEARING OFFICER CELLI: Okay. That's  
12 straightforward enough, including that part about the  
13 suggested change to the conditions of certification.

14 Anything further from you, Ms. Koss, before I  
15 listen to Mr. Galati speak to the issue?

16 MS. KOSS: No. I may have something to respond  
17 to at that point, but not right now.

18 HEARING OFFICER CELLI: Mr. Galati, go ahead.

19 MR. GALATI: First I want to start with an  
20 overview.

21 This is one of those areas of law like a home  
22 contract. You read your real estate contract, and every  
23 word matters. The area of water law, every word matters.  
24 And if you notice, not once did CURE say the project would  
25 be pumping from the mainstream of the Colorado River,

1 which is the only thing that the law says.

2           There's a USGS study that has said it's possible  
3 that water that's replaced by the Colorado River, could be  
4 pumping from the mainstream, doesn't say definitively, and  
5 that report in 2004 and 2008, Exhibit 541 in this case, is  
6 just a report of USGS about if the bureau would like to  
7 make that claim, how would they regulate. So it doesn't  
8 use the word "hydraulically connected," it doesn't say  
9 tributaries.

10           The law says very specifically -- and it's been  
11 the same since 1964, nothing has changed with the 2006  
12 Supreme Court decision. As pointed out in our brief, it  
13 says, the consumptive use could be underground pumping  
14 from the mainstream of the Colorado River.

15           Let's not forget to use a little bit of common  
16 sense. Over geologic time just about everything could  
17 pump from or be hydraulically connected to a surface water  
18 source. All groundwater and surface water are connected.  
19 It's the one time I know that. I'm a geological engineer  
20 and used to do that modeling. They are all connected. It  
21 matters what time frame you want to look at, a hundred  
22 years, a thousand years, a million years. That's not what  
23 the law says. It says am I pumping from the mainstream of  
24 the Colorado River.

25           And as pointed out in our testimony and in our

1 brief, the only wells that have ever been regulated are  
2 those wells that are within the flood plain of the  
3 Colorado River where you could actually see the  
4 difference. You pump this well, and it's the same level  
5 as it is in the Colorado River. Colorado River goes up,  
6 within a few days you see the well go up. That's the only  
7 time it's ever been regulated.

8 Be very careful about treading into water law as  
9 complex as the Colorado River, because this would affect  
10 every project along the I-10 corridor, every project  
11 anywhere near the Colorado River. There is a body of law  
12 out there to regulate it. We suggest, as we did in our  
13 brief, that you simply just allow that to occur. There  
14 isn't anything here to show we need an entitlement.

15 Second of all, let's look at the evidence,  
16 because what Ms. Koss didn't say is probably more  
17 important than what she did. She didn't tell you that the  
18 letter she's relying on for MWD says if it's pumping from  
19 Colorado River, it didn't say you're pumping from the  
20 Colorado River, if you are, and that's the real issue  
21 here. Nobody has proven the project will pump from the  
22 mainstream of the Colorado River, and the only evidence in  
23 the record is that it will not pump from the mainstream of  
24 the Colorado River.

25 HEARING OFFICER CELLI: Actually, isn't that in

1 dispute with Staff and the Applicant?

2 MR. GALATI: It is not in dispute with Staff and  
3 Applicant of whether it will pump from the mainstream of  
4 the Colorado River. There was a dispute between Applicant  
5 and Staff over geologic time would there be an influence  
6 or an impact. And rather than get into a long, lengthy  
7 discussion about how the mounded irrigation water between  
8 the Colorado River and this, Staff and Applicant came to  
9 an accommodation that requires the Applicant to offset  
10 things we don't need to offset. But clearly, and Staff  
11 was very clear about it, no entitlement to Colorado River  
12 should be concluded from their analysis, they do not  
13 believe that there is an entitlement, nor does anybody  
14 else.

15 In addition, the most telling thing that Ms. Koss  
16 said today is that she's in possession of some evidence  
17 from the U.S. Bureau of Reclamation that apparently  
18 supports her position, which was not in this record, and  
19 we'd like to move to strike that we're relying on  
20 something from the U.S. bureau in a FOIA request --

21 HEARING OFFICER CELLI: Let's look at that.

22 MR. GALATI: Yeah, I'm sure it says if, because  
23 I've seen that letter five or six times.

24 HEARING OFFICER CELLI: Let me just ask Ms. Koss.  
25 Is that in our record, this letter that you're

1 referring to?

2 MS. KOSS: It's not. We received their response  
3 just last week.

4 HEARING OFFICER CELLI: Okay.

5 MS. KOSS: From the Bureau of Reclamation.

6 HEARING OFFICER CELLI: Then the Committee can't  
7 consider that because the evidence is closed then. Just  
8 to be clear on that.

9 Go ahead.

10 MR. GALATI: In addition, the Colorado River  
11 Board, which she didn't tell you, they signed on to the  
12 letter that says if as well.

13 And lastly, let's not forget, of course, if  
14 you're MWD, and you own the only water rights that will be  
15 uncontested -- and why is that? Because everybody above  
16 you gets theirs first. So MWD, if you tried to get an  
17 allocation from PVID or IID, MWD would oppose you. So of  
18 course they'd be willing to sell us an entitlement. And  
19 if I were a business person, I'd tell you I have an  
20 entitlement for you.

21 With respect to the Final EIS, there was a  
22 mistake made in the Final EIS as well, and we are  
23 perfectly comfortable that that's going to be fixed.  
24 There's a lot of confusion in this area between an impact  
25 and requiring an entitlement. And it's complex. And



1 it -- I think it's going to be worked out in the  
2 Final EIS, because there's another round of comments and a  
3 ROD, as it should be done, as you did here.

4           So we'd be -- the concept of a tributary to the  
5 Colorado River, that, again, is not the law. What the law  
6 is is pumping from the mainstream. It's in the  
7 replacement, it's not hydraulic, it's not tributary, it's  
8 not impact. And if you just apply the law, you come to  
9 the same conclusion that you came to in the PMPD, which is  
10 correct.

11           HEARING OFFICER CELLI: Let me ask, I wonder if  
12 there's anyone from the BLM who is on the telephone right  
13 now.

14           Is there anyone from the BLM on the phone?

15           Okay. I just thought I'd be interested to hear  
16 what they have to say about the FEIS.

17           Anything further from Applicant on this point?

18           MR. GALATI: If you do want to use the 2008 USGS  
19 study, use all of it, don't just use the part that says  
20 tributary. Use the part that says here's the accounting  
21 surface above which is not Colorado River, below which is  
22 might be a tributary and Colorado River. So if you want  
23 to use the USGS study, don't just use the part that  
24 Ms. Koss has suggested you use, that somehow all pumping  
25 in the Chuckwalla Valley is Colorado River.

1           That study, if it were the law, wouldn't regulate  
2 all pumping, it would not regulate pumping above the  
3 accounting surface. That study updated the accounting  
4 surface. That was its primary purpose.

5           So again, the only evidence in the record, as we  
6 pointed out, Exhibit 62, page 19, Soil and Water testimony  
7 clearly shows this project will not draw the static water  
8 level down below the accounting surface, even if you  
9 wanted to use the study as if it were law.

10           HEARING OFFICER CELLI: Thank you.

11           Let's hear from Staff if we could on this point,  
12 please.

13           MS. HAMMOND: Thank you for allowing Staff to  
14 speak to Staff's position. And I would refer the  
15 Committee and the Commission to Staff's brief on this  
16 subject. And what Staff did say is that it's not clear  
17 how much of the Colorado River is affected. So I think,  
18 Hearing Officer Celli, you have that right.

19           HEARING OFFICER CELLI: That the matter was -- I  
20 remember it was not a settled point.

21           MS. HAMMOND: It's not a point that we can know  
22 at this point. And we were deferring to the appropriate  
23 agency, the California Colorado River Board.

24           HEARING OFFICER CELLI: Okay. So Applicant's  
25 position is that the accounting surface -- accounting

1 surface there has to be some sort of metric to show that  
2 the amount of they're using will pump below the accounting  
3 surface, and we have any evidence of that?

4 MR. GALATI: Let me just explain.

5 What the accounting surface is, remember, I  
6 explained to you before that the wells that were  
7 regulated, were actually responded to levels of the river,  
8 they were basically the same water. So this is near the  
9 bank of the water, a couple hundred feet away from the  
10 bank of the river. And so you pop a well in there, you  
11 pump the well, the well comes back right immediately when  
12 you stop pumping back to the Colorado River water level.  
13 When the Colorado River goes high, the well's high, it's  
14 that connection.

15 What the 2008 study did is it assumed that that  
16 extended forever, that there was no geology, it was all a  
17 big bowl of sand, and they extended that line on an  
18 elevation level. And the 2008 study adjusted that line  
19 for high water for Colorado River water and low water for  
20 Colorado River. That's all it did. So it assumed this  
21 line. So everything below that line could be replaced  
22 from Colorado River over geologic time is what the  
23 accounting surface proposed.

24 HEARING OFFICER CELLI: Right.

25 MR. GALATI: If you're pumping above that,

1 there's a bunch of water above that in some locations, if  
2 you pump below -- above that and you never cause the  
3 static water level to go down, the water is determined to  
4 not be Colorado River, but would be natural recharge from  
5 all the different basins.

6 HEARING OFFICER CELLI: Right.

7 MR. GALATI: And again, the only evidence in the  
8 record about what pumping happens to that static water  
9 level is in Soil and Water 19, which summarizes it,  
10 studies that were submitted in other exhibits. But that's  
11 our expert testimony, would not draw for the life of the  
12 project.

13 HEARING OFFICER CELLI: And initially there was a  
14 finding by the Committee that the accounting surface  
15 methodology was not LORS, it was just a methodology which  
16 was subject to the parties' evidence essentially as you  
17 were going to put it into the record.

18 What I have is 541, which is a description really  
19 of the accounting surface, and it contains maps that show  
20 that the Genesis Project would fall within the area  
21 expected to be included in the accounting surface  
22 methodology if the accounting surface methodology were to  
23 be used.

24 So that was -- I just wanted to bring us current  
25 on at least that much of a finding.

1 Ms. Koss, you're being patient.

2 MS. KOSS: I'd like to respond to several of the  
3 points raised.

4 First --

5 HEARING OFFICER CELLI: Let me ask you a  
6 question, if I may.

7 MS. KOSS: Sure.

8 HEARING OFFICER CELLI: If we have it that there  
9 is -- that the accounting surface is not a LORS, then it's  
10 really just a piece of evidence to show some sort of proof  
11 that the water underneath the Genesis site would somehow  
12 be connected to the Colorado River. Okay. And that  
13 you're -- I need you to make the connection between that  
14 water and the need for an entitlement. The water directly  
15 below the Genesis site that they're going to be pumping --

16 MS. KOSS: Yes.

17 HEARING OFFICER CELLI: -- without evidence that,  
18 because I don't believe we have any evidence in the record  
19 on what that water level is and how does that level relate  
20 to the accounting surface level --

21 MS. KOSS: Let me just start by saying what the  
22 law requires and what Arizona v. California says.

23 HEARING OFFICER CELLI: Because I read it. And I  
24 didn't see anything about the Chuckwalla Valley in Arizona  
25 versus California.

1 MS. KOSS: No. What it does say is consumptive  
2 use of the mainstream includes water drawn from the  
3 mainstream by underground pumping. It's not as if you  
4 stick a straw down and what's underneath the straw is the  
5 Colorado River. If pumping over a period of time draws  
6 water from the Colorado River, that is considered to be  
7 using the mainstream of the Colorado River. That is what  
8 Arizona v. California says.

9 Now, Arizona v. California also says that all of  
10 that water has to be accounted for. And in order to  
11 account for that water, Bureau of Reclamation asked USGS  
12 to come up with some tool to try to figure out what wells  
13 are going to be pumping Colorado River water, not by  
14 sticking a straw down and sucking it out, but by inducing  
15 flow from the Colorado River. That's what the accounting  
16 surface methodology was, is. It's a tool, it's not a  
17 LORS. We never argued it was a LORS. We agree it's a  
18 tool.

19 And based on that tool, USGS and Staff agree that  
20 pumping in Chuckwalla Valley would be pumping  
21 Colorado River water.

22 Now, let's just take the accounting surface  
23 methodology out of the picture. Let's just take it out.  
24 We still have Arizona v. California, we still have the  
25 fact that Chuckwalla Valley Groundwater Basin is a

1 tributary to the Colorado River.

2 HEARING OFFICER CELLI: Now, how do we have that?  
3 That's the part I'm missing.

4 MS. KOSS: USGS determined that.

5 HEARING OFFICER CELLI: But other than in  
6 Exhibit 541, where do we have that in our record? See,  
7 the question is, we take Exhibit 541 out of the mix --

8 MS. KOSS: There's no need to take 541 out of the  
9 mix. There's a whole discussion of the law of the river  
10 in there, Arizona v. California, the basins, tributaries,  
11 hydraulic connections. There's no dispute that the  
12 Chuckwalla Valley is hydraulically connected. There's no  
13 dispute.

14 HEARING OFFICER CELLI: I think there is.

15 MR. GALATI: Yes, there is. And Exhibit 541  
16 specifically says we assume for purposes of the accounting  
17 surface rule that they are hydraulically connected.  
18 That -- there's an assumption, there's no modeling, there  
19 was no study.

20 HEARING OFFICER CELLI: So the point is --

21 MR. GALATI: Use it all or don't use it.

22 HEARING OFFICER CELLI: -- there is a dispute.  
23 That's what I'm looking for.

24 MS. KOSS: And Metropolitan Water District, USGS,  
25 Colorado River Board, Bureau of Reclamation, BLM, Energy

1 Commission Staff all agree that Chuckwalla Groundwater  
2 Basin is hydraulically connected to the Colorado River.  
3 All of the agencies agree.

4 HEARING OFFICER CELLI: I think -- let me just be  
5 clear.

6 My sense from Staff was that it may be  
7 hydraulically connected. I didn't get an unequivocal is  
8 hydraulically connected from Staff.

9 Do I have that right, Ms. Hammond?

10 MS. HAMMOND: I think that is probably an  
11 overstatement. It's when there's wet cooling that there  
12 would be a draw of Colorado River water, because the  
13 amount of water consumed is going to down to such a low  
14 level, we can't conclude that at this point.

15 HEARING OFFICER CELLI: Okay.

16 Is that helpful, Ms. Koss?

17 Okay. The overstatement you were saying, the way  
18 I characterized it was an overstatement?

19 MS. HAMMOND: I beg your pardon. I was referring  
20 to Ms. Koss.

21 HEARING OFFICER CELLI: Okay. So her  
22 characterization -- speak clear; step back.

23 Staff's position is you don't have enough  
24 information to make the determination. So we can say  
25 maybe. Is that helpful?



1 MS. KOSS: Well, my reading of the record, what  
2 the record shows, Staff's testimony states that even with  
3 dry cooling, over a period of time, even with dry cooling,  
4 the project would impact the Colorado River by inducing  
5 flow. That inducing flow is what triggers Arizona v.  
6 California, because consumptive use of the mainstream of  
7 the Colorado River includes drawing water, inducing flow  
8 from the Colorado River.

9 What Staff doesn't know is how much will be  
10 impacted, how much water will be used by the project.  
11 That is what is unknown by Staff --

12 HEARING OFFICER CELLI: Now, wasn't there a  
13 stipulation I thought we had to a number -- 50 comes to  
14 mind, maybe 50 acre feet a year between the Palo Verde  
15 Groundwater Basin and the Chuckwalla Valley Basin?

16 MR. GALATI: Yes, there was.

17 HEARING OFFICER CELLI: Okay.

18 MR. GALATI: There will be further modeling to  
19 refine that number, but we had put into evidence in the  
20 record of what our original modeling had shown.

21 HEARING OFFICER CELLI: So that is as far as I  
22 thought Staff took it, was to that impact between those  
23 two groundwater basins.

24 MS. KOSS: That's correct. Staff concluded that  
25 project pumping over a period of time would reduce the

1 flow from Chuckwalla Valley to Palo Verde Mesa and,  
2 therefore, induce flow from the Colorado River.

3 HEARING OFFICER CELLI: Well, doesn't it have to  
4 go below the accounting surface to induce flow from the  
5 Colorado River? And is there any evidence in the record  
6 to show that 50 -- I think it was 50 acre feet a year,  
7 would bring the water table down in the Chuckwalla Valley  
8 low enough to get it below the accounting surface? Isn't  
9 that the question?

10 MS. KOSS: There's no modeling to show how much  
11 of the Colorado River water would be affected, impacted,  
12 used. There's -- the original Soil and Water 19 would  
13 have had the Applicant do that modeling. After a  
14 stipulation between Staff and Applicant, they decided to  
15 do that modeling at a different point between the two  
16 basins. So there's no evidence, there has been no  
17 modeling to show how much of the water from the Colorado  
18 River would be impacted, would be used.

19 HEARING OFFICER CELLI: If any. That's my  
20 understanding of the state of the evidence right now.

21 MR. GALATI: That is correct. We have put in  
22 evidence in the record in our data responses in -- I can't  
23 remember which one -- to show that the project does not  
24 impact the Colorado River. And there's a difference here  
25 again between hydraulically connected versus an

1 entitlement or inducing flow from or to, and really the  
2 question wasn't whether or not Colorado River moves to --  
3 towards the Chuckwalla Valley from our pumping, the real  
4 question was whether or not the flow that's coming from  
5 the Chuckwalla Valley in through the Palo Verde  
6 Groundwater Basin and then in through the valley basin is  
7 actually somewhat less into the Colorado River.

8           So the question was never pumping from the  
9 mainstream, the question was are you pumping water that  
10 over geologic time could someday get to the Colorado River  
11 that now does not.

12           HEARING OFFICER CELLI: All right. And I think  
13 that a large part of that discussion occurred, was really  
14 centered around the issue of the wet cooling that --  
15 before the change was made.

16           Go ahead, Ms. Koss, you were going to say --

17           MS. KOSS: I just want to again point out that  
18 BLM, based on the same evidence presented to the Energy  
19 Commission, came to a different conclusion, which is that  
20 all water used by the project, even with dry cooling,  
21 would be considered Colorado River water. They say it  
22 repeatedly, they have a thorough discussion of why  
23 Arizona v. California is applicable to this project.  
24 Also --

25           HEARING OFFICER CELLI: Did they create a

1 condition?

2 MS. KOSS: They do have conditions. I can't  
3 recite them; I apologize.

4 HEARING OFFICER CELLI: I can answer that  
5 question.

6 And there is no condition to get an entitlement,  
7 and that -- what Ms. Koss is referring to is an analysis  
8 of their staff similar to the analysis of your staff, it's  
9 not BLM's final position.

10 MS. KOSS: And I also would like to direct the  
11 Committee to way back when I actually wasn't here, but  
12 there was some briefing, there was a scoping order on the  
13 accounting surface methodology. And I know, you know, we  
14 can take that out of the picture, and it doesn't matter,  
15 but in that -- at that hearing, Staff counsel actually  
16 testified -- or not testified, argued, relayed information  
17 from the Bureau of Reclamation that is in the transcript  
18 that the Bureau of Reclamation does consider over the life  
19 of the project that the project would be using Colorado  
20 River water. So I point you to the transcript there as  
21 well.

22 HEARING OFFICER CELLI: Okay. I'd like to hear  
23 it from Staff now, please.

24 MR. MONASMITH: That specific reference is in  
25 fact -- was briefed by Staff Counsel Robin Mayer on this.

1 We extensively briefed the issue of use of Colorado River  
2 water. This issue was discussed throughout the  
3 proceedings, throughout the workshops, both down in  
4 Riverside County and here in Sacramento.

5 I think the brief that Robin wrote on August 2nd  
6 is very definitive and very clear. And if it would be  
7 okay with the Committee, I'd like to recite it, just two  
8 paragraphs from that.

9 HEARING OFFICER CELLI: Please.

10 MR. MONASMITH: "It is clear that using Colorado  
11 River without entitlement is illegal." And she cites  
12 Arizona v. California. "The 2006 consolidated decree is  
13 just the latest tip of a very deep iceberg which the  
14 Committee is surely familiar with by now from Staff's  
15 opening brief, CURE's second opening brief, as well as the  
16 briefs addressing the scoping order," which Ms. Koss just  
17 referred to.

18 "What isn't clear and has never been clear is how  
19 much or if at all the Genesis project would draw Colorado  
20 River water. The latest letter from the Colorado River  
21 Board required a contract if it is determined that these  
22 wells are, in fact, pumping Colorado River water,  
23 Exhibit 546. The U.S. Bureau of Reclamation never made a  
24 determination, neither did the River Board nor the Bureau  
25 of Reclamation nor the commercially-interested

1 Metropolitan Water District suggest a particular amount of  
2 acre feet. Most conservatively, Staff's original concerns  
3 positing that the wells might conceivably dip below the  
4 accounting surface towards the end of the project's  
5 30-year life," which Ms. Koss just referred to, a  
6 statement by staff counsel, Caryn Holmes, "were based on  
7 the use of wet cooling. And Applicant's consent to dry  
8 cooling dramatically lowered impacts. If pumping below  
9 the accounting surface was far off in the future, it is  
10 beyond the life of the project with dry cooling and enters  
11 the realm of speculative.

12 "More pertinently, if the most knowledgeable  
13 agencies responsible for the river would not previously  
14 state unequivocally there would be pumping of the river,  
15 there are much less likely for the state to do so now."

16 Again, we briefed this issue extensively, we  
17 would refer the Committee to this fact. I know it's  
18 brought up over and over again, but I just wanted to state  
19 that for the record.

20 HEARING OFFICER CELLI: Thank you.

21 Ms. Koss, would you like to reply?

22 MS. KOSS: Yes, just briefly.

23 Much of the argument in that brief is not  
24 supported by the record. The discussion that's --

25 HEARING OFFICER CELLI: It's argument.

1 MS. KOSS: It's argument, but not based on the  
2 record.

3 Staff testified that even with dry cooling, the  
4 project would impact the Colorado River. Staff never said  
5 it was speculative, Staff still concludes that with dry  
6 cooling the project would impact the Colorado River; so  
7 despite the argument in the brief, it's not supported by  
8 the record.

9 HEARING OFFICER CELLI: Actually, I'm looking at  
10 page 11, Soil and Water, and basically the PMPD addresses  
11 CURE's argument, page 10, really at the bottom of page 10  
12 if you have it -- I don't know -- talks about that CURE  
13 correctly asserts that federal law requires lower Colorado  
14 mainstream water users to have an entitlement and that  
15 consumptive use of the mainstream includes water drawn  
16 from the mainstream by underground pumping, citing CURE's  
17 second opening brief, and Arizona versus California. CURE  
18 relies on the U.S. Bureau of Reclamation's accounting  
19 surface methodology, which is Exhibit 541.

20 Then we go on to say that Applicant's reply brief  
21 argues that the bureau does not recognize the wells in the  
22 Chuckwalla Valley as pumping from the mainstream of the  
23 Colorado River. Applicant further argues that even if the  
24 accounting surface methodology is applied to the GSEP, it  
25 is undisputed that the GSEP would not cause the static

1 groundwater table to drop below the theoretical accounting  
2 surface.

3           Okay? So so far everybody is nodding that we  
4 have that right in the PMPD.

5           The next paragraph, "Staff argues it has never  
6 been clear if the Genesis project would draw Colorado  
7 River water at all. Staff points out that the latest  
8 letter from the Colorado River Board required a contract  
9 only if it is determined that these wells are, in fact,  
10 pumping Colorado River water." That's Exhibit 546.

11           "Staff also states that the U.S. Bureau of  
12 Reclamation has never made a determination. Staff asserts  
13 that they have," quote, "never argued that there is an  
14 existing a legal requirement for this project to obtain a  
15 Colorado River entitlement." That's a quote from our  
16 hearing on 7/12. So so far, and I got a nod from Staff,  
17 so so far the PMPD, there's no issue yet.

18           So both Staff and Genesis agree that the GSEP  
19 would not be required to secure an entitlement of Colorado  
20 River water in order to legally pump groundwater in the  
21 Chuckwalla Valley, citations, we agree with CURE that  
22 using Colorado River without an entitlement is illegal.

23           The question before the Committee is whether  
24 groundwater pumped at the GSEP site from the Chuckwalla  
25 Valley Groundwater Basin is water drawn from the



1 mainstream of the Colorado River.

2           That's the question that this Committee needs to  
3 deal with. And in the way that they looked at it was that  
4 we just did not have enough evidence to see, to know what  
5 the accounting -- whether we're going to -- I mean,  
6 basically, at the scoping hearing the Committee ruled that  
7 the U.S. Bureau of Reclamation's accounting surface  
8 methodology is not a LORS and that the methodology's  
9 applicability to the Genesis AFC process is a question of  
10 fact that may be heard in future evidentiary hearings if  
11 necessary. So it was a question of fact brought before  
12 us.

13           And other parties introduced testimony at the  
14 evidentiary theory on the accounting surface methodology's  
15 applicability to the Genesis project. CURE introduced  
16 Exhibit 541 entitled, "Update of the Accounting Surface  
17 Along the Lower Colorado River," which describes the  
18 methodology and contains maps that indicate that the  
19 accounting surface may extend to the area where the GSEP  
20 site will be located. However, there's nothing in  
21 Exhibit 541 or anywhere else in the record that we see  
22 that compels us to adopt the methodology which we have  
23 already found is not a LORS.

24           And then we -- now, Staff had a problem with the  
25 following language. It says, more to the point, there's

1 nothing in the record that actually applies the  
2 methodology to the quantity of groundwater that the GSEP  
3 will use or that the GSEP would cause the static  
4 groundwater table to drop below the theoretical accounting  
5 surface as argued by the Applicant.

6 That's the kind of data that when I'm looking in  
7 the record to see, I don't see anything like that in the  
8 record.

9 So CURE simply has not provided sufficient  
10 evidence to convince the Committee to make a finding that  
11 the groundwater pumped at the GSEP site and the Chuckwalla  
12 Valley Groundwater Basin is water drawn from the  
13 mainstream of the Colorado River; that was the logic that  
14 the Committee used.

15 Now, Applicant proposes changes to that language.  
16 But I think in terms of just the underlying understanding  
17 of what's going on, that's the question, is where is the  
18 evidence that shows that there is -- there's a dispute,  
19 but we don't have evidence that really proves that this is  
20 Colorado River mainstream water that would be used by the  
21 GSEP other than Exhibit 541.

22 Do I have that right?

23 MS. KOSS: Well, pardon me. I'm sorry.

24 HEARING OFFICER CELLI: One moment. Applicant  
25 suggests that there were two more exhibits that I

1 didn't -- that weren't included that contained evidence  
2 with regard to the accounting surface.

3 MR. GALATI: If you do not use Exhibit -- if you  
4 do not use Exhibit 541 for the accounting surface and you  
5 don't use -- there's another exhibit with an earlier  
6 report for the accounting surface, and you don't use -- if  
7 that report's out of the record, for example, and you  
8 don't use it as a tributary, then there's no need to cite  
9 to our evidence which said if it were, it's also not  
10 Colorado River. Since I couldn't tell whether or not you  
11 were -- wanted an evaluation of the accounting surface, I  
12 was merely pointing out to the Committee there is evidence  
13 in the record, it's only ours, that the dry cooled project  
14 will not draw the static water level below the accounting  
15 surface in the Chuckwalla Valley if you chose to use it  
16 from the 2008 Exhibit 541.

17 HEARING OFFICER CELLI: So that's offered  
18 arguendo.

19 MR. GALATI: Correct.

20 And again, the primary point here is -- and if  
21 you go back and you read Staff's testimony, and what you  
22 hear is there is a settlement of all of their potential  
23 issues, but their issues always have been are we reducing  
24 outflow towards the Colorado River, never are we inducing  
25 inflow from the Colorado River, and that's never been

1 decided. And there is evidence in the record that it's  
2 about 52 acre feet at the boundary between the Chuckwalla  
3 Valley Basin and the Palo Verde Mesa Groundwater Basin.

4 So I think there's plenty here, and it's the  
5 confusion between the words. There is no evidence that  
6 the project will pump from the mainstream of the Colorado  
7 River, and no agency has said that.

8 HEARING OFFICER CELLI: And I think what we're  
9 doing here, now at this point I just wanted to -- and I  
10 appreciate the parties participating in this discussion,  
11 because what -- with all of the volume coming so quickly,  
12 you know, things can be missed. And we want to make  
13 sure -- this Committee wants to make sure that there  
14 wasn't some evidence that was overlooked or that something  
15 was dropped out.

16 You know, one or the other parties is going to be  
17 unhappy with the result, whatever the result is that the  
18 Committee decides, and that's just the nature of the  
19 business that we do, but I just wanted to make sure that  
20 the record was clear and that we were all satisfied that  
21 we were all operating with the same evidence.

22 So I'm not hearing that there's anything other  
23 than what Mr. Galati raised that needed to be added in,  
24 was those two exhibits.

25 MR. GALATI: Just a correction for levity.

1           Sometimes your decisions make all of the parties  
2 upset at the same time.

3           HEARING OFFICER CELLI: Yeah. That's true.

4           MS. KOSS: May I?

5           HEARING OFFICER CELLI: Please, Ms. Koss, go  
6 ahead.

7           HEARING OFFICER CELLI: Because technically,  
8 legally the burden would be on CURE in this case.

9           MS. KOSS: There are actually several exhibits  
10 that CURE includes in its recommended changes,  
11 Exhibit 400, Exhibit 48, Exhibit 402, Exhibit 546, 532. I  
12 believe that's it. But they're all -- you'll see them all  
13 in the red-line portions of our proposed changes.

14           HEARING OFFICER CELLI: Yes.

15           MS. KOSS: And I would again like to point out  
16 whether the Committee considers it as evidence or not, the  
17 Bureau of Reclamation, who is the water master of the  
18 Colorado River, disagrees with the Applicant's conclusion  
19 that the project would not impact the river or require an  
20 entitlement. They're the water master; they have the duty  
21 under Arizona v. California to account for water.

22           I implore you to read Arizona v. California again  
23 and to seriously consider Bureau of Reclamation's opinion  
24 on this matter.

25           HEARING OFFICER CELLI: Do you remember --

1           MR. GALATI: I'm going to -- motion that strike  
2 that. That's like the third time that she's referring  
3 to --

4           HEARING OFFICER CELLI: Right. I just --

5           MR. GALATI: And the testimony of Caryn Holmes  
6 arguing that somebody said something in January, again,  
7 it's not evidence, and I just want to be on the record  
8 that that is not evidence in this record.

9           HEARING OFFICER CELLI: You know what's troubling  
10 is that at the informational hearing -- I'm trying to  
11 remember whether you were at the informational hearing or  
12 not. No, it was Loulena Miles I think was there. CURE  
13 was there. And this discussion came out right out of the  
14 shoot day one. It was an argument over the accounting  
15 surface. And I recall at the time when Staff and the BLM  
16 at the time were still joined at the hip and they were  
17 going to create this joint document, specifically the  
18 representative from the BLM said we will get you that  
19 letter. Because I said, well, can't we just resolve this  
20 with a letter from the Bureau of Reclamation? And, oh,  
21 yes, we will get you that letter. And however long ago  
22 that was, it was ample time for us to have received some  
23 kind of evidence from them. We didn't.

24           We have this letter from the bureau -- the  
25 Colorado River -- who is it? The ones who said if, and

1 possibly if this, in fact, pumping you would need an  
2 entitlement in the subjunctive, but not a statement, not  
3 an unequivocal statement that says that they're pumping  
4 Colorado River water. And so now it's a little -- it's  
5 not available to us, whatever the BOR is going to do,  
6 because our record is closed. So I have to -- we, the  
7 Committee has to deal with the record that we have. And  
8 so that's what we're looking at.

9           So we will consider these, look at them or review  
10 the exhibits that you've cited and present to the  
11 Committee whatever that information presents, and then we  
12 will take it from there, but I thank you for bringing this  
13 up.

14           Is there anything further on this discussion  
15 before we move to the next item?

16           Nothing? Okay.

17           Anything, Ms. Belenky, out there?

18           MS. BELENKY: Not on that water issue  
19 particularly. I do have -- and I'm sure everyone wants to  
20 get out early today, I do have to be somewhere at 5:30,  
21 and we just have a couple of issues we wanted to raise  
22 sometime this afternoon.

23           HEARING OFFICER CELLI: Well, hang in there with  
24 us.

25           Let me just ask right now, it's ten after 2:00,

1 did Mr. Boyd from Californians for Renewable Energy come  
2 on the line? Any members of Californians for Renewable  
3 Energy on the phone? Hearing none.

4 What about Mr. Tom Budlong? Are you there,  
5 Mr. Budlong or Larry Silver?

6 Okay. I guess they're not part of this.

7 Okay. Let's move on. Mr. Galati, that was one  
8 of two issues I thought you wanted to present.

9 MR. GALATI: Yeah, I think the rest are  
10 self-explanatory. I'll -- the second issue was something  
11 that we argued in our brief, something that we discussed  
12 the last day of evidentiary hearings. We didn't see a  
13 discussion of it in the Committee PMPD so we wanted to  
14 raise it again. And this is the issue of the compliance  
15 project manager having the authority to approve compliance  
16 plans, not drawings, not CBO drawings, but compliance  
17 plans prepared for a particular activity so that you could  
18 continue with construction.

19 And the examples that I gave is if you're not  
20 going to get to constructing something far off into the  
21 solar field for quite some time but you need to build your  
22 access road, could you prepare a plan for the access road,  
23 get constructed on it, like your Soil and Water pollution  
24 prevention plan, your drainage erosion control plan, or if  
25 you do a dust control plan, and either amend and augment



1 as you move towards other areas of the field.

2           Again, we didn't ask for a blanket ability to do  
3 this, we just asked for acknowledgement that the CPM has  
4 the discretion to be able to do that, to accept compliance  
5 plans in a way that mimic construction. Staff objected to  
6 it.

7           I know that we have done this before, and the  
8 reason that we're asking for this clarification is  
9 obviously there's a loss of institutional memory, but I  
10 remember very much working on gas-fired plants where we  
11 got our authority to construct to a certain level before  
12 additional plans were submitted. And that's all we're  
13 asking for, is a specific acknowledgement by the Committee  
14 so the CPM knows that they have that authority so that  
15 they're not -- because at this time I think they've been  
16 instructed they do not have that authority.

17           Again, the language we proposed is general, and  
18 it allows the discretion of the CPM on a case-by-case  
19 basis.

20           HEARING OFFICER CELLI: Let's hear from Staff.

21           Now, Staff had opposed this previously. But I do  
22 want to acknowledge that, Ms. Hammond, in the Blythe case,  
23 this language was adopted in Blythe, the same -- in their  
24 PMPD, this identical language exists. And I don't think  
25 I'm giving away too much by saying that the concern the

1 Committee had initially was that basically it was the  
2 Committee's feeling that the CPM already had this power to  
3 exercise their judgment and that this additional language  
4 was unnecessary.

5           And we weren't -- and, frankly, the language  
6 proposed seems quite vague in terms of we're trying to  
7 determine how this would be used and didn't really get a  
8 very concrete example of how it might be used, and that  
9 was why there were some misgivings. But I wanted to hear  
10 from Staff on this point with regard to this language.

11           MS. HAMMOND: I'll make some general comments and  
12 hand it over to other members of Staff.

13           My understanding is there's a reluctance to make  
14 a blanket statement about giving this sort of discretion  
15 to the compliance project manager for all types of plans.  
16 There is a material difference between the types of plans  
17 that the compliance project managers are willing to  
18 approve on, you know, having received partial submittals.

19           One example that was given to me was in the area  
20 of the CPM -- Cultural Resources, the CPM might be willing  
21 to approve an archeologist, and that partial submittal is  
22 based on the nature of the other portions of the condition  
23 that concern on-the-ground activities, but they concern  
24 activities that an archeologist might follow, procedures  
25 that the archeologist might follow upon discovery of

1 certain artifacts.

2 That type of condition is materially different  
3 from, I guess, storm water pollution prevention plans,  
4 plans that might go to the need to modify the project.  
5 Those types of plans should be submitted in toto rather  
6 than on a partial basis.

7 Now, if Mr. Monosmith has something to add, or  
8 perhaps other members of Staff, I'll turn it over.

9 HEARING OFFICER CELLI: I also see that you have  
10 a compliance staff person here who you might want to call  
11 upon.

12 MR. MONASMITH: I also just would like to, again,  
13 point the Committee to the fact that this issue was  
14 briefed. As you remember, it did come up during  
15 evidentiary hearings, and Staff did in its reply brief,  
16 one, on page 7 of 18, list five components of reasons why  
17 there was hesitancy in this matter.

18 And Compliance Project Manager Chris Davis will  
19 join us now I think to articulate part of the reason why  
20 the phasing in gives us and gives the compliance  
21 department some degree of uncertainty and pause.

22 MR. DAVIS: My name is Chris Davis. One of the  
23 issues, probably the biggest problem, especially with a  
24 storm water pollution prevention plan is that the plan  
25 deals with only, say, a road. It could turn out that

1 without looking at the overall project and the impact of  
2 this one part, it wouldn't work at all when you take a  
3 look at the plan for the overall project.

4           From what I understand there is quite a bit of  
5 drainage on this site. And that would be one of the big  
6 issues. Same with the biological resources monitoring and  
7 mitigation, cultural resources. That approving one tiny  
8 part of a plan without looking at it in the overall -- how  
9 it fits into an overall plan could be a problem.

10           HEARING OFFICER CELLI: That makes sense.

11           My concern, Mr. Galati, is that -- and the  
12 Committee acknowledges that there might be, let's say, the  
13 experience factor. You create one structure that you're  
14 doing something, create an identical structure in the  
15 other half of the project; well, you run into something  
16 that was unforeseen that, you know, you'd be able to amend  
17 to change the plans if you needed to on the second one.  
18 So I -- we understand that.

19           The problem I guess is with the high level  
20 blanket broad brush of this language just could be applied  
21 to just about anything, and that's --

22           MR. GALATI: Let me clarify that.

23           It's not broad brush. It only applies to what  
24 the CPM will let you. Okay? That's very narrow. So if I  
25 was having this conversation with the CPM right now about

1 the soil and water plan, I would say, look, we need to get  
2 a well up and operating and I need to get a temporary road  
3 in there. Is it okay if I get the well up and operating  
4 with the following BMPs for that temporary activity while  
5 you're approving the rest of the storm water pollution  
6 prevention plan so that I have water available to me when  
7 I mobilize, because this site is windy and there's dust  
8 that needs to be controlled. Or I need to do a lot of  
9 desert tortoise fencing, and in order to do that desert  
10 tortoise fencing, I actually need to get that well up and  
11 operating. So I'm not grading the entire site, there will  
12 not be any storm water problems because I'm doing this in  
13 the summertime, and all I really need to do is to get out  
14 there and put the Desert Tortoise fence in.

15 That could be something the CPM could say, I  
16 can -- you give me something, and I can write you a letter  
17 authorizing you only that.

18 Or, for example, maybe the storm water pollution  
19 prevention plan within the power block is a little  
20 different than the larger grading activities on the  
21 outside when I'm putting in the drainage.

22 My point is we don't have to solve that here; I'm  
23 not asking for that to be solved here. I've asked just to  
24 engage in the conversation. If we can't convince the CPM  
25 that that's doable, then he says, no. Okay? But he has

1 said yes in the past for these kinds of things when we  
2 made a strong case. And I'm not talking about approve,  
3 you know, just this and there's a piece missing, I'm  
4 talking about a complete activity, a complete discrete  
5 activity and a plan associated with activity. Just give  
6 us the opportunity to make our case to Mr. Davis that I'm  
7 not messing up the rest of the plan.

8           And some of the plans, for example, require  
9 levels of detailed engineering that might take more time  
10 to do. And we revise these plans as we go. There are  
11 hundreds of compliance submittals, hundreds. We sit down  
12 with the CPM and we put forth a compliance contract, a  
13 table, and we sit down, we go through each thing, and if  
14 one of these comes up, we want to be able to have that  
15 conversation there.

16           What the Committee will be sending the message is  
17 what Staff currently believes is that for every plan, the  
18 answer is no because there are some plans, the answer will  
19 be no for. Totally get it. There are some plans they'll  
20 say no. We just want you to give them the ability to  
21 sometimes say yes. And that would help us a lot. And it  
22 wouldn't hurt anything.

23           So I think what's happening here is there is a  
24 fear that all of a sudden we're only going to get  
25 compliance plans that are piecemeal. The language I

1 drafted stops it, stops that from happening.

2           COMMISSIONER BOYD: Let me -- as Mr. Celli said,  
3 when we got this request, we pondered it, and we were kind  
4 of curious, I mean, and I can almost see -- you know,  
5 we're anxious to see that maximum flexibility within  
6 reason is given. We kind of thought the Staff already had  
7 that. And by you broaching this and then having to have a  
8 response back, we may be painting ourselves into an  
9 unnecessary corner.

10           Let me ask the Staff, I kind of thought they had  
11 the kind of latitude you were talking about already. And  
12 let me ask Mr. David or Mr. Monosmith if they want to  
13 respond to that. I mean, where do you draw the line? And  
14 I struggle with it on a case by case. I mean, how do you  
15 define that situation?

16           But anyway, I'd like to hear from our award  
17 winning compliance manager. You weren't here this morning  
18 to hear Mr. Davis get a superior accomplishment award for  
19 his good work.

20           MR. GALATI: I've worked with Mr. Davis. I  
21 appreciate that he deserves it and that he would let me do  
22 this if we had a conversation.

23           MR. DAVIS: That's amazing. He knows things  
24 about myself that I don't know.

25           We did in the Humboldt Bay Generating Station

1 allow them to phase in, do -- first phase I think was  
2 tearing out the old building, second phase grading. They  
3 did not have all the required submittals in, but the ones  
4 they did have in were complete, if my memory's correct.  
5 And the piecemeal issue that Mr. Galati raised is really  
6 the thing that we're worried about.

7 MR. GALATI: I only brought this to the  
8 Committee's attention because during an early compliance  
9 discussion, I got that we don't have the authority to do  
10 this. That was the answer back. So I always thought they  
11 had the authority because they'd done it in the past. And  
12 it was only during a conversation about thinking and  
13 starting the conversation about doing it again was the  
14 response back, we don't have the authority, we can't do  
15 it. And that's why I'm asking for the Committee, because  
16 this is exactly the authority the Commission has, the CPM  
17 on a case-by-case basis, meaning you bring me a good case,  
18 and it makes sense and it doesn't violate the condition,  
19 I'll consider it, but I won't do it blanket, I won't do it  
20 for all storm water plans, I won't do it for all fugitive  
21 dust plans, I won't do it for all plans, but your site  
22 might show something unique about it, like the well, and  
23 like Humboldt with demolition.

24 So there are reasons to do it on a case by case.  
25 I'm not asking for a blanket that they do it all the time.



1           HEARING OFFICER CELLI: And that is the one of  
2 the concerns I had, was to my way of thinking, when we say  
3 case-by-case basis, case by case means Beacon, Genesis,  
4 those are cases.

5           MR. GALATI: Not that language.

6           HEARING OFFICER CELLI: Okay. We could maybe --  
7 and I think a point you're trying to make is that each  
8 decision as it arises isn't binding on the next one so  
9 that if the CPM finds that it's not acceptable, having  
10 just approved one last week and then the following week  
11 they get another one and they find that it doesn't -- it  
12 doesn't smell right to them, they would have the  
13 ability -- they wouldn't be bound by the precedent of the  
14 prior decision.

15           MR. GALATI: That certainly was my intent here.  
16 My intent, for example, Humboldt, had very unique  
17 situations, so we were able to do something. Colusa had  
18 very unique situations. Gateway had its own unique  
19 situations. And for all of those we were able to do  
20 pieces of things. The submittals that we submitted were  
21 complete for the activity we were going to do.

22           So if we could change that based on particular  
23 circumstances before the CPM on that project or something  
24 like that, any of those types of language. I was actually  
25 trying to limit by using case by case, trying to limit it

1 so that it would be a determination for that CPM on those  
2 facts on that plan.

3 HEARING OFFICER CELLI: Staff, anything further?

4 MR. DAVIS: There is another issue of workload.  
5 The kind of thing that Mr. Galati is talking about is  
6 going to take more staff time, and so it's a decision if  
7 this Commission wants to spend that.

8 HEARING OFFICER CELLI: In other words, if you  
9 get a partial plan and then you're going to get subsequent  
10 more complete plans that you have to go back and cover the  
11 same ground again; is that the idea?

12 MR. DAVIS: Well, and you get a partial plan, and  
13 then you have to pull everybody together to see if they  
14 can live with that partial plan, which requires maybe only  
15 one meeting or maybe we can't get ahold of the Fish &  
16 Wildlife Service for that meeting or Fish & Game who would  
17 also have an opinion. So it takes time to go over these  
18 things and decide whether or not to approve it.

19 HEARING OFFICER CELLI: Anything from CURE?

20 MS. KOSS: No, thank you, not at this time. We  
21 may have something in our written comments.

22 HEARING OFFICER CELLI: Thank you.

23 Ms. Belenky, anything on this issue regarding the  
24 CPM?

25 MS. BELENKY: Yeah, I mean, I think that the

1 Center did, you know, adjust this in our briefing. We  
2 don't think that it's necessarily a problem per se, but I  
3 do still feel that the Applicant should come forward and  
4 say what it is they want now. I'm not sure why they feel  
5 that they need to wait and not apprise all of the parties  
6 of what it is they want as their initial step on this  
7 project.

8           So regardless of that, I don't have a particular  
9 objection if the Staff feels that it is -- has enough  
10 information to make those kind of decisions and that the  
11 Applicant realizes by not putting it out at this point and  
12 having, you know, the PMPD recognize what they want, they  
13 may not get it at all. And I feel like this is a little  
14 bit of an awkward way of doing this.

15           HEARING OFFICER CELLI: Uh-huh.

16           MS. BELENKY: So I think the preference would be  
17 for them to be extremely clear at this stage what it is  
18 they want, and we would all address it, and then it could  
19 be in the PMPD instead of waiting for the Staff to be put  
20 in the position of making a decision at the last minute in  
21 a rush, undoubtedly, you know, when they're very pushed  
22 because they have a very short time frame to meet their  
23 deadlines.

24           HEARING OFFICER CELLI: That makes sense.

25           Mr. Galati.

1           MR. GALATI: There's a whole other side to the  
2 process that not a lot of people in this room, other than  
3 Mr. Davis, have any experience in, and that is what  
4 compliance is like. There are hundreds of plans, there  
5 are hundreds of meetings. And this is not something that  
6 you can describe at this stage other than -- let me just  
7 give you an example.

8           Until we start to prepare the storm water  
9 pollution prevention plan, we may realize that in the  
10 middle of the power block which we're not going to get to  
11 till month 21, or whatever it is, that there needs to be a  
12 particular thing designed that would help with the BMPs  
13 for that one area, but the rest of the drainage is all  
14 coming in another area. We might be able to go to  
15 Mr. Davis and say, look, I got the BMPs for everything  
16 here, here's a box, here's the six things I'm  
17 contemplating, I'll know in another four months which one  
18 I'll do. Are you comfortable with that? Those things  
19 come up as you're doing final design. And people don't do  
20 final design with the uncertainty of a permit. So we're  
21 doing final design now because it looks like we're going  
22 to get a permit.

23           So this happens all the time in construction,  
24 there are daily decisions made. As long as they don't  
25 violate the condition, there's lots of discretion and

1 decisions about things like which bolt and what goes first  
2 and suddenly the construction schedule got messed up, so  
3 we can't do X first, we need to do Y first. That happens;  
4 you have to allow that flexibility. This does it.

5           If we don't like the language for that, if we  
6 don't like case by case, I'd consider -- we'll go back and  
7 put our heads together and file additional comments by the  
8 20th, some additional language, but I think -- I think  
9 we've been as clear as we can about what is it we would  
10 like to do. And again, it's been done, so we just want an  
11 acknowledgement that it can be done and that the CPM has  
12 that discretion.

13           As far as the workload, consider the alternative.  
14 If we don't, and every plan had to be done perfectly for  
15 the next 24 or 30 months of construction or whatever it  
16 would end up taking, before you could move anything,  
17 you're just -- I think you're having a delay without any  
18 additional protection or environmental protection or  
19 additional compliance. There's a way to do it, and we've  
20 done it before. Just make sure they understand they can.  
21 We'll do our part, we'll make our case as to why it should  
22 be done on a particular plan.

23           HEARING OFFICER CELLI: Well, then I suppose  
24 we'll need to see the new language that you come up with.  
25 But let me just ask -- we'll go off the record for a

1 moment.

2 (Discussion off the record.)

3 HEARING OFFICER CELLI: So what I'd like to do  
4 just quickly is review my notes just to see if there was  
5 anything further about Staff's comments -- I'm sorry,  
6 Applicant's comments. I look forward to getting Staff's  
7 response to these comments because a lot of my notes in  
8 the margin say is this okay with Staff? And I'd like to  
9 hear what Staff has to say. Just to verify a lot of these  
10 changes in numbers, quantities, dimensions, we need to see  
11 sites.

12 There was a -- page 12 on Bio, table lists 151  
13 acres for downwind impacts under indirect impacts and  
14 should be deleted per Staff testimony in Exhibit 68. This  
15 is -- I'm looking on page -- the problem, just so everyone  
16 who's trying probably to follow me with your papers, is  
17 that I'm working off of the comments from Staff rather  
18 than the errata that we put out. So this is on biology --  
19 biological resources, page 12, Mojave Fringe Toed Lizard.

20 MR. GALATI: I can answer that question. When  
21 the RSA was produced, there was a belief on the part of  
22 Staff that an area downwind of the project supported  
23 Mojave Fringe Toed Lizards. So it wasn't about -- and so  
24 there was a wind shadow that Staff calculated that they  
25 thought were indirect impacts to Mojave Fringe Toed

1 Lizard. We believe that it was Mojave Fringe Toed Lizard  
2 habitat, we also believe the wind shadow wasn't there, but  
3 it -- we produced evidence.

4 Staff asked some additional in the last workshop,  
5 some additional information about temperature. You heard  
6 testimony on it because CURE disagreed with the  
7 temperature data, put testimony in that it should have  
8 been treated as Mojave Fringe Toed Lizard habitat, but  
9 Staff and the Applicant's experts agreed that it was not  
10 Mojave Fringe Toed Lizard habitat, so it didn't matter if  
11 there was a downwind shadow. So those indirect impacts  
12 actually went away, they're not in the condition that  
13 requires mitigation, and Staff and Applicant agreed that  
14 we didn't have to mitigate for that.

15 When the PMPD was prepared, that section of the  
16 RSA that originally thought it was Mojave Fringe Toed  
17 Lizard habitat was lifted and it wasn't corrected. That's  
18 what we're pointing out.

19 HEARING OFFICER CELLI: Okay.

20 Go ahead, Ms. Belenky.

21 MS. BELENKY: Oh, sorry, this is another issue  
22 that the Center did brief, and, you know, we feel that it  
23 is quite clear that this is an indirect impact of this  
24 project and that it is appropriate to mitigate them, we  
25 said that during the hearings as well. So I think that

1 the PMPD got this right, that it correctly includes the  
2 indirect impacts and mitigation for them. And if not,  
3 there will have to be quite a lot of significant changes  
4 to that portion of your PMPD, which specifically said that  
5 you recognize the indirect impact and if you are now no  
6 longer recognizing that, that would be, I think, hard to  
7 justify at this point.

8           There are certainly indirect impacts of this  
9 project, edge effect and fragmentation that this is just  
10 one piece of it that was actually quantified by Staff, and  
11 I don't think it was ever clear why Staff abandoned this.  
12 The question is not just whether what habitat is occupied  
13 by Mojave Fringe Toed Lizard, that is not the only issue.  
14 This is a whole basin with sand moving across it, and  
15 those -- I think that the evidence showed fairly clearly  
16 there may be Mojave Fringe Toed Lizard in that area and  
17 that the surveys were not sufficient to show absence,  
18 which is much harder to show than presence in some case,  
19 and I think that in either case it shows that this is an  
20 area of indirect impact in the sand shadow and should be  
21 mitigated for. So the PMPD, in our opinion, got that  
22 right.

23           HEARING OFFICER CELLI: Thank you.

24           CURE?

25           MS. KOSS: Nothing to add at this time. Thank



1 you.

2 HEARING OFFICER CELLI: Staff?

3 Ms. Sanders, identify yourself, please.

4 MS. SANDERS: This is Susan Sanders, the  
5 biologist that worked on the revised staff assessment.

6 The Applicant has it right. We were going to  
7 make that correction in the PMPD. In Exhibit 435 on  
8 page 28 we actually -- we made the correction for the  
9 removal of the 151 indirect -- 151 acres of indirect  
10 impacts. And so that changes the mitigation obligation  
11 to -- I believe 136 acres is the total.

12 HEARING OFFICER CELLI: Okay.

13 MS. SANDERS: We went through this pretty  
14 thoroughly during the hearings, the reasons that Staff  
15 revised their conclusions about considering the 151 acres  
16 as Mojave Fringe Toed Lizard habitat. As you recall, we  
17 were waiting for some more information from the Applicant  
18 as to how their surveys were conducted and what the  
19 habitat was like. They supplied that information fairly  
20 late, and so we introduced in the record at the hearings  
21 the reasons for Staff's revisions, and those were captured  
22 in Exhibit 435.

23 HEARING OFFICER CELLI: Okay. Thank you. So let  
24 me just make a note of that. 435.

25 Okay. I just -- as relates to the Applicant's

1 changes, just as an explanation, when there is some sort  
2 of preamble language in the conditions, which is unusual,  
3 that was because when we received the exhibit, the exhibit  
4 contained a preamble, and we put the whole exhibit in the  
5 conditions assuming that the whole of that exhibit was the  
6 condition. But I do agree with some of these -- the idea  
7 of taking that preamble language out or any of that sort  
8 of textural analytical information and putting it in the  
9 analysis where it belongs and getting it out of the  
10 conditions. So that's no problem.

11 MR. GALATI: I can point out to the Committee  
12 that this was discussed at the evidentiary hearing on the  
13 12th, transcript page 223, starting with Dr. Collison who  
14 describes why Staff removed the 151.

15 HEARING OFFICER CELLI: Say it again. I'm sorry.

16 MR. GALATI: On the 12th hearing, page 223,  
17 Dr. Collison describes why the indirect impact for Mojave  
18 Fringe Toed Lizard were removed from the condition, the  
19 151 that we made -- this is basically a correction to the  
20 PMPD to make the condition consistent with the analysis,  
21 because the condition does not require the mitigation for  
22 those additional acreage. And then Dr. Sanders goes in  
23 and explains more. And I'll find that page number for you  
24 as well; but 223's a good starting place.

25 HEARING OFFICER CELLI: Thank you. Just moving

1 on, the way that we normally handle -- to avoid confusion,  
2 because we're creating a record that may be read by the  
3 Supreme Court some day, and the record contains all sorts  
4 of references to Cultural 17, Cultural 16. We don't  
5 change the numbers on the conditions. So what we do if a  
6 condition goes away is we just keep the number and say  
7 omitted or deleted. So that -- I just wanted you to  
8 understand that. On page 17. And I think that covers all  
9 of the errata as submitted to date from the Applicant,  
10 from the Committee's point of view.

11           There were some questions on PMPD with regard to  
12 the yellowed-out sections that the Committee gave you.  
13 And I think most of that was handled, most of that had to  
14 do with things like quantities of water, sizes of tanks,  
15 things like that that may have changed with the change  
16 from wet cooling to dry cooling. There were specific  
17 questions with regard to cultural that were yellowed out.  
18 Yes, that's right. Okay. So Cultural 1 and Cultural 2 --

19           MS. HAMMOND: Hearing Officer Celli, I'd like to  
20 ask, are you proceeding -- are we leaving Bio now? As  
21 long as we have Dr. Sanders here, can she chime in on  
22 giving a heads up on what Staff is going to be offering as  
23 errata?

24           HEARING OFFICER CELLI: That would be great.

25           MS. SANDERS: This might be a long chiming. Do

1 you -- is this going to fit in with what you're doing?

2 HEARING OFFICER CELLI: You know, it's  
3 unfortunate that we -- the timing of this, because it  
4 would have been best if we would have had everybody's  
5 written documents before we had this conference, but  
6 unfortunately we just couldn't schedule it to meet  
7 everybody's preferences.

8 So we also have Ms. Belenky on the line who had  
9 some questions with regard to biology. So, Ms. Sanders,  
10 why don't you go ahead and give us a preview of coming  
11 attractions in Staff's errata.

12 MS. SANDERS: All right. Thank you.

13 Some of the changes that Staff will be suggesting  
14 are the minor tweaks to acreages, the PMPD did a good job  
15 capturing all the changes that came about toward the end,  
16 but there were a few minor tweaks, and we'll be fixing  
17 those, one of which we've already discussed, the other was  
18 acreage of impacts for mitigation for state waters, it's  
19 111 acres.

20 But I think one of the largest changes are  
21 similar to those we've introduced on other projects, and  
22 that is application of the Renewable Energy Action Team  
23 table for compensatory mitigation. So originally in  
24 the -- and you'll recall on July 21st Mr. Roger Johnson  
25 introduced that table, a slightly earlier version of it,

1 and said that we would be applying it.

2 Well, now what we need to do is put in the  
3 numbers, the security numbers that you get when you plug  
4 in the table for compensatory mitigation. That would be  
5 for Desert Tortoise, for sand dune habitat, Burrowing Owl  
6 and waters. So you'll be seeing that change. And a good  
7 model for what it's going to look like is what happened in  
8 Blythe. And I think the stipulated conditions were just  
9 filed today, so that -- the language in there and the  
10 level of detail that we provide is going to be similar to  
11 what Staff will be doing for this project as well.

12 HEARING OFFICER CELLI: So we're not -- but all  
13 of those numbers and all of that is somewhere in the  
14 evidence in the record that we have; is that correct?

15 MS. SANDERS: The security numbers calculated  
16 from the REAT table are not currently in the record. You  
17 could get there by just applying the numbers; so the means  
18 by which you get the numbers is in there, but not the  
19 numbers themselves.

20 MR. GALATI: If I could clarify, because --

21 HEARING OFFICER CELLI: Please.

22 MR. GALATI: The REAT table in one version was  
23 entered as an exhibit in this record. And so it's  
24 modified slightly, although I don't believe that  
25 modification affected the numbers. The numbers that Staff

1 then put in the condition which said your security shall  
2 be X, that number changed. And you don't have that in the  
3 record yet, but you do have the table from which those  
4 numbers could be derived.

5 HEARING OFFICER CELLI: CURE, anything?

6 MS. KOSS: Not at this moment.

7 HEARING OFFICER CELLI: Ms. Sanders, are those  
8 numbers going to go up?

9 MS. SANDERS: Yes, they will go up.

10 HEARING OFFICER CELLI: Okay. So in other words,  
11 with the new application there's going to be greater  
12 protection to the designated species?

13 MS. SANDERS: It's not a change in the amount of  
14 acreage that's impacted, it's the fees that are taken into  
15 account for the security.

16 HEARING OFFICER CELLI: Oh, okay.

17 MS. SANDERS: So, for example, the original  
18 revised staff assessment only included acquisition fee,  
19 which I believe was 1450 an acre; initial enhancement,  
20 like fencing, clearing of hazardous waste was something  
21 like 250; and then long-term monitoring and management  
22 fee, which was, I believe, 1350 or thereabouts. Well,  
23 those fees are pretty much in the new REAT able, but  
24 there's new ones; for example, an appraisal fee,  
25 environmental hazard assessment fee, all the fees

1 associated with preparing a management plan, those things  
2 that are real cost that normally come about when an agency  
3 or some party buys property and manages it for habitat.  
4 Those are now incorporated because the REAT agencies got  
5 together to come up with a consistent approach to coming  
6 up with security on all these projects. And this is  
7 happening on Ivanpah, Blythe, it will be happening on  
8 Palen, Calico, Imperial, Rice, all these -- the REAT table  
9 is being applied to all of these.

10 HEARING OFFICER CELLI: I wonder if we could get  
11 a stipulation with regard to the new table and the new  
12 numbers from the parties. Maybe that would --

13 MR. GALATI: That is how we handled it in Blythe.  
14 There were other minor changes to the conditions of  
15 certification, and if they are similar as Dr. Sanders is  
16 saying, I think that we -- if we started with the  
17 stipulated conditions in Blythe, I think that we can  
18 arrive that between the Applicant.

19 Many of these changes are very, very minor, and  
20 the one that deals with security is just basically the  
21 updated assessment of what it's going to cost, and  
22 ultimately, just so you know, ultimately the Applicant is  
23 not tied to paying that number. That number is used to  
24 put up security to ensure that they do perform. So if  
25 they go out and find land that's cheaper or find in the

1 actual cost of clean up of a particular piece of land is  
2 cheaper, then they can do that.

3           Their job is to give the land -- there are  
4 certain other fees, endowment and things that need to be  
5 done, but again, I just wanted to make sure the Committee  
6 understands that the Applicant and Staff, we believe we  
7 can work this out in a stipulated fashion; this is not an  
8 area of dispute.

9           HEARING OFFICER CELLI: That's great. I think  
10 the Committee would feel better with a stipulation and  
11 with citations to the record than -- if it's in the  
12 evidence and if it's something that the parties all agree  
13 to, then the Committee shouldn't have a problem with it.

14           MR. GALATI: The comments are due on the 20th. I  
15 propose that we work up a Staff stipulation. We'll take  
16 the pen on that since we know Staff is busy doing other  
17 things, we'll circulate it to all the parties by next  
18 week, and all the parties can comment on it. Ultimately,  
19 not all parties may stipulate to it, but we'll be focused  
20 on just the conditions and just those minor changes.

21           So if Dr. Sanders could give to us their current  
22 version of what they think needs to change, I can make  
23 sure that it's incorporated, and I'll circulate to all the  
24 lawyers on the proof of service list.

25           HEARING OFFICER CELLI: Thank you.



1           Anything further, Ms. Sanders -- Dr. Sanders?

2           MS. SANDERS: Thank you. That's a nice offer  
3 from Mr. Galati.

4           I just want to clarify one thing. We will be  
5 needing to introduce the most updated REAT table into the  
6 record, which is slightly different than the one  
7 Mr. Johnson provided. It adds a \$30,000 fee from the  
8 National Fish & Wildlife Service Foundation, and we're  
9 using an assumption of 160 acres per parcel rather than  
10 the 40 acres per parcel which was in the original REAT  
11 table that was submitted. So those changes will happen  
12 also.

13           But I think that's very workable. Thank you.

14           HEARING OFFICER CELLI: Thank you. So we're  
15 interested in -- go ahead.

16           ASSOCIATE MEMBER WEISENMILLER: While we're on  
17 the REAT table, I think in the other cases the other issue  
18 that came up was whether the Applicant wanted the option  
19 to use the in lieu fee program. I don't know if that's on  
20 the table in this case.

21           MR. GALATI: Both in this project and on the  
22 Blythe project there is a condition that says you can  
23 satisfy by using the in lieu fee. The particular issue we  
24 were talking about, Commissioner Weisenmiller, had to do  
25 with one particular condition on big horn sheep. We

1 weren't sure, since it was going to be managed by federal  
2 agency, whether the in lieu fee could actually work for  
3 that. And we worked out that language; so we're good, and  
4 I think we're covered here. We have a bio condition that  
5 says you can use the in lieu fee, and the Blythe project  
6 has a bio condition that says you can use the in lieu fee.

7 ASSOCIATE MEMBER WEISENMILLER: I think to the  
8 extent there were other issues that were settled  
9 between -- associated issues that were settled between  
10 Staff and Applicant, again, I think they would be good to  
11 roll into this if necessary.

12 I think the other question was sort of the -- on  
13 in lieu fee was environmental assessment there.

14 MR. GALATI: I'm sorry, I didn't hear that last  
15 part.

16 ASSOCIATE MEMBER WEISENMILLER: I thought along  
17 with the in lieu fee option there was also the question of  
18 the environmental assessment associated with that.

19 MR. GALATI: Yeah, there certainly was. And in  
20 that particular issue, and only with the big horn sheep  
21 issue in that case, BLM wrote a letter and agreed to take  
22 responsibility for those issues, and so it didn't become  
23 an issue for us.

24 HEARING OFFICER CELLI: So if there's -- is there  
25 anything further from Staff, please, on biology?

1 MS. SANDERS: Yes, there are some things.

2 With respect to Bio 29, which is that in lieu fee  
3 condition that we just talked about, we did have some  
4 improvements to the language which we're going to apply  
5 to -- we hope to apply to Genesis, which makes it a little  
6 easier to clarify. If you don't mind, could I just read  
7 it so you'll hear what they are? It's only one or two  
8 sentences.

9 HEARING OFFICER CELLI: Well, let me get there.  
10 Hang on.

11 Oh, boy. Has your legal counsel seen Bio 29 and  
12 weighed in on it yet?

13 MS. SANDERS: Well --

14 HEARING OFFICER CELLI: And that's a big --  
15 because we went around and around and around on Bio 29.  
16 There's some legal concerns. And so I just wonder if --

17 MS. SANDERS: Well, I can tell you the language  
18 that was decided this morning with -- there was some input  
19 from legal counsel. Not -- not Ms. Hammond, but I think  
20 the head of our legal counsel looked at that. I'm not  
21 sure if she approved it yet.

22 HEARING OFFICER CELLI: Okay.

23 MS. SANDERS: Let me just give you the language,  
24 and we can tell you -- and I don't think anything's going  
25 to be objectionable in this language, it simply makes it

1 easier for compliance.

2           And the additional sentence that would be added  
3 to the condition itself for Bio 29 is, "If the in lieu fee  
4 proposal is found by the Commission to be in compliance  
5 and the project owner chooses to satisfy its mitigation  
6 obligations through the in lieu fee, the project owner  
7 shall provide proof of the in lieu fee payment to the CPM  
8 prior to project -- prior to construction related ground  
9 disturbance."

10           So basically it's moving something that's  
11 currently in the verification into the condition. And  
12 then one more sentence is added too -- well, there's one  
13 more phrase added to the verification. What's current in  
14 there is, "If electing to use this provision, the project  
15 owner shall notify the Commission," and here's what's  
16 added: "and all parties to the proceeding that it would  
17 like a determination that the project's in lieu fee  
18 proposal meets CEQA and CESA requirements."

19           And then another sentence is added, "Prior to  
20 construction-related ground disturbance, the project owner  
21 shall provide proof of the in lieu fee payment to the  
22 CPM." So this is essentially just making it a little  
23 easier to comply with and adding some timing requirements  
24 that were missing before.

25           HEARING OFFICER CELLI: Okay.

1 CURE, anything on that?

2 MS. KOSS: I don't think so. Not right now.  
3 Perhaps I could --

4 HEARING OFFICER CELLI: I'm sorry, you know --

5 MS. KOSS: Perhaps I could look at her screen to  
6 just read it again.

7 HEARING OFFICER CELLI: Okay. I'm confusing -- I  
8 had a lot of projects lately. This isn't the one where we  
9 went around and around on this language, it was a  
10 different one. I'm sorry. I just realized it was another  
11 solar project. We didn't. That's fine. I'm sorry about  
12 that. It's hard to keep them separated.

13 MS. SANDERS: And in lieu fees is used kind of  
14 loosely for many different things, so there's a lot of  
15 confusion about what constitutes an in lieu fee.

16 HEARING OFFICER CELLI: Yes.

17 MS. HAMMOND: And I think the Commission, Ms. --  
18 or Dr. Sanders was referring to is the condition  
19 concerning SB 34.

20 HEARING OFFICER CELLI: Yes.

21 MS. HAMMOND: And from what I heard and read, the  
22 substance doesn't change except that proof of payment of  
23 the mitigation fee should occur before ground disturbance.  
24 That appears to me to be the only change.

25 HEARING OFFICER CELLI: Right. Okay.

1 Ms. Belenky, anything on that?

2 MS. BELENKY: No, that seems fine.

3 HEARING OFFICER CELLI: Okay. So let's --  
4 Mr. Galati?

5 MR. GALATI: What I heard doesn't sound  
6 objectionable. I do want to think about it a little bit  
7 more. So I think there's two things that were added here.  
8 One, show that you paid the fee.

9 I guess you caught us. No, just kidding.

10 Okay. That's easy.

11 The second thing is notifying all parties.

12 I'd like to understand what happens then. So  
13 does that give CURE an opportunity to file motions that  
14 the in lieu fee is ineffective and reopen the record or  
15 something? I'm assuming they have to come ask you to do  
16 that, that there's a not an automatic right --

17 HEARING OFFICER CELLI: That's correct.

18 MR. GALATI: -- we'd notify, and they'd have to  
19 come in and try to reopen and delay construction or  
20 whatever they do.

21 HEARING OFFICER CELLI: To the best of my  
22 understanding, having had to go around and around in  
23 Beacon, not Genesis, sorry if I panicked anybody, is that  
24 essentially it would be a citizen -- it would be like a  
25 public complaint under -- in compliance.

1 MR. GALATI: But they'd have to bring something?

2 HEARING OFFICER CELLI: That's correct.

3 MR. GALATI: Okay. So it wouldn't automatically  
4 open up --

5 HEARING OFFICER CELLI: They had would have to  
6 bring -- they're notified, they have a choice. If they  
7 don't like it, they can file a complaint.

8 MR. GALATI: I think we're okay with what we  
9 hear.

10 MS. SANDERS: It's actually identical to what was  
11 in Beacon. So if you want to see the language in writing  
12 before we end up with the stipulated conditions, that's  
13 where it came from.

14 MR. GALATI: If it's identical to Beacon, then we  
15 have no objection.

16 HEARING OFFICER CELLI: That's what I think  
17 they're going towards; and this Committee always prefers  
18 stipulations, so that would be great.

19 So we're still with you, Dr. Sanders, on biology.

20 MS. SANDERS: Yes. One more thing, and this, for  
21 those of you who have participated in Blythe, the Fish &  
22 Wildlife Service -- and I've just e-mailed Tannika  
23 Englehard from Fish & Wildlife Service to call back in,  
24 she is working on the biological opinion for this project  
25 right now. She would like achieve maximum consistency

1 between this document and her biological opinion so she  
2 can incorporate by reference, just incorporate our  
3 conditions and have them serve for hers. And because of  
4 that, she had some changes. They were relatively minor,  
5 which we made on Blythe. And again, that was just filed  
6 today. And she would like to make similar changes to  
7 Genesis.

8           There are changes, for example, having the WEAP,  
9 the worker awareness program, the educational program  
10 provided not for approval but provided to Fish & Wildlife  
11 and Fish & Game, because endangered species is a major  
12 component of that, provisions that they be provided a copy  
13 of the BRMP. If there's work stoppage related to Desert  
14 Tortoise or other endangered species, they be notified.  
15 You can see all of them that we're contemplating in the  
16 Blythe stipulated conditions that were just filed this  
17 morning.

18           So I don't know if Tannika's on the phone yet,  
19 but that was her hope, was to be able to make those  
20 changes.

21           HEARING OFFICER CELLI: I had her earlier, and  
22 then she seems to have hung up.

23           MS. SANDERS: Well, she said she didn't want to  
24 stay for the water, but she would come back if I called  
25 her for bio. She has a conference call from 3:30 to 4:00,



1 but --

2 HEARING OFFICER CELLI: Well, let me ask you  
3 this: Will BLM's comments come in separately from BLM or  
4 are they going to come through Staff?

5 MS. SANDERS: BLM's comments on our proposed  
6 changes?

7 HEARING OFFICER CELLI: That's right.

8 MS. SANDERS: Well, we coordinated very closely  
9 with BLM on the Blythe conditions, which were similar. I  
10 don't think they're going to be submitting separate  
11 comments, we've just been working together --

12 HEARING OFFICER CELLI: Okay.

13 MS. SANDERS: -- and sending them copies of --  
14 they've gotten a copy of the PMPD, they've gotten copies  
15 of the Blythe changes, so they know what's going on.

16 HEARING OFFICER CELLI: I just to say that  
17 Mr. Galati and his people did a good job of creating --  
18 telling us what they think the errata were, and then in  
19 those cases where it was called for, they would actually  
20 give us a paragraph on why.

21 And in the event that we're making some change  
22 for the benefit of BLM for consistency sake or whatever,  
23 it would be good if you could just insert a little  
24 explanation in those instances. That would be helpful to  
25 the Committee.

1 MS. SANDERS: I will do that.

2 HEARING OFFICER CELLI: Okay. Anything further?

3 MS. SANDERS: Did you want to go over minor  
4 changes in the text not related to the conditions?

5 HEARING OFFICER CELLI: If they're truly minor  
6 changes. I mean, things like we've got the wrong -- you  
7 know, a wrong amount or something like that, I'm sure  
8 we're going to get all of those changes in writing, and  
9 the parties will be able to see those comments, and we're  
10 happy to put those into the PMPD. So there's no need to  
11 do it orally right now because we will receive those.

12 The important thing is that -- the concern I have  
13 is that the changes are reflected in the record that we  
14 have and that they're cited to the record we have. So if  
15 there was an amount of some quantity of water or something  
16 like that and that changed because of dry cooling, then  
17 right now in the PMPD, we have a cite, an original cite to  
18 wherever we pulled that evidence from, Exhibit 400, page  
19 whatever, and if there was a change an update to that  
20 amount of water or whatever, I need the cite to that,  
21 where that number came from to put in there with it.

22 So to me, that's the most -- I know it's  
23 annoying, but that's the most important thing I'm going to  
24 need, is the actual cite where that evidence came from.  
25 So if we're going to make a change in number, I need to

1 see that it's in the record, I need to know what exhibit  
2 it was.

3 MS. SANDERS: Clear enough.

4 I have one change that I'll run by you, and you  
5 can decide if it's worth continuing. This won't take  
6 long. But this is characterization of the habitat as  
7 Desert Tortoise habitat or not. So let me just go through  
8 that briefly.

9 Currently the PMPD on page 7, the first full  
10 paragraph says, "The evidence shows that the project  
11 disturbance area is currently unoccupied by Desert  
12 Tortoise, and the northwestern portion of the GSEP site is  
13 suitable or marginally suitable habitat, while the  
14 remainder of the site is not habitat for Desert  
15 Tortoise."

16 There's considerable evidence in the record that  
17 the resource agencies, Fish & Wildlife, Fish & Game, BLM,  
18 consider the entire site to be Desert Tortoise habitat.  
19 And what I've cited in the record for that is -- oh, I  
20 don't think it has an exhibit -- oh, it's from Staff  
21 rebuttal testimony, it's attachment A, which was docketed  
22 on June 29th, 2010, and that's the Fish & Wildlife Service  
23 and BLM's assessment of the site as Desert Tortoise  
24 habitat.

25 So what it boils down to is deleting the phrase

1 "while the remainder of the site is not habitat for the  
2 Desert Tortoise." That, I'm suggesting we delete, and  
3 I've provided the evidence as to why we're doing that.

4 HEARING OFFICER CELLI: Okay. Well, we'll get  
5 that.

6 MS. SANDERS: Okay.

7 HEARING OFFICER CELLI: We'll get a cite, strike  
8 through and a cite, right?

9 MS. SANDERS: And I have to say I've not  
10 completely finished a careful review of everything. Those  
11 are the things that I know are going to be changed or  
12 would like to change, and it's possible there are other  
13 that I haven't detected yet. I think this is it.

14 HEARING OFFICER CELLI: Well, thank you very  
15 much. But don't leave, because we have Lisa Belenky on  
16 the phone, and she had some issues with regard to biology.

17 So, Ms. Belenky, are you there?

18 MS. BELENKY: Yes.

19 HEARING OFFICER CELLI: Go ahead.

20 MS. BELENKY: Okay. I just -- I mean, I think at  
21 this point there's just a couple of things that are in the  
22 PMPD we wanted to highlight. One is the response in the  
23 PMPD regarding the all-terrain fire engines and whether  
24 there's a need for any kind of preplanning analysis of the  
25 impacts that they would have on wild lands if they are

1 used off road, which is, in fact, what they are designed  
2 to be used for.

3 HEARING OFFICER CELLI: What page are you on,  
4 Ms. Belenky?

5 MS. BELENKY: I think on page, maybe, 34 to 35.

6 HEARING OFFICER CELLI: Okay.

7 MS. BELENKY: And I mean, the Center still  
8 believes that there has not been any analysis, there may  
9 be planning. We believe that it would be far better if  
10 the PMPD would acknowledge the need for that planning and  
11 actually have a date certain by which that planning should  
12 be done. It cannot just be a random moment of an  
13 emergency when they're needed and people don't know what  
14 to do.

15 The fire department said they would do  
16 preplanning. I believe that it makes much more sense for  
17 this PMPD to give a date by which that planning should be  
18 done. It simply doesn't make sense to say they will just  
19 be used in emergency and, therefore, they are not subject  
20 to CEQA. That is not correct, it's not a correct analysis  
21 of the law, and the likelihood or unlikelihood is not  
22 really the question when you're talking about something  
23 like fire; it may happen, it has happened in the past.

24 HEARING OFFICER CELLI: You know, Ms. Belenky,  
25 are you just trying to prove your point by having fire

1 engine noise in the background?

2 MS. BELENKY: No, this is where I work.

3 So I really feel that this is not adequately  
4 addressed in the PMPD, that it would be far superior if  
5 the Committee would acknowledge that this is possible and  
6 at least have some schedule for preplanning on these  
7 things. That's why people have fire drills, that's why  
8 people have fire planning. And I think it really needs to  
9 be done.

10 HEARING OFFICER CELLI: Are you going to submit  
11 some proposed language in your comments?

12 MS. BELENKY: Yes, we will.

13 HEARING OFFICER CELLI: Okay. That's great.  
14 Thank you. Go ahead.

15 MS. BELENKY: And then the second point that  
16 hasn't yet been mentioned is the whole question of the  
17 gate, which I think is in the PMPD, in the cultural  
18 section it does discuss the gate. And I think that if you  
19 look at the record and you look at the impacts of this new  
20 road in that area, it also has -- clearly has impacts on  
21 biological resources. And it's hard for me to understand.  
22 It may have something to do with the history of how you do  
23 your conditions, but I don't see why this isn't also  
24 provided as a condition for biological resources.

25 HEARING OFFICER CELLI: Now, I recall that there

1 was -- are you looking at the page in cultural that  
2 discussed the gate area?

3 MS. BELENKY: I could be.

4 HEARING OFFICER CELLI: I just recall that it was  
5 there. And maybe we can hear from the parties on that  
6 with regard to the overlap in terms of time, because my  
7 sense for the -- I wasn't clear whether the -- how long  
8 the gate was going to be there and how long it was going  
9 to be guarded for. That was a BLM issue as I recall.

10 MS. BELENKY: It's on page 50, just, and it's  
11 called 7, I think.

12 HEARING OFFICER CELLI: Page 50 of biology or  
13 cultural?

14 MS. BELENKY: Oh, cultural. It's CUL 14. And I  
15 do understand that the Committee appears to believe it is  
16 a BLM issue. I respectfully disagree; I think it's both.  
17 And I think that the Committee providing this in the PMPD  
18 is very important.

19 This is a road that is being authorized for use  
20 for this project, and I think these kind of protective  
21 measures really need to be in the PMPD itself as well.

22 HEARING OFFICER CELLI: Okay. And you, again,  
23 are going to propose some language to that?

24 MS. BELENKY: I think we did before, but I'm  
25 happy to put in new language again.

1 HEARING OFFICER CELLI: Well, thank you. I mean,  
2 really, we have -- the 20th is the last day to provide us  
3 with any comments and errata to the PMPD, so I'm just  
4 going to encourage you to do that.

5 I'm sorry, I'm looking for it, and you said it  
6 was on page 50 of Cultural?

7 MS. BELENKY: That's what I have written down,  
8 but let's see if I can find it again.

9 MR. GALATI: Page 50 there's two statements in  
10 the condition. One says, "Prior to commencement of  
11 grading operations on the plant site, the project owner  
12 will provide documentation to the CPM demonstrating the  
13 security gate and/or guard is in place." That seems  
14 pretty clear to me.

15 HEARING OFFICER CELLI: Yes. And so she would --  
16 you want the same language, Ms. Belenky, in Biology.

17 MS. BELENKY: Yes. Yes. We believe this is an  
18 important condition to protect biological resources as  
19 well as cultural resources.

20 MR. GALATI: How about just a reference in the  
21 text that there will be a gate and, therefore, in Biology;  
22 because to have another condition, what do I have to do,  
23 submit it twice?

24 HEARING OFFICER CELLI: Yeah.

25 MR. GALATI: Submit proof twice to comply with



1 Bio 16, and then CUL -- there's going to be a gate, it's  
2 here, if you want to maybe refer to CUL 14 in the bio  
3 section.

4 MS. BELENKY: That seems like a good compromise.  
5 I think it needs to be acknowledged that that's part of  
6 the reason for the gate.

7 HEARING OFFICER CELLI: Seems reasonable to me.  
8 So that sounds good.

9 Go ahead, Ms. Belenky, you still have the floor.

10 MS. BELENKY: Okay. I think those were the two  
11 that we identified for, you know, in our first read  
12 through. Obviously there's always more, but I think that  
13 will do for now.

14 HEARING OFFICER CELLI: Okay. Thank you very  
15 much. You have about two weeks to consider this before we  
16 close the comment period on it.

17 MS. BELENKY: We'll try to get you any additional  
18 comments as soon as possible.

19 HEARING OFFICER CELLI: Thank you.

20 Mr. Galati, do you have a question?

21 MR. GALATI: Yeah. May I address the first issue  
22 on the roadway planning for the secondary emergency  
23 response?

24 Ms. Belenky was saying that this PMPD should  
25 include a timeline for the planning of how the emergency

1 all-terrain vehicles respond to the site. I just wanted  
2 to remind the Committee that you certainly have  
3 jurisdiction over us, but you don't have jurisdiction over  
4 how Riverside County is going to conduct its fire planning  
5 and how those all-terrain vehicles will ultimately be  
6 used.

7           You have a lot of evidence in the record that  
8 it's very likely they will never be used to respond to the  
9 Genesis project. In fact, it's more likely they won't be  
10 used than they will be used, but it's a caution, we  
11 provided that as mitigation in case -- and again, to  
12 remind the Committee, this is only if the access road  
13 and/or -- the access road, there's an incident on that  
14 while there's also an incident at the site. So that they  
15 need to get to the site and that they cannot go around the  
16 access road or they could not drive around the incident  
17 off of the access road to site. It's only then that there  
18 would be an opportunity for them to come across the  
19 desert, however they're going to get there, for a  
20 secondary access.

21           We provided quite a bit in our briefs and so did  
22 Staff, that it's speculative for this Commission to  
23 require us to mitigate as a CEQA impact for any of those  
24 biology.

25           I also submit to you that it's not appropriate

1 for this Commission to force some sort of planning  
2 timeline on the Riverside County Fire Department.

3 HEARING OFFICER CELLI: Understood. Okay.

4 If that's everything, Ms. Belenky on biology,  
5 unless Staff or CURE had anything further, Dr. Sanders?

6 MS. SANDERS: I just want a clarification. Is  
7 Staff going to be writing -- adding an element to some  
8 condition calling for a gate similar to what's in  
9 Cultural? Is that what I've been directed to do?

10 HEARING OFFICER CELLI: I think CBD is planning  
11 on offering some language that would have some reference  
12 in Biology to CUL 14 with regard to the obligation to  
13 install a gate and possibly have the gate guarded.

14 MS. SANDERS: All right. So we'll just wait to  
15 see what CBD submits.

16 HEARING OFFICER CELLI: That's right. Or --

17 MS. BELENKY: If you want to do it, I mean, I can  
18 certainly come up with some language and suggest where it  
19 could be put; and if Staff has ideas of how to best work  
20 that in, I'd be happy to have that.

21 HEARING OFFICER CELLI: And the parties are free  
22 to discuss and perhaps come together with a stipulated --  
23 a stipulation of some stipulated language that covers it  
24 and makes everybody happy.

25 MR. GALATI: Yeah, I'll certainly include some

1 language. Again, the theory that I was going to include  
2 was not going to be any change to the biology conditions,  
3 but in the text of the PMPD for Biology, it would say, and  
4 the biological impacts would be reduced by the security  
5 gate which is required under CUL 14. It would be that  
6 simple. That's all I was planning to do. And then the  
7 parties can add to that statement if they like. But I  
8 wasn't intending to do it in a condition.

9 HEARING OFFICER CELLI: Okay. And that was my  
10 understanding. And I have nods from the parties here in  
11 the room.

12 Okay. Anything on Biology before we move on to  
13 Cultural?

14 MS. HAMMOND: Just a couple more general  
15 statements, and Staff will be putting these in its  
16 comments.

17 Staff is going to be requesting that the  
18 Committee incorporate some of the other actions that are  
19 recommended in the PMPD to reduce the impacts to less than  
20 significant. It's not just the mitigation measures that  
21 are -- Staff would like to see a recognition of the  
22 avoidance and minimization measures to bring the impacts  
23 to less than significant.

24 On the discussion of cumulative impacts, Staff is  
25 going to request that the focus be shifted from presently

1 the project's -- focus on the project's impacts alone, and  
2 shifting that focus toward the project's contribution to  
3 impacts in the region.

4 HEARING OFFICER CELLI: Well, right now as it  
5 stands, we have the usual flow as, you know, construction  
6 and operation, direct and indirect, and then cumulative  
7 impacts, each treated pretty much separately, cumulative  
8 from the direct impacts. So I'm not sure what -- are you  
9 just telling me in general that basically you're going to  
10 be looking for more -- you need more -- what is it you  
11 need? I'm not sure what you're looking for in the  
12 cumulative impacts.

13 MS. HAMMOND: Well, I guess Staff is concerned  
14 about what it perceives to be is a misstatement in the  
15 PMPD that a finding of impacts being reduced to less than  
16 significant without acknowledging the residual impacts  
17 would lead necessarily to a conclusion that there are no  
18 cumulative impacts.

19 HEARING OFFICER CELLI: I believe that we came to  
20 the conclusion that there were cumulative impacts.

21 MS. HAMMOND: I'm thinking in particular in the  
22 areas of Biology, possibly Soil and Water as well.

23 HEARING OFFICER CELLI: Okay. So Staff is --  
24 just to be clear then, PMPD right now as it came out comes  
25 to the conclusion in Soil and Water -- now, I don't even

1 remember that there were no cumulative impacts or direct  
2 impacts from soil and water.

3 MS. HAMMOND: Uh-huh, uh-huh.

4 HEARING OFFICER CELLI: And is it now Staff's  
5 position that there were cumulative impacts?

6 MS. HAMMOND: We're not changing the -- asking  
7 for a change in the position of the PMPD but just perhaps  
8 a correction in the analysis.

9 HEARING OFFICER CELLI: Okay. All right. Well,  
10 we'll see what Staff submits on paper, and we'll take a  
11 look at that.

12 I just want to -- I just was trying to get a  
13 sense of what we were -- what to expect.

14 MS. HAMMOND: Yeah, if I can restate it or  
15 rephrase it --

16 HEARING OFFICER CELLI: Please.

17 MS. HAMMOND: -- maybe it will be clearer.

18 What Staff has seen and interprets the PMPD as  
19 saying is that because there are no significant impacts or  
20 that significant impacts have been reduced to less than  
21 significant, that necessarily there are no cumulative  
22 impacts. We don't believe that that is a correct way to  
23 do a cumulative impacts analysis, that a cumulative  
24 impacts analysis has to also consider the residual impacts  
25 when impacts are reduced to less than significant. And so

1 we would just -- we're concerned that the PMPD be  
2 corrected.

3 HEARING OFFICER CELLI: Okay. I'll eagerly watch  
4 for those comments and see what we get from there.

5 With that, can we move on to Cultural?

6 MS. ENGLEHARD: Hi. This is Tannika Englehard  
7 with the Fish & Wildlife Service. I just called back and  
8 I understood that there may be some additional questions  
9 for me?

10 MS. SANDERS: Tannika, this is Susan. Thank you  
11 for calling in.

12 We discussed briefly the fact that we're trying  
13 to get consistency between the biological opinion and our  
14 conditions, and I referenced everybody hear to the Blythe  
15 changes. And I believe what we're going to do is simply  
16 submit those and see if all parties can agree that those  
17 are reasonable changes. I believe that's how we left it.

18 HEARING OFFICER CELLI: Yes.

19 MS. SANDERS: So I guess we don't have questions  
20 for you. Thank you for calling back in, unless someone  
21 did have questions.

22 MS. ENGLEHARD: Okay. All right. Thanks.

23 HEARING OFFICER CELLI: Did the Committee have  
24 any committees for the USFWS?

25 No questions. Thank you.

1           Okay. Ms. Bastian's here.

2           Hello.

3           Mr. Monosmith, you might want to resume a place  
4 at the table.

5           Cultural. Going to defer to Ms. Allen who had  
6 several questions with regard to Cultural. This is having  
7 to do with Cultural 1 and Cultural 2, which we put in  
8 highlight in the PMPD.

9           MS. ALLEN: I wondered if Staff could go through  
10 a brief explanation for CUL 1 and CUL 2 on the concepts of  
11 who will do what by when in terms of actual products  
12 involved in the documentation and possible nomination for  
13 the historic register process. I know that I asked this  
14 question in the Blythe proceeding also, but we need to get  
15 it on the record for this proceeding.

16           MS. BASTIAN: Okay. For both of the landscape  
17 level studies, the one addressing World War II resources  
18 and the one addressing prehistoric and ethnographic  
19 resources, the timeline is really broken into two, a very  
20 quick and immediate delivery of the information that we  
21 decided is necessary to inform the data recovery  
22 activities of the project prior to their beginning ground  
23 disturbance, and those will be historic contexts from  
24 which are derived evaluation criteria and the essential  
25 data to answer research questions and the research



1 questions themselves. And we are expecting to have those  
2 middle of October.

3 I still, I have to say, do not have somebody  
4 working on it. It's proved extremely difficult and slow  
5 to get -- to be able to employ the people that I needed to  
6 have do this, very high-level scholars. Their  
7 availability was excellent; the problem has been actually  
8 getting them on a contract basis.

9 Still expecting to get something -- enough that I  
10 think will be what we need to inform, as I say, the data  
11 recovery activities archaeological teams as they begin  
12 their work prior to starting ground disturbance on the  
13 project. After that, the timetable is fairly wide open,  
14 and, in fact, could best be characterized as episodic in  
15 the sense that this project will be phased. They will  
16 build some parts of their project, and then other parts  
17 later. And our conditions allow them to provide data as  
18 it is acquired, but not across the entire site, just  
19 across that part of the site for each aspect of their  
20 construction phasing that they are affecting and where the  
21 data recovery would have to happen.

22 So the data recovery, or the recovered data,  
23 would be provided then to the landscape level people to  
24 incorporate eventually into the final documentation and  
25 nomination to the National Register of these two cultural

1 landscapes. So there's a feedback relationship between  
2 the landscape level scholars and the CRS for this project  
3 and the other two as well.

4           The landscape level people provide elements of  
5 the critical research design for the project -- CRS is  
6 cultural resources specialists -- and the cultural  
7 resources specialist, as the data are generated, again,  
8 with this phasing that the project anticipates doing,  
9 provides data to the landscape level, the regional level  
10 scholars to put into their final products. And that, as  
11 I've said, is somewhat open and dependent because they are  
12 drawing on data from three different projects, each with  
13 its own schedule and its own phasing. So this could be --  
14 the second part of this whole program could be prolonged.

15           MS. ALLEN: Thank you. My reading of the wording  
16 in the condition, CUL 1 and similar wording in condition  
17 CUL 2 doesn't present any mention of research questions or  
18 data recovery or the personnel that would be involved.  
19 That doesn't come through in the condition as currently  
20 written. Do you anticipate any challenges with  
21 implementation of the conditions?

22           MS. BASTIAN: Not in terms of the program. It  
23 was a deliberate decision to not have the actual program  
24 detail spelled out in the conditions because we need  
25 flexibility in ultimately designing the program. This is

1 to say that when the particular experts are on board,  
2 their input is going to be very important to how this is  
3 approached. They are the people who know the region.  
4 Beth and I and all the other people who contributed ideas  
5 could layout a fairly detailed program, but I think the  
6 ultimate elements of that need to be approved by and have  
7 the input of these regional experts, so we did not want to  
8 lock them into specifics, and we, therefore, have these  
9 programs discussed in detail in the RSA itself.

10 MS. ALLEN: I did notice that detail in the RSA,  
11 so thank you for making the link here.

12 HEARING OFFICER CELLI: I had a question. Is  
13 there anything further on CUL 1 or 2?

14 I was concerned about the management of the  
15 funds. I recall in compliance many years ago that there  
16 was a situation, I don't remember if Mr. Monosmith was  
17 involved in this or not, where there was a fund set up for  
18 the Keno Checkerspot Butterfly out of San Diego. This was  
19 a biology issue. And it said you shall create an  
20 endowment fund to be administered by the Energy Commission  
21 and the USFWS to take care of the Keno Butterfly.

22 The USFWS took the money and was going to put it  
23 into the creation of some regional, you know, like  
24 mitigation lands thing without any analysis of whether the  
25 butterfly was going to benefit from these funds. And

1 there was a bit of a meltdown, and it finally resolved  
2 after much, much turbulence.

3           And I wonder if Applicant or Staff might want to  
4 insert something that requires some sort of an MOU between  
5 any of the parties that would be administered funds so  
6 that it's clear what the roles are. In the case of that  
7 one power plant, I won't mention which one it was, we  
8 ended up having an MOU, coming to an MOU where it created  
9 an endowment fund, we brought in a third party who was  
10 willing to stipulate to the jurisdiction of the Energy  
11 Commission, because we had no jurisdiction over him, and  
12 we worked it out that way.

13           But I just am concerned that there be some sort  
14 of detailed instrument that lays out what the respective  
15 responsibilities of the parties would be.

16           Mr. Galati.

17           MR. GALATI: How I envision this currently  
18 working and the way the language works, it's -- right now  
19 it's an Energy Commission only managed fund. It's and/or  
20 BLM, should BLM choose to participate. In the final EIS,  
21 it's unclear to me about whether the BLM's going to  
22 participate in the fund or how that's going to work. So  
23 we prefer to have one agency manage the fund, have the  
24 Energy Commission manage the fund. We think that's  
25 easier. I can tell you that I'm still working on an MOU

1 for a project that is almost licensed, so -- on how the  
2 parties are going to process the project together. So  
3 sometimes that can be pretty hard.

4           Since this is not going to be a fund that then is  
5 expended to benefit something like that, it hires people,  
6 these people are identified as to how they coordinate the  
7 people that Genesis hires in the other condition, like in  
8 Cultural 5, when we prepare the CRMMP. This person -- the  
9 people who are hired under CUL 1 and CUL 2, they -- we  
10 have to coordinate with them to make sure when our  
11 monitors go out into the field, that if they are -- they  
12 see something or they're collecting data, they're  
13 collecting data with some input of how it affects  
14 something regionally, not just that particular site. And  
15 then when that data is done and collected, it's given to  
16 them. And the landscape people then who are paid through  
17 this fund take that data, collect it, and study it, and do  
18 a broader landscape study which may allow the larger  
19 regional landscape to be eligible for listing.

20           So I think that for us it's more of a scope of  
21 work if we pay the money that these people are available  
22 to work with our people, and so far, at least on the  
23 Blythe project, we've started working that out. So I'm  
24 less concerned with the fund, you know, not being used  
25 for -- to benefit a species, for example, like in your

1 case --

2 HEARING OFFICER CELLI: This is for the benefit  
3 of these trails, right?

4 MR. GALATI: It's -- the fund is really not to  
5 benefit the trails; the fund is to actually hire the  
6 people who can interpret the data. So a little different  
7 than they're not enhancement to the trail or something  
8 like that.

9 It's really, we just need to get these people on  
10 board, and there's no way to pay for them, so the  
11 Applicants are paying for getting these people on board.  
12 That's how I see the fund.

13 HEARING OFFICER CELLI: Is there a problem,  
14 Staff, with just making it be CEC rather than and/or BLM?

15 MS. BASTIAN: I'm anticipating no problems with  
16 that. And as Mr. Galati said, at this time it's rather  
17 unclear what role BLM will play, but for -- I see it where  
18 the worst-case scenario is that almost chooses not to  
19 recognize -- I don't think this is a real possibility,  
20 just from my informal feedback from BLM at this point, but  
21 should BLM choose not to recognize these two landscapes as  
22 resources for which mitigation needs to be arranged and  
23 would not, therefore, include in any respect the  
24 equivalent of CUL 1 and CUL 2 and the programs that are in  
25 the RSA, in their programmatic agreement, we can proceed

1 with the implementation of CUL 1 and CUL 2 and these  
2 programs because no aspect of that entails a permission  
3 from BLM to proceed. They do have to give permission for  
4 anything that involves ground disturbance, but these  
5 programs are not of that nature.

6 HEARING OFFICER CELLI: I'm just throwing this  
7 out there because I've encountered a similar problem in  
8 the past. Maybe if, Staff Counsel, you might want to  
9 present this to whoever's going to handle this and have a  
10 discussion and maybe offer some language that leaves us --  
11 makes us a little more certain what the responsibility --  
12 who's responsible for management. I mean, as written, it  
13 looks like the two agencies, they're handling it.

14 MR. GALATI: Well, while Staff is considering  
15 that, I did want to correct a statement that I said.

16 It's not only to fund the people, but we  
17 understand that during that process there -- this  
18 particular group will also do the Native American  
19 consultation that's called out in CUL 14.

20 HEARING OFFICER CELLI: Right.

21 MR. GALATI: So again, it funds that effort.

22 HEARING OFFICER CELLI: Maybe in consultation  
23 with or something like that, but the and/or just seems  
24 like it's a -- it's a big hole to step into.

25 So is there anything further on that from Staff?

1 MS. HAMMOND: I guess -- I'm not familiar,  
2 terribly familiar with this case. Could you clarify or  
3 restate what you're looking for?

4 HEARING OFFICER CELLI: Well, you were consulting  
5 with your cultural consultants, so you didn't hear me, but  
6 I was basically saying my concern is with the and/or,  
7 because that's the language we had in that circumstance  
8 that I described before in Biology down in the San Diego  
9 area. And what I was looking for is perhaps maybe  
10 something more along the lines of a -- you know, an offer  
11 of language in your comments that accomplishes what you  
12 want to accomplish but makes it clear what the roles are.  
13 Perhaps CEC in consultation with, or something like that.  
14 But leaving it "CEC and/or BLM," everything's kind of, oh,  
15 they're doing it, essentially.

16 MS. HAMMOND: No, absolutely, that's a very, very  
17 good point, and we will address it in kind.

18 HEARING OFFICER CELLI: So that's all we were  
19 asking, I'm asking for.

20 Anything further on CUL 1 or CUL 2 from the  
21 Committee?

22 Ms. Michael?

23 Applicant?

24 MR. GALATI: Nothing from us.

25 HEARING OFFICER CELLI: CURE?



1           Ms. Belenky? Ms. Belenky, are you -- oh, didn't  
2 she mention that she had to go to another -- okay, we may  
3 have lost her.

4           By the way, is Mr. Budlong --

5           MS. BELENKY: You didn't lose me. I'm sorry. I  
6 just was listening.

7           HEARING OFFICER CELLI: Okay. The question was  
8 was there anything further on cultural from CBD.

9           MS. BELENKY: No, that's okay. Thank you.

10          HEARING OFFICER CELLI: Is CARE, Californians for  
11 Renewable Energy, any representative from CARE on the  
12 phone?

13          Or Tom Budlong?

14          Okay. Is there anything further from anyone on  
15 Cultural at all?

16          MS. KOSS: Yes.

17          HEARING OFFICER CELLI: Go ahead, Ms. Koss.

18          MS. KOSS: Thank you.

19          CURE just has one more thing to ask of the  
20 Commission today, of the Committee today, rather, and that  
21 is to recognize the fact that this project is proposed to  
22 be built in an area that's very rich with cultural  
23 resources. And just to give some perspective, if the 13  
24 projects that are proposed to be built along the I-10  
25 corridor, including this project, are approved, over

1 48,000 acres of desert lands would be disturbed and over  
2 800 cultural resource sites would be destroyed.

3           And if you look at it on a broader scale, looking  
4 at the southern California desert region, if all of the  
5 projects proposed to be built in the region are approved,  
6 one million acres, that's over 1500 square miles of desert  
7 lands would be disturbed and over 17,000 cultural resource  
8 sites would be destroyed. This needs to be taken to  
9 heart.

10           Specifically, this project is proposed to be  
11 built on approximately 1800 acres of relatively  
12 undisturbed desert land along the edge of a dry lake bed  
13 where significant prehistoric remains exist. And as one  
14 of the Native American elders who has actively  
15 participated in this proceeding stated, the project is  
16 proposed to be built in the most sacred area on the North  
17 American continent. It's an area, according to Staff's  
18 and CURE's expert witnesses, that has a high likelihood, a  
19 high likelihood of containing buried resources, including  
20 human burials. But the Commission did not analyze the  
21 project's impacts on human burials. That was admitted by  
22 Staff at the hearing, and the PMPD does not mention human  
23 burials at all.

24           Now, CEQA requires the Commission to disclose and  
25 analyze each of the project's impacts. That includes

1 impacts on human burials. And CEQA requires the  
2 Commission to impose all feasible mitigation.

3           If the Commission doesn't analyze the project's  
4 impacts on human burials, the Commission cannot make its  
5 finding required under CEQA, specifically until the  
6 analysis is performed and the Commission is adequately  
7 informed of all the project's environmental effects,  
8 including impacts on human burials; the Commission simply  
9 cannot find that all feasible mitigation was required, nor  
10 can the Commission find that the project's significant  
11 impacts on cultural resources are outweighed by the  
12 project's benefits. It is impossible to make those  
13 determinations without an impact analysis.

14           Now, if the Commission does not analyze the  
15 project's impacts on human burials, despite the state law  
16 that requires it to do so, the Commission in the  
17 alternative should require the Applicant to conduct  
18 Phase 2 test excavations prior to project ground  
19 disturbance. This is necessary to determine the extent of  
20 buried resources on the project site and significance  
21 values that those sites may contain. Only then can it be  
22 determined whether additional sites need to be avoided.

23           The way the process is currently set up, going  
24 straight to data recovery, it's impossible to avoid any  
25 sites once ground disturbance has begun. And it's also

1 very important that this testing be conducted by hand, not  
2 mechanical means; otherwise, there's no chance of  
3 preserving any resources that may be lost. This is a very  
4 simple ask. We just ask that this is done prior to ground  
5 disturbance so that there's a chance of saving this  
6 culturally-rich area. Over 17,000 cultural resources will  
7 be destroyed if all of these projects are approved.

8 HEARING OFFICER CELLI: Do you have proposed  
9 language with you today in this?

10 MS. KOSS: I have a little summary of what I just  
11 stated. I also will provide specific language for a  
12 condition as soon as we hear back from our consultant.  
13 We're just waiting for specific language, and I'm hoping  
14 to get that very soon, and we'll submit it as soon as it's  
15 ready prior -- hopefully prior to the 20th. But I do  
16 have --

17 HEARING OFFICER CELLI: It's got to be prior to  
18 the 20th. The 20th is the last day.

19 MS. KOSS: Right, I mean --

20 HEARING OFFICER CELLI: On or before.

21 MS. KOSS: Yeah, but I'm going to be submitting  
22 written comments on the 20th, and I'm just hoping that  
23 this specific condition language I can get to you sooner.

24 HEARING OFFICER CELLI: Thank you.

25 Any response to this particular issue from --

1 well, let's hear from Staff first since you have  
2 Ms. Bastian here.

3 MS. BASTIAN: Yes, thank you.

4 HEARING OFFICER CELLI: This is the idea of a  
5 Phase 2 analysis.

6 MS. BASTIAN: Our conditions of certification,  
7 the specific mitigation measures that are -- that address  
8 data recovery also include an evaluation phase, which was  
9 discussed in the RSA as a compressed Phase 2, Phase 3  
10 operation. So the -- on every site where there is a  
11 prospect at -- by what is known about those sites at this  
12 time of any kind of buried deposits, including burials,  
13 and at this point there is no indication of that in this  
14 area.

15 The first effort will be a hand operation testing  
16 and a determination of the prospect of buried resources,  
17 and the application of machinery in the event that the  
18 buried resources are not burials but rather a type of site  
19 known in the desert region and I guess adjacent to these  
20 lakes of house pits and related features that would  
21 represent habitation sites.

22 We believe our mitigation measures provide for  
23 the concerns, address the concerns expressed by CURE both  
24 with respect to considering the prospect of burials, going  
25 about an evaluation phase that indeed entails hand

1 excavation, and using machinery in the event to explore  
2 other types of sites -- other types of deposits, excuse  
3 me.

4 HEARING OFFICER CELLI: So can you kind of direct  
5 us to which cultural condition?

6 MS. BASTIAN: I don't have that with me, I'm  
7 sorry to say.

8 HEARING OFFICER CELLI: Because this is going to  
9 be the condition I think that Ms. Koss is going to have to  
10 be offering an amplification to.

11 MS. BASTIAN: I believe the primary one that  
12 she -- yes, it would be CUL 11 where there is the  
13 consideration of the potential for buried deposits of any  
14 kind where the initial effort is to do hand excavation and  
15 then to pursue the potential for deposits that represent  
16 house sites with a machine-type operation. And I would  
17 have to guess that that's where CURE may be suggesting  
18 alternative -- an alternative approach.

19 HEARING OFFICER CELLI: CUL 11 is entitled "Data  
20 Recovery for Large Sites."

21 MS. BASTIAN: Correct.

22 HEARING OFFICER CELLI: And "Prior to the start  
23 of ground disturbance, project owner shall ensure that the  
24 CRMMP includes a planned recovered data from those parts  
25 of site CARAV 9072 that the project will directly impact.

1 When ground disturbance is within 30 meters of the  
2 boundaries of this site, the project owner shall ensure  
3 that the plan is implemented if allowed by the BLM.  
4 Subsurface data recovery plan shall at a minimum include  
5 the following: Marking with lathe and flagging, research  
6 questions related to data recovery, detailed examination  
7 of the surface within the site study area, creation of  
8 digital map --"

9 MS. BASTIAN: Number five is where the hand  
10 testing --

11 HEARING OFFICER CELLI: Okay. "Testing of  
12 horizontal limits of the site by placing test units down  
13 to the upper boundary of the --" is that QOAF alluvium?

14 MS. BASTIAN: Correct.

15 MR. STEIN: And also at the bottom of the page  
16 under D.

17 HEARING OFFICER CELLI: Okay. "Buried features  
18 shall be excavated by hand or by mechanical stripping with  
19 a backhoe bucket to remove sterile overburden."

20 Looks like we're missing a period or we're  
21 missing the rest of that sentence.

22 MS. BASTIAN: I'm not certain. It could well be  
23 a period.

24 HEARING OFFICER CELLI: Okay. "Sterile  
25 overburden," is "overburden" a noun?

1 MS. BASTIAN: Yes.

2 HEARING OFFICER CELLI: Rather than a verb?

3 MS. BASTIAN: Yes, it is a noun.

4 We should check to see that that is a complete  
5 version of what we had as that condition.

6 HEARING OFFICER CELLI: So are those -- Ms. Koss,  
7 I just want to be clear, are we in the right ballpark here  
8 in terms of the kind of detail you're looking for?

9 MS. KOSS: Well, this condition is for data  
10 recovery.

11 HEARING OFFICER CELLI: Yes.

12 MS. KOSS: And that's exactly the problem. We --  
13 CURE submitted extensive testimony that going straight to  
14 data recovery prohibits any opportunity to avoid resources  
15 that may be discovered. And if you're using, as allows in  
16 8D, a backhoe, you're -- you could very well destroy them  
17 as well. So there's two issues with this condition.

18 HEARING OFFICER CELLI: But you understand that  
19 the Committee found that there -- I mean, you can't -- the  
20 only way to have avoidance on the project is to not have  
21 the project. And so the Committee found that there was a  
22 significant impact, an unmitigable impact essentially  
23 because the presumption of ethnographic resources on the  
24 site will be disturbed if the project goes forward, and  
25 it's an unmitigable impact. That's the worst case, I



1 mean, that was the worst case, it was based on worst-case  
2 scenario.

3 MS. KOSS: Right. And there was extensive  
4 briefing on that, and as the PMPD notes, it wasn't  
5 actually based on the worst-case scenario.

6 HEARING OFFICER CELLI: Well, actually, the  
7 Committee added a couple extra factors to make it a little  
8 worse, make it the worst possible. The worst-case  
9 scenario would be that the assumed presence of cultural  
10 that there were there, which I assume to be significant,  
11 are also assumed to be spiritual values or ethnographic  
12 resources.

13 MS. KOSS: I think it would be imperative to  
14 include in the PMPD why despite all of the testimony and  
15 briefing on human burials the issue has been dismissed.

16 HEARING OFFICER CELLI: Oh, and I -- I'm not --  
17 what I am going to encourage you to do is actually come up  
18 with some language that addresses the human burial  
19 question which you've raised.

20 MS. KOSS: Yes.

21 HEARING OFFICER CELLI: So I'm asking -- I mean,  
22 we invite you to bring some language. I just wanted to  
23 get you to the right place. Because if Staff is saying,  
24 look, we've already dealt with that, and you're saying  
25 that they didn't, I just want to make sure that you're

1 both talking about the same thing.

2 MS. KOSS: I will do that.

3 HEARING OFFICER CELLI: So that would be helpful.  
4 Applicant, anything on -- any comments?

5 MR. GALATI: Just real brief.

6 Nothing stops the Applicant if it can to avoid  
7 something it finds that it didn't anticipate, and that  
8 happens a lot. If you find something in a trench or you  
9 find something in an area that you can move around or you  
10 find something while you're starting to do grading for a  
11 transmission pole, things can be moved. So the idea that  
12 nothing can be avoided from here on out is not actually  
13 accurate, but the Committee is overestimating and assuming  
14 and mitigating that it's all gone.

15 HEARING OFFICER CELLI: Correct.

16 MR. GALATI: The real question that we're  
17 debating was the question that was briefed and the  
18 Committee already decided, whether or not additional work  
19 had to be done in order to comply with CEQA prior to the  
20 Committee taking action. And we've identified in our  
21 brief and we agree with Staff that the conditions here are  
22 not just data recovery; they involve the CRMMP, they  
23 involve performance standards, they involve avoidance,  
24 they involve additional testing. There's testing in here  
25 as you start to get closer to known sites, that's not data

1 recover, that's testing to further identify the limit; and  
2 if we can avoid those, we will. So we think that this  
3 issue has been resolved, and I don't think we're hearing  
4 anything new today.

5 HEARING OFFICER CELLI: Staff?

6 MS. BASTIAN: I would agree with that. And the  
7 language that is in there may not say specifically  
8 "testing," but it says "explore," "determine the limits  
9 of," "determine the nature of these deposits." All of  
10 that is essentially the same as is evaluation phase for  
11 the determination of the presence of the sorts of  
12 resources, these burial resources that CURE is concerned  
13 about.

14 HEARING OFFICER CELLI: Just to be clear, the  
15 reason that Staff -- my impression is that the reason that  
16 the Staff went with the worst-case scenario was that there  
17 just was not the ability to do a Phase 2 study -- I guess  
18 is the word we call it -- Phase 2 study of the area for  
19 burial sites, et cetera, which is digging down and poking  
20 around.

21 MS. BASTIAN: That's correct. Not for burials or  
22 any other buried deposits of whatever nature.

23 HEARING OFFICER CELLI: Okay. But what I -- what  
24 CURE is raising -- and I just want to make sure because I  
25 don't -- I'm not sure it's here, is do the conditions as

1 they exist right now impose an obligation due to Phase 2  
2 prior to ground disturbance.

3 MS. BASTIAN: I believe so, yes.

4 HEARING OFFICER CELLI: Okay. It doesn't  
5 actually say --

6 MS. BASTIAN: It's not explicit, I agree.

7 HEARING OFFICER CELLI: Yes.

8 MR. GALATI: It does say to do the evaluation  
9 as -- you know, within so many feet of the sites that  
10 we're anticipating where we've done surface looks, and it  
11 is correct that it's possible that during a pedestrian  
12 survey you didn't see anything on the ground, there could  
13 be something underneath, that goes to show you that it --  
14 would a Phase 2 study involved for 18 acres, how many test  
15 pits, hand dug test pits would it take to preclude that  
16 possibility. We can't preclude that possibility.

17 What we did do is a geoaicheology study to  
18 determine what the land forms are and, in fact, the  
19 deposits where we think they are in the areas where the  
20 alluvium is the thickest. So we've already moved the site  
21 several times and moved and identified areas to stay away  
22 from.

23 Are the limits of those areas, are they known  
24 because we went out and did test excavation or hand  
25 digging? No. That's why Staff requires us as we get

1 close to them to actually do that evaluation phase as we  
2 move close to them. So there is that evaluation phase.  
3 It's not a Phase 2 before site work is done, but it's a  
4 Phase 2 before site work near these resources.

5 HEARING OFFICER CELLI: Ms. Koss.

6 MS. KOSS: Yeah, just a small point.

7 From a big picture perspective, there's no reason  
8 to destroy resources if it is feasible to avoid them.  
9 This plan is a plan to destroy resources. That's what  
10 data recovery is. When you think from an ethnographic, a  
11 cultural value perspective, data recovery destroys the  
12 value of the resource. So all CURE is saying is take the  
13 ten days, two weeks, whatever it may be, short period of  
14 time, we submitted testimony that I think 85 resource  
15 sites were excavated, test excavated in two weeks. This  
16 project site has 27. We're talking about days. All CURE  
17 is saying is do the testing. Let's be cautious here.  
18 Let's not destroy these resources where it's not necessary  
19 to do so.

20 HEARING OFFICER CELLI: And that seems eminently  
21 reasonable to me. I'm eager to see proposed language in  
22 that regard. And then if you can sort of integrate it to  
23 what the existing conditions are, that would be most  
24 helpful.

25 MS. KOSS: I will do that.

1 HEARING OFFICER CELLI: Thank you.

2 Anything further on Cultural, Ms. Koss?

3 MS. KOSS: No, thank you.

4 HEARING OFFICER CELLI: Okay. Ms. Belenky,  
5 anything on Cultural?

6 MS. BELENKY: No.

7 HEARING OFFICER CELLI: And Mr. Boyd, did you  
8 come in?

9 Mike Boyd?

10 Tom Budlong?

11 Okay. Are we finished with Cultural, parties?

12 MS. HAMMOND: Staff would like to request, and  
13 perhaps it's efficient and expedient if CURE does  
14 circulate the language, maybe the parties could come to a  
15 stipulation.

16 HEARING OFFICER CELLI: That would be preferred.

17 MS. KOSS: Sure. Will do.

18 HEARING OFFICER CELLI: That would be great.

19 MS. HAMMOND: Thank you.

20 MS. BELENKY: Is there a break? Did I miss that?  
21 Hello?

22 (Discussion off the record.)

23 HEARING OFFICER CELLI: The Committee is --  
24 requests and encourages the parties to communicate, share  
25 information, do what you can to stipulate -- come to

1 stipulated agreement on any changed language or conditions  
2 that you can reach agreement on.

3           We had talked about a possible workshop. We  
4 don't think there's enough time really. It's -- in ten  
5 days it's the 20th, essentially, with weekends. So -- and  
6 the parties are welcome to stay after tonight and discuss  
7 whatever language, whatever stipulations you can reach  
8 while you're all here together would be helpful. But  
9 again, it's easiest for the Committee to receive language  
10 when all the parties agree to it than trying to sift  
11 through and go back through the record and try to make a  
12 determination based on new comments.

13           With that, have we covered everything we need to  
14 with regard to errata?

15           I'll start with the Applicant.

16           MR. GALATI: Yeah, the rest is in here, and I  
17 don't think we are going to have very many more changes;  
18 if they are, they're just minor.

19           HEARING OFFICER CELLI: Okay. Staff?

20           And, Ms. Hammond, thanks for coming in and  
21 stepping in in the absence of your colleagues.

22           MS. HAMMOND: Thank you for that encouraging  
23 comment.

24           HEARING OFFICER CELLI: Nothing further from  
25 Staff?

1 MS. HAMMOND: Nothing further. Thank you.

2 HEARING OFFICER CELLI: Thank you.

3 Ms. Koss?

4 MS. KOSS: No. We look forward to submitting our  
5 written comments as soon as we can.

6 HEARING OFFICER CELLI: Look forward to seeing  
7 them.

8 And, Ms. Belenky, anything further on the PMPD?

9 MS. BELENKY: No, not at this time. I think we  
10 will send in our comments as soon as we can. And thank  
11 you for listening today.

12 HEARING OFFICER CELLI: Thank you.

13 Now it is time for the public comment part of our  
14 program.

15 I just want to make a point to say that the PMPD  
16 and errata, the errata, proposed errata have to be to the  
17 Committee on the 20th. Assuming that there are no  
18 revisions that would trigger a 15-day comment period  
19 again, the PMPD and errata would be up before the full  
20 Commission at the September 29th business meeting. So  
21 that is where I think we're headed unless we are surprised  
22 by something in your proposed errata.

23 And, Mr. Galati, did you have a point?

24 MR. GALATI: Yeah, if I could just address the  
25 Committee. And again, it's more of a general comment.



1           And the general comment is that we would prefer  
2 in the future with PMPD conference hearings, even if they  
3 get scheduled soon, the parties are not -- do not qualify  
4 for the 30-day public comment period. And in the past and  
5 what the Committee should do in the future is require all  
6 parties to file comments before the PMPD conference  
7 hearing so that there are no surprises that have to be  
8 addressed at the business meeting. And it's okay for the  
9 Committee to do that because we're parties and you can  
10 tell us we have less than 30 days. That's the rights and  
11 responsibilities of a party. Once you become a party, you  
12 are subject to the presiding member's decision on  
13 timelines.

14           So what is often done is all parties have filed  
15 their comments before a date today so that all parties can  
16 respond to each other's comments and there are no  
17 surprises. And then if there's anything to work out,  
18 stipulations, you can do so between that and the close of  
19 comment period.

20           The public comment period comes in, and then the  
21 Committee is only left with looking at comments from the  
22 public as opposed to the complex comments that often come  
23 from parties, and that makes the business meeting, in my  
24 opinion, run a lot smoother than the last few that I've  
25 seen where that didn't occur.

1           So I'd really implore, and primarily talking to  
2 the commissioners here, is the next PMPD conference  
3 hearings require every party to file comments before the  
4 hearing. Because we're going to get -- I know what we're  
5 going to get, and it's going to be very difficult to deal  
6 with in the nine days between then and the business  
7 meeting, and then we're going to hear -- we're going to go  
8 through them at the business meeting, and it's going to  
9 take a long time. And that's awful hard. It's unfair to  
10 the Committee. The Committee should have an opportunity  
11 to take and ask questions about those comments, not in a  
12 business meeting setting.

13           HEARING OFFICER CELLI: That's true. And we will  
14 take those to heart.

15           MR. GALATI: I just wanted to put that on the  
16 record.

17           HEARING OFFICER CELLI: Point well made, yes;  
18 point well made.

19           COMMISSIONER BOYD: I've been a victim of some of  
20 those long business meetings.

21           HEARING OFFICER CELLI: We're on public comment.  
22 I'm looking around the room. I don't see anyone who looks  
23 like they qualify as public only because they're all  
24 members of the parties. So I'm going to go to the phones.

25           And Ashley Pinnock, are you still on the line?

1           No, I guess she hung up.

2           I have Tricia Bernhardt. Did you wish to make a  
3 comment?

4           MS. BERNHARDT: No. No comments from Tricia  
5 Bernhardt.

6           HEARING OFFICER CELLI: Thank you.

7           Scott Busa. Hi, Scott.

8           MR. BUSA: Hi, Ken. Hello, everyone. Sorry I  
9 couldn't make it today. No comment.

10          HEARING OFFICER CELLI: Thank you.

11          Reed Farmer?

12          MR. FARMER: No comment.

13          HEARING OFFICER CELLI: Thank you.

14          Lisa Belenky, any further comment?

15          MS. BELENKY: No, I can't -- I didn't do that on  
16 purpose.

17          HEARING OFFICER CELLI: Do you live above the  
18 fire department?

19          MS. BELENKY: There's a lot of fire drills today.

20          Okay. No, I have no further --

21          COMMISSIONER BOYD: It's a tough day in  
22 San Francisco.

23          MS. BELENKY: Okay. Thank you.

24          HEARING OFFICER CELLI: Not to beat a dead horse  
25 or anything.

1           Okay. Let's see. Jennifer Jennings is on the  
2 line.

3           Hi, Jennifer.

4           Emily Festger, any comment?

5           MS. FESTGER: No comments, thanks.

6           HEARING OFFICER CELLI: Duane McCloud?

7           MR. McCLOUD: No comment.

8           HEARING OFFICER CELLI: Okay. This leaves me as  
9 usual at these hearings with people identified as Call-in  
10 User 10, Call-in User 12, Call-in User 6, Call-in User 7,  
11 and Call-in User 8. I don't know who you are. If you are  
12 on the phone and you wish to make a comment, please speak  
13 up, and we'll go with whoever's the most aggressive.

14           MR. KLINE: George Kline, BLM. I have no  
15 comments.

16           HEARING OFFICER CELLI: Thank you, George, for  
17 identifying yourself.

18           Anyone else on the phone who would like to make a  
19 comment?

20           I have -- and these could be staff people  
21 listening in for all I know.

22           Anyone on the phone who would like to make a  
23 public comment at this time and make a record in front of  
24 the two commissioners who make up this Committee?

25           Hearing none, I guess we've finished the public

1 comment section. And I will turn it over to Commissioner  
2 Boyd who will adjourn the conference.

3 COMMISSIONER BOYD: Thank you, Hearing Officer  
4 Celli.

5 Well, thanks to all of you for your continuing  
6 hard work and your efforts on this case and your efforts  
7 to resolve differences. As hinted at by Hearing Officer  
8 Celli, we encourage you to have some interaction on  
9 language, if you can, and try to resolve differences as  
10 best you can. While we can't take the approach  
11 recommended by the Applicant today in finishing this case,  
12 we can encourage everybody to try to work together on  
13 language issues before submitting your final comments on  
14 the 20th, and hopefully we will be able to resolve issues  
15 such that the business meeting won't be as protracted as  
16 some of them have been of late, just over a siting case.

17 So with that, I thank you all. Wish you all a  
18 happy evening.

19 (Thereupon the California Energy Commission,  
20 Genesis Solar Energy Project Committee Conference  
21 adjourned at 4:12 p.m.)  
22  
23  
24  
25

## CERTIFICATE OF REPORTER

I, JOHN COTA, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Committee Conference; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of September 2010.



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JOHN COTA