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PRESIDING MEMBER'S PROPOSED DECISION
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for)
Certification for) Docket No.
The Calico Solar) 08-AFC-13
Project (formerly SES)
Solar 1)
)
)
_____)

CALIFORNIA ENERGY COMMISSION
HEARING ROOM B
1516 NINTH STREET
SACRAMENTO, CALIFORNIA
FRIDAY, OCTOBER 22, 2010
10:08 A.M.

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CERTIFIED SHORTHAND REPORTER
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APPEARANCES

COMMITTEE MEMBERS PRESENT

Jeffrey Byron, Presiding Member

Anthony Eggert, Associate Member

HEARING OFFICER AND ADVISERS

Paul Kramer, Hearing Officer

Lorraine White, Advisor

STAFF AND CONSULTANTS PRESENT

Stephen Adams, Staff Counsel

Jared Babula, Staff Counsel

Christine Hammond, Staff Counsel

Caryn Holmes, Staff Counsel

Christopher Meyer, Project Manager

Witnesses

Sarah Allred

Alvin Greenberg

Chris Huntley

Nagar Vahidi

Casey Weaver

Scott White

APPLICANT

Tessera Solar

Felicia Bellows

Ella Foley Gannon

Allan Thompson

APPEARANCES CONTINUED

INTERVENORS

CURE

Loulena Miles

Defenders of Wildlife

Joshua Basofin

Sierra Club

Travis Ritchie

San Bernardino County

Bart Brizzee

Peter Brirety

BNSF

Cynthia Burch

Steven Lamb

ALSO PRESENT

BLM

Chris Otahal

Jim Shearer

PUBLIC

Sarkis Avanian

Darci Pauser

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1 PROCEEDINGS

2 COMMISSIONER EGGERT: Good morning, everybody.
3 Good morning, everybody. My name is Anthony Eggert, and I
4 am the Presiding Commissioner for the Committee for the
5 Calico Solar Project.

6 I am also joined by the Associate Commissioner,
7 Commissioner Byron, who may have a few words to say.

8 For introduction, actually, Commissioner Byron,
9 do you have any words to say to get started here?

10 COMMISSIONER BYRON: I'll just check in with you
11 to make sure you can hear me.

12 Yes, I'm with you, Commissioner Eggert. And I'm
13 sorry I can't be there today. But I'd like to thank all
14 the parties and acknowledge their participation in this
15 extremely important hearing today, but also the speed at
16 which everyone has provided their comments is very much
17 appreciated.

18 COMMISSIONER EGGERT: Thank you very much,
19 Commissioner.

20 So as I said, this is for the Calico Solar
21 Project. This is a Committee conference on the Presiding
22 Member's Proposed Decision. And the purpose of this
23 Committee conference is to consider oral and written
24 comments on the Presiding Member's Proposed Decision from
25 parties, government agencies, and members of the public.

1 Members of the public and their agencies'
2 representatives are encouraged to submit their written
3 comments by the close of a 30-day review period, which is
4 4:00 on Monday, October 25th. We encourage those to
5 provide your comments via e-mail and include the name of
6 your organization and the name of the file.

7 Also just want to thank all the parties who
8 submitted their preliminary comments in advance of today's
9 hearing. I think that will definitely make today go more
10 smoothly and more efficiently.

11 I also just wanted to say real quickly I think
12 it's been a long time coming to this.

13 Just a couple of quick dates. In December of
14 2008 was the original application for certification ASC
15 was submitted by Stirling Energy Systems and that was
16 being done May 6th of 2009. And I think virtually
17 everybody here is very familiar with the long
18 environmental process we've gone through to get to today's
19 PMPD conference. Again, I just want to thank everybody
20 for their patience and perseverance in bringing us to
21 today's hearing.

22 I think I'll go ahead and take introductions.

23 HEARING OFFICER KRAMER: Sure. Before you do
24 that, let me just clarify that the deadline for comments
25 was not an encouraged deadline. It was an absolute

1 deadline on Monday at 4:00 p.m., on Monday the 25th. And
2 as the notice says, if it doesn't come in that day's mail
3 or by e-mail on or before 4:00 p.m., the comments may not
4 be considered. So we encourage you if you want your
5 comments to be considered to get it in by then.

6 COMMISSIONER EGGERT: Thank you for that
7 clarification. Also, just -- so that was our Hearing
8 Officer, Paul Kramer.

9 And also to my right here is my Advisor, Lorraine
10 White.

11 I think we'll take introductions from the CEC
12 staff.

13 PROJECT MANAGER MEYER: I'm Christopher Meyer,
14 Energy Commission Project Manager. And to my right, Steve
15 Adams is Staff Counsel, also have Christine Hammond, Staff
16 Counsel sitting behind me.

17 We have Sarah Allred for Cultural Resource; Casey
18 Weaver for Stormwater Resources; Jared Babula, Staff
19 Counsel working in Cultural Resources as well; and Caryn
20 Holmes, Staff Counsel on the phone. And I believe we have
21 Chris Huntley, Scott White for Biology on the phone and
22 Nagar Vahidi and Susanne Huerta on the phone for Land Use.
23 And Dr. Alvin Greenberg is on the phone for Worker Safety
24 Fire Protection, HAZMAT. I believe that's it.

25 HEARING OFFICER KRAMER: And looks like Will

1 Walters is also on the phone.

2 PROJECT MANAGER MEYER: I am sorry. Will Walters
3 was able to call in as well.

4 HEARING OFFICER KRAMER: So what I can see on the
5 telephone on the Web Ex list is Mr. Walters, Chris
6 Huntley, Ms. Holmes, and Dr. Greenberg.

7 So the other people that Mr. Meyer mentioned,
8 could you confirm to us whether or not you're on the
9 telephone?

10 MR. AVANIAN: Yes. Sarkis Avanian.

11 HEARING OFFICER KRAMER: Okay. No. I'm sorry.
12 I'm just looking for the Commission staff members that he
13 mentioned.

14 MR. WHITE: This is Scott White. I'm on the same
15 line as Chris.

16 HEARING OFFICER KRAMER: Okay. Thank you. The
17 applicant?

18 MS. FOLEY GANNON: Good morning. This is Ella
19 Foley Gannon, counsel to Tessera.

20 With me to my left is Felicia Bellows from
21 Tessera Solar. And to her left, my co-counsel, Allan
22 Thompson.

23 COMMISSIONER EGGERT: Thank you. CURE?

24 MS. MILES: Loulena Miles, counsel for CURE.

25 COMMISSIONER EGGERT: Defenders of Wildlife?

1 MR. BASOFIN: Joshua Basofin on behalf of the
2 Defenders of Wildlife.

3 COMMISSIONER EGGERT: Basin and Range Watch? Is
4 anybody on the phone from Basin and Range Watch?

5 Okay. Sierra Club?

6 MR. RITCHIE: Travis Ritchie with Sierra Club.

7 COMMISSIONER EGGERT: Society for the
8 Conservation of Bighorn Sheep?

9 San Bernardino County?

10 MR. BRIZZEE: By phone, Bart Brizzee, Deputy
11 County Counsel. And Peter Brierty I believe is also on.

12 MR. BRIERTY: Yes, I am. Peter Brierty with San
13 Bernardino County Fire.

14 COMMISSIONER EGGERT: Thank you, Mr. Brierty, Mr.
15 Brizzee.

16 Patrick Jackson?

17 Anybody from the Newberry Service District?

18 BNSF Railroad?

19 MR. LAMB: Steve Lamb and Cynthia Burch for BNSF.

20 COMMISSIONER EGGERT: Thank you.

21 Anybody from the federal agencies, Bureau of Land
22 Management?

23 MR. OTAHAL: Chris Otahal, Wildlife (inaudible)
24 Barstow.

25 COMMISSIONER EGGERT: Okay. Anybody --

1 MR. SHEARER: (Inaudible.)

2 COMMISSIONER EGGERT: I'm sorry. Say that name
3 again.

4 MR. SHEARER: Jim Shearer.

5 COMMISSIONER EGGERT: Can you spell that, Jim?

6 MR. SHEARER: S-h-e-a-r-e-r.

7 COMMISSIONER EGGERT: Thank you. Anybody from
8 the other State agency here?

9 Anybody from the State agencies?

10 Did we catch everybody?

11 Okay. Anybody from the Lahontan Regional Water
12 Control Quality -- RWQCB?

13 Anybody else that I missed that other State or
14 federal agency party in this proceeding?

15 Okay. Then also we -- do we have is our public
16 advisor --

17 HEARING OFFICER KRAMER: She couldn't be here
18 today. But I believe in the back there will be some blue
19 cards maybe on the table outside the door. So if we have
20 any members of the public here -- I'm not sure we do -- if
21 you want to speak later, you can fill out a blue card and
22 send that up to me and we'll call on you at the
23 appropriate time.

24 PROJECT MANAGER MEYER: Hearing Officer, this is
25 Christopher Meyer, Project Manager.

1 Sarkis contacted me by phone yesterday and
2 informed me that wishes to make public comments. And I
3 believe you heard him on the phone earlier. We had the
4 comment letter.

5 HEARING OFFICER KRAMER: Yes, we did. Is there
6 anyone else on the telephone who thinks they may be
7 speaking today who wants to identify themselves now?

8 Okay.

9 COMMISSIONER EGGERT: Okay. Again, I just do
10 want to thank those who did get their comments into us
11 prior to today's Committee conference. That definitely
12 makes our job a lot easier.

13 And so go ahead and turn it back over to Mr.
14 Brirety.

15 HEARING OFFICER KRAMER: Okay. Mr. Brirety, for
16 our court reporter, could you spell your last name?

17 MR. BRIRETY: Yes. It's B-r-i-r-t-y.

18 HEARING OFFICER KRAMER: B-r-i-r-e-t-y?

19 MR. BRIRETY: That's correct.

20 HEARING OFFICER KRAMER: Okay. The E went silent
21 on the phone line there.

22 Folks, if you're in a noisy place or you're
23 making noise -- and sometimes that's just moving the hand
24 set on your shoulder, if you could mute yourself. I
25 believe the command is -- it was probably told to you when

1 you signed on. But I think it's star 6. Does that ring a
2 bell with anyone? We think that's right. And then you
3 can unmute yourself.

4 Otherwise, if we get a lot of noise, I can do
5 that for you. But then it will be harder for you to speak
6 at the part where you wish to speak, okay, especially if
7 you're just listening and don't plan to speak, if you
8 could mute yourself. And your phone may allow you to do
9 that as well. We'd appreciate it.

10 And whatever you do, don't put us on hold if
11 you're in some big system like San Bernardino County,
12 because we do get noise from that. We may get music,
13 which again I can mute, but then it sort of puts you
14 behind the eight ball if you want to speak afterwards.

15 So without further ado, let's start to work
16 through the comments of the parties. And I don't have
17 anything yet in writing from Burlington Northern; is that
18 correct?

19 MR. LAMB: That's correct.

20 HEARING OFFICER KRAMER: So let's begin with the
21 applicant's comments. And what we're mostly interested in
22 hearing from the other parties and especially staff would
23 be your reactions to any of the changes that the applicant
24 is proposing for the PMPD and especially the conditions.

25 So Ms. Gannon, do you want to go ahead?

1 MS. FOLEY GANNON: Sure.

2 First off, we'd like to thank you for all the
3 work on this project and for the PMPD and the analysis
4 contained therein.

5 I think as you can see going through our
6 comments, most of them are really clarifications. Some of
7 them are corrections, picking up things that may have been
8 carried through from the earlier version of the project
9 and updated -- such as it may not have been updated to
10 reflect 5.5. So I think that's the vast majority of the
11 discussions.

12 I would say substantively, the only things that
13 we were asking for changes -- and other people may want to
14 comment on the specific things. But I would say the
15 substantive change we asked for related to the Vis 3
16 restriction, which had precluded development in the area
17 that is between the pipeline and the highway. And we
18 think according to the analysis that was contained in the
19 staff assessment -- supplemental staff assessment, as well
20 as the PMPD, the intent of that condition was to have an
21 adequate setback from the freeway. And so there is an
22 area of land which lies between the pipeline and the
23 setback that would be required from the highway which we
24 could utilize to install sun catchers. And we don't think
25 that it's necessary to preclude that to address in any way

1 the impact that is addressed by those three. So requested
2 that be changed to allow for use of that area.

3 I think that substantively, that's our really
4 biggest change that we were asking for, but we would be
5 happy to talk through in detail any of the comments that
6 you would like us to answer or just respond to other
7 parties comments on our suggestions.

8 HEARING OFFICER KRAMER: Staff or any other party
9 have a comment?

10 PROJECT MANAGER MEYER: Staff has no objection to
11 the applicant's comment on these three.

12 MS. FOLEY GANNON: One other point of
13 clarification. We did docket yesterday -- the BLM issued
14 the decision this week. And we did docket that yesterday
15 for all the parties to view, and we would request that the
16 Committee take notice of that and allow to be admitted
17 into the record.

18 MS. MILES: And just for clarification, what you
19 docketed did not contain the appendices. We will also be
20 docketing the appendices.

21 MS. FOLEY GANNON: That was a version that we
22 received. We can docket the appendices, yes.

23 MR. LAMB: I want to state a formal objection for
24 the record.

25 This is Steve Lamb from BNSF.

1 The document that was purported to be complete
2 yesterday is not complete. It does not contain the
3 appendices. In fact, we have reason to believe the
4 appendices have not been signed to include the
5 determination of adequacy. If you look on the BLM website
6 yesterday, the ROD wasn't there. So apparently this was
7 provided to the applicant prior to being provided to the
8 public. When you look at the BLM website today, you can
9 see that it is there now. It was posted today. And there
10 is a website reference site check to go to the appendices.

11 But if you go to that, it's the same website and
12 the appendices are not on there, because the appendices
13 have not in fact been signed. So it's not complete.

14 I believe it's inappropriate for this agency or
15 any other body to take judicial notice of a document
16 that's not complete.

17 HEARING OFFICER KRAMER: Would the individual
18 appendices be signed normally?

19 MS. FOLEY GANNON: No.

20 MR. LAMB: Yes, sir, they would be. And in fact
21 they are required to be. The determination of NEPA
22 adequacy must be signed before the ROD is signed by the --

23 MS. FOLEY GANNON: The determination of NEPA
24 adequacy is one, the appendices. And that would be
25 signed. There is the biological opinion which was issued

1 by the Fish and Wildlife Service. That has been signed.
2 The right-of-way grant also was issued yesterday. So the
3 BLM has taken all of its formal actions. We are happy to
4 provide the appendices for the Committee as well and the
5 comments close on Monday. And we can provide that before
6 the close of the comment period if the Committee would
7 like us to do that.

8 HEARING OFFICER KRAMER: Yeah. I think we
9 certainly would.

10 MR. LAMB: Again, we're going to object, because
11 we can't comment on those documents the way that this
12 proceeding has been handled.

13 And just so it's clear for the record, I think
14 the record is clear here. We've submitted letters. We've
15 submitted briefs. We've submitted written testimony. We
16 provided expert witnesses. Those have detailed BNSF
17 issues and have specifically commented on Conditions of
18 Certification. We have cross-examined applicant's
19 witnesses, staff's witnesses. In many instances, they
20 have agreed the study's uncontested subsidies are
21 insufficient, incomplete, inadequate to go forward.
22 They've agreed with BNSF issues in many instances. And to
23 specific detailed language of Conditions of Certification.
24 We have entered stipulations with the applicant regarding
25 specific language for Conditions of Certification, none of

1 which is in the present PMPD.

2 CEQA clearly requires that this agency performs
3 studies, prepare plans, and develop mitigation measures
4 and submit those to public comment before there is a
5 determination as to whether or not mitigation is feasible.
6 And that is critical and has not been done here. And in
7 fact it is very clear that this Committee has
8 pre-determined the result and that's evident from all the
9 comments about ERA funding and the timing and having
10 hearings that go until 1:00 in the morning and 4:30 in the
11 morning so it is physically impossible to comment on
12 Tuesday at applicant's request. We met and confirmed
13 reportly regarding certain Conditions of Certification.
14 They did not talk about those. They talked about other
15 issues that concerned them. Once we started talking about
16 those, they left the meeting. So that's the position that
17 we're in right now.

18 HEARING OFFICER KRAMER: Okay. Mr. Lamb has
19 obviously segued into an opening statement. So out of
20 fairness, let me ask if any of the other parties wish to
21 make opening statements and then we'll go back to the
22 detailed review of the applicant's comments.

23 MS. FOLEY GANNON: Thank you. The applicant
24 would like to make an opening statement.

25 As I did indicate in the beginning of these

1 proceedings, we are very appreciative of all of the effort
2 that the Committee has made to ensure thoughtful
3 consideration of the project, the potential impacts to
4 develop mitigation measures that work to offset the
5 impacts that have been identified as well as to allow for
6 this important project to proceed.

7 There are a number of issues that Mr. Lamb has
8 just raised, which he's accurate they reflect things that
9 he has talked about a number of times. So I don't think
10 we need to spend time addressing those in this particular
11 forum.

12 There is two issues, though, however, I would
13 like to address. One is I failed to understand the reason
14 to bring up on this record a meeting which happened
15 between the applicant and BNSF, and it is true that that
16 meeting turned out not to be productive. But I think that
17 is all that the Committee needs to hear about that and
18 that is all that is relevant to these proceedings. So
19 that's not even actually relevant to these proceedings.

20 And if the adequacy of the opportunity for
21 parties to participate, again we continue to find it
22 somewhat ironic that the objection is raised because the
23 hearings always went on too long. And they were
24 (inaudible) opportunities.

25 Your proceedings, as I'm sure you're very well

1 aware, are incredibly open compared to other proceedings.
2 There are ample opportunities for people to not only to
3 comment, but to question witnesses and present evidence.
4 And we think that in many ways as difficult as this
5 process has been for us and has resulted in reductions in
6 the project, it does show that the process can work.

7 I think what we have been doing is trying to find
8 that line that you start talking about in the very first
9 hearings was the balancing between the need for renewable
10 energy and the ways to minimize those impacts. And what
11 we have done through these months of proceedings is to
12 continue to scale back the project and to avoid impacts
13 and to identify visual mitigation measures and still
14 retain a project that will help meet the goals of
15 providing clean energy for California. And as I said, we
16 weren't always in favor of all of those reductions and
17 those changes and we may have felt that the line should
18 have been drawn or could have been drawn in a different
19 place.

20 But I think this shows that through this process
21 of hearing people's opinions and responding to it we can
22 come up with something that is really going to work for
23 everybody. And again, we really thank the Committee and
24 the staff and the other parties for all of their input in
25 helping us to get to where we are today. So we appreciate

1 that. And we can talk more about whether the ROD should
2 be put in I guess after other people have a chance to make
3 an opening statement.

4 Thank you.

5 HEARING OFFICER KRAMER: Any from staff?

6 MR. ADAMS: Steve Adams.

7 Just very briefly. I think it's been
8 acknowledged that the time frame of this project has
9 presented challenges. We've all strived to meet the time
10 frame in a manner that complies with the Warren Alquist
11 Act and CEQA. I think I'll leave it at that.

12 Thank you.

13 HEARING OFFICER KRAMER: Any of the other
14 intervenors? The mikes here -- they're stretched out. So
15 if you can swivel the mike on its base and get it pointed
16 more or less at you and as close as you can, that's
17 probably the best we're going to do.

18 MS. MILES: Yes, we do still have a lot of
19 concerns about this project. And although I would agree
20 that the project that's before the Commission now is a
21 better project than when it started, under CEQA we need to
22 remember that we are not comparing the project that we
23 have now against the initially proposed project, but
24 really against the base line that existed at the time that
25 we started this process.

1 And so the project that we're looking at now is
2 still extremely large. But our problem is not with the
3 size of the project, but with the process and with the
4 fact that we feel that the analysis has not been done on a
5 number of critical environmental issues.

6 Based on the record to date, the Commission has
7 not analyzed the transmission that will be required for
8 this project. There will be a 67-mile transmission line
9 that's going to go primarily through desert tortoise
10 habitat, and this project will not be able to bring its
11 power the market without that transmission line. That
12 transmission line is going to go through critical habitat.
13 It's going to go through areas of critical environmental
14 concern.

15 Additionally, there will be a substation that is
16 likely to be necessary. It is the Pisgah Substation II,
17 as I've heard it referred to, although there is no
18 official name for it. And it certainly was not analyzed
19 in this PMPD other than a very casual mention. This
20 substation would be 100 acres of impact area that we don't
21 know where it would be.

22 And you know, this is a fragile desert ecosystem.
23 It's not appropriate to approve a project when you have
24 not analyzed the whole of the action under CEQA. And
25 we're talking about three decades of CEQA case law from

1 the California Supreme Court starting with Laurel Heights
2 that you have to analyze the whole of the project. And no
3 matter how much political pressure is ushering this
4 project forward, that does not excuse the Commission from
5 its obligation to comply with CEQA. So a lot of analysis
6 is required.

7 Additionally, desert tortoise issues are very --
8 the impacts to desert tortoise are still very substantial.
9 I don't think we fully understand the impacts. And the
10 PMPD did not fully address the impacts associated with the
11 desert tortoise.

12 For example, there will be impacts in off-site
13 desert tortoise reserves that were established to continue
14 the survival of this species that is in decline throughout
15 its range. And this project proposes to move desert
16 tortoises into those reserves. And that will cause
17 disturbance and impact. This has not been analyzed or
18 mitigated.

19 And Chris Otahal testified there would be
20 approximately 100 desert tortoise that would be impacted
21 in this off-site Ord-Rodman Preserve if they need to move
22 any desert tortoises from this project. And the staff had
23 previously testified there would be very significant
24 impacts associated with the disturbance and testing and
25 handling and blood drive in the off-site reserves

1 necessary to be a host site for moving towards.

2 So additionally, the hearings that we've shown
3 that translocation is not an effective mitigation measure,
4 that it causes its own impacts. There is not substantial
5 evidence in the record to support the Commission relying
6 on that as the mitigation measure, and we believe there's
7 not substantial evidence in the record to support the
8 Commission's determination that off-site land purchase and
9 increasing carrying capacity will be an effective
10 mitigation measure. So we believe a lot of additional
11 analysis will be necessary to fully analyze the impacts to
12 desert tortoise and fully mitigate them.

13 And also I'd like to address the issue that's
14 been raised this morning about the long hearings we've had
15 and it has been very difficult to participate, especially
16 when our experts are forced to come onto the stand at such
17 late hours. And I feel that we have been denied an
18 opportunity to have a fair hearing with regard to our
19 experts.

20 Thank you.

21 MR. BASOFIN: Joshua Basofin on behalf of
22 Defenders of Wildlife. I'll just make a brief statement.

23 First, I'd like to say that we do appreciate the
24 applicant and Committee's efforts to deal with the
25 significant environmental impacts by reducing the project

1 size and mitigating some of those impacts. However, there
2 are still various unknowns. There are still potential
3 impacts.

4 You know, I'd just like to reiterate what's
5 missing. As Mr. Lamb said, we don't have a biological
6 opinion. It hasn't been released. We don't have a final
7 translocation plan. We have a draft translocation plan.
8 And we have very little clarity on what the timing and
9 substance of the translocation project program will be at
10 this point. We're getting near to the closing of the fall
11 season for translocation. There's been very little
12 indication from the applicant or the staff as to how that
13 translocation is going to function, how the tortoises that
14 are currently on the site are going to be protected, and
15 how translocation will move forward in the future.

16 In addition, as we mentioned in our comments,
17 there still hasn't been a comprehensive study of movement
18 corridors or either the bighorn sheep or the desert
19 tortoises. That's in contradistinction to at least one
20 other project that the Commission has approved, the Palen
21 project. The desire for consistency and CEC approvals
22 dictates that we do the same types of studies for the same
23 types of projects. And in the Palen project, we have a
24 situation where we have a very similar layout and site
25 configuration within a half a mile of a major highway with

1 affected species that are likely to engage in movement and
2 use movement corridors.

3 Desert tortoises, big horn sheep, and we have a
4 similar situation at the Calico site. This has been an
5 issue that staff has danced around for quite some time,
6 and frankly we really don't have sort of a comprehensive
7 analysis of how these movement corridors are affected.
8 And we could have. We could have done that. We could
9 have looked at every trestle under the railroad, and we
10 could have looked at every underpass under the freeway and
11 we could have said here's what they're going. Here's
12 where there's borrows. And there's places where desert
13 tortoises may have gone. Here's where bighorn sheep may
14 have gone. And we could have had the satisfaction of
15 knowing that we have looked at all those things. But that
16 was an analysis that was conspicuously missing.

17 So I think that those three items, final
18 biological opinion and final translocation plan and a
19 corridor study, are things that Defenders of Wildlife
20 feels we need to have before this proposed decision can go
21 to the Commission for final approval.

22 MR. RITCHIE: This is Travis Ritchie with the
23 Sierra Club.

24 I'd like to point out before really starting
25 the -- the Sierra Club greatly appreciates the desire to

1 develop solar projects in the desert in California. It's
2 a good renewable resource. It's one that should be
3 developed, and in fact Sierra Club has supported several
4 of the projects between BLM and this Commission to develop
5 solar projects. And the applicants has one of those solar
6 projects going forward in the Imperial Valley. And
7 several tens of thousands of sun catchers are going to be
8 going off into the California deserts. And Sierra Club
9 did not actively engage in a lot of those proceedings and
10 many of those proceedings we support solar development.

11 From the beginning, however, Sierra Club has
12 opposed this site location as a solar development project.
13 It's a special site. It's the wrong location to put a
14 massive development of this scale. And we've talked about
15 scaling this project back and that's true. And every acre
16 in my opinion that you take away from this project
17 benefits biological resources because of the value of the
18 site.

19 But let's not lose site of the fact this is still
20 a 4,000 acre project. It is huge. All of these projects
21 are huge. And what we're sacrificing here are resources
22 in the desert that will never be recovered. Once they're
23 destroyed -- we've seen destruction from the beginning of
24 the last century that is still visibly evident in the
25 desert. So this commitment of resource is permanent.

1 And this particular site for this commitment of
2 resources does not justify the renewable power that we'll
3 be getting from it. There are other sites that we should
4 be looking at. There are other alternatives that this
5 proceeding and the federal proceeding did not adequately
6 explore. And for that reason, Sierra Club still opposes
7 this project. And the PMPDs modified analysis scenario
8 5.5 did not fix the critical errors Sierra Club had
9 commented on throughout this proceeding.

10 Specifically going through a few of those with
11 the desert tortoise in particular, this is a very
12 sensitive species. We heard repeatedly it's in decline
13 throughout its range. And while scenario 5.5 avoided
14 certain areas where there are desert tortoise, it
15 certainly did not avoid the desert tortoise and it did not
16 avoid the desert tortoise habitat. And the mitigation
17 measures this proceeding has looked at to protect the
18 desert tortoise are inadequate at this point as we
19 discussed before. The translocation plan is not
20 finalized. It's in draft form. And from what Sierra Club
21 is saying, there aren't adequate performance standards or
22 criteria listed in any of the Conditions of Certification
23 or in the federal process that would ensure that those --
24 that the translocation plan is at all effective and it
25 could even be more harmful than not doing it at all.

1 In addition to that, staff has proposed and
2 others have said there are other mitigation measures for
3 the desert tortoise. But again, we don't -- the
4 compensation lands and the mitigation measures that staff
5 has put forward and the PMPD looks at, we don't believe
6 they're adequate. We don't believe they've been fully
7 analyzed on their effectiveness. And we don't believe
8 that the impacts to desert tortoise are being addressed or
9 mitigated in this proceeding. Similarly with bighorn
10 sheep and all species movement corridors, there are no
11 mitigation measures to improve what everyone recognized is
12 a vital movement corridor in this area.

13 That's another large flaw. With the Mojave
14 fringe-toed lizard, Sierra Club very much disagrees with
15 the change in the final analysis of the staff that there
16 are not significant cumulative impacts to the Mojave
17 fringe-toed Lizard. We believe there are and we don't see
18 what changed in order to change staff's conclusion on that
19 issue.

20 There's going to be a local extirpation of Mojave
21 fringe-toed lizard and we still think there will be
22 species-wide impacts that will be cumulatively significant
23 from this program and there haven't been adequate
24 justification showing why that's not the case.

25 And finally, with the golden eagle, that's

1 another species where the mitigation measures proposed by
2 this proceeding are not adequate. There are not specific
3 performance standards and criteria. The aviation plan
4 that's been put forward is just that: It's the
5 requirement to do a plan. There's no conditions. There's
6 no performance standards to ensure that mitigation measure
7 will be sufficient to protect a very critical and very
8 protected species.

9 And with that -- you know what, I would like to
10 reserve. I don't have to do this at this point. We can
11 do this more specifically. But I did docket yesterday a
12 news article from San Bernardino County on the desert
13 tortoise, and I'm not sure if now is the appropriate time
14 to talk about it, Mr. Kramer, if you want me to defer that
15 until later, I'm happy to.

16 HEARING OFFICER KRAMER: Let's put those at the
17 end, along with Ms. Gannon's request.

18 MR. RITCHIE: That's fine. As long as I can
19 reserve a bit of time later to do that. Thank you.

20 HEARING OFFICER KRAMER: Those were I think most
21 of you summarized your positions and perhaps won't have
22 that much more to say specifically. But those were
23 opening statements in my formulation. So you're not done
24 or you don't have to be.

25 MR. RITCHIE: I did book a room for 4:00 a.m.

1 tonight.

2 HEARING OFFICER KRAMER: I'm good until about
3 10:00 p.m. I need the last bus. But we shouldn't have to
4 go that long.

5 Anyone else? Did any of the other intervenors --
6 well, let's see.

7 Mr. Brizzee, did you have anything?

8 MR. BRIZZEE: Actually, I was going to waive
9 opening, but in light of the comments that have been made,
10 just to alert the Committee to the county's concerns.
11 They really are two-fold. And those are not new issues.
12 We essentially made them clear in our brief that was
13 submitted on August 23rd as to worker safety. And Mr.
14 Brirety can chime in since I believe he is dealing
15 directly with the applicant. We believe we are working
16 forward to an agreement to adequately address all the
17 worker safety issues the county has concerns.

18 HEARING OFFICER KRAMER: Can you speak up a
19 little bit?

20 MR. BRIZZEE: Is that better?

21 Yes, I was saying one of the issues is worker
22 safety, and we believe we're working with the applicant on
23 formulating an agreement that will appropriately deal with
24 the impacts to county fire emergency services. Mr.
25 Brirety is on the phone, and I think he can correct me if

1 I'm wrong in that regard, since he's been dealing directly
2 with the applicant.

3 The second one is the ongoing concern of the
4 county that the resource agencies are requiring huge swabs
5 of private land to be taken up as mitigation for these
6 projects. And although the latest permutations on this
7 one has drastically reduced that amount, it's still very
8 significant, over 10,000 acres.

9 And I just want to go on record with the county's
10 ongoing concerns about the impacts that taking these large
11 areas of private property off of the -- any means of
12 recovering any kind of tax or other income for the county
13 or -- so that would conclude my opening remarks.

14 HEARING OFFICER KRAMER: Okay. Thank you.

15 Did any of the other intervenors join us since we
16 took roll?

17 And specifically I have either Mr. Jackson or the
18 Society or the Big Horn Sheep or Basin and Range Watch, or
19 the Community Service District?

20 Okay. Hearing none, let's go back then to --
21 well, perhaps, Ms. Gannon, since I think you're most up to
22 date on what's going on on the federal process, I'm under
23 the impression that there would have to be a final
24 biological opinion and an approved translocation plan in
25 order for the ROD and the right-of-way permit to be

1 issued. Am I wrong?

2 MS. FOLEY GANNON: That's correct. And they are
3 both attachments to the ROD. As I said, the version that
4 we got that was sent just after it was signed that was
5 sent to us from BLM's project manager Jim Stobaugh didn't
6 have the attachment because it's a large document. But
7 they have all been executed and finalized by the agencies.
8 And we are happy to share them. We don't believe that
9 they are necessary for the analysis. The analysis was
10 done at the proper time and considered the impacts and the
11 actual facts of the mitigation. But we are happy to share
12 them.

13 HEARING OFFICER KRAMER: Well, I think one issue
14 that the Committee is interested in in looking to these
15 documents to address is the question of the donated lands.
16 So we'll get into that a little later perhaps.

17 MS. FOLEY GANNON: Yes. And we have a copy of
18 ROD with us here and we can point you to the language that
19 it discusses so it does make its decision about its
20 adequacy, its compliance with the policy in terms of laws,
21 the federal laws and obviously it could only issue the ROD
22 if it made that determination and it specifically
23 addresses that in the ROD itself.

24 HEARING OFFICER KRAMER: Okay. Let me ask, are
25 any of the other parties interested in this donated lands

1 issue?

2 MS. BURCH: I'm not interested in donated lands.
3 I am interested in an accurate record. And I was
4 served -- if you call this service with a copy of a ROD
5 with no attachments, no appendices attached to it late,
6 day before yesterday.

7 I then called BLM. I spoke to Mr. Stobaugh. He
8 said he actually received the document from the applicant.
9 I asked him for the appendices. And for the last day and
10 a half, he's not been able to find the documents to
11 support that document.

12 So at this point in time, on the face of it, what
13 we have submitted is not complete and we cannot continue
14 to keep admitting evidence at hearings and at the end of a
15 comment period and expect that parties can make the kind
16 of objections I can now make because I'm working hard to
17 keep up with all the things they keep trying to shove into
18 the record without support and incomplete documents.

19 So I would really appreciate a clear indication
20 of whether you're going to allow that to be supplemented
21 at this time. If you want to look on the website as to
22 what they submitted to you, it has no appendices attached.
23 And it's critical documents.

24 HEARING OFFICER KRAMER: Ms. Gannon, when do you
25 think you could assemble a complete set and deliver it

1 electronically to all the parties?

2 MS. BURCH: They had not moved to reopen --

3 MS. FOLEY GANNON: Just for clarity's sake, we
4 did not actually even ask for it to be provided into the
5 record when we documented as a courtesy. And we
6 documented what we had received. So we were not hiding
7 anything, and we weren't trying to pull anything on
8 anybody clearly. I just want to clarify that. So we
9 docketed what we had received. We have just e-mailed --
10 and we did receive it from Jim Stobaugh. Was accurate he
11 didn't receive it from us. And we just e-mailed Jim
12 Stobaugh and said can you provide us all of the documents
13 so we can have the complete package. We can certainly
14 have it by Monday, probably by the end of the day today.

15 HEARING OFFICER KRAMER: Okay. On the donated
16 lands question, is the discussion in the ROD more thorough
17 than that memorandum that staff circulated last week? It
18 was an internal BLM memorandum.

19 MS. FOLEY GANNON: It's actually more of a
20 summary. It just says these are the donated lands and
21 this is the decision we need about the policy. It does
22 not have a very long discussion and it does give its
23 conclusion.

24 HEARING OFFICER KRAMER: Does it explain the
25 rational?

1 MS. FOLEY GANNON: Not incredibly clearly.

2 HEARING OFFICER KRAMER: Okay. So it may be
3 that -- is it fair to say a more detained explanation is
4 in the internal memo that was circulated to everyone last
5 week?

6 MS. FOLEY GANNON: I would interpret it that way,
7 yes.

8 MR. RITCHIE: Mr. Kramer, if I could weigh in on
9 this. I'm not entirely clear, although I do appreciate
10 seeing the ROD. I am not entirely clear the relevance to
11 this record.

12 My understanding based off of a Memorandum of
13 Understanding between this Commission and BLM was actually
14 considered this proceeding would be finalized prior to
15 issuing the ROD. We were a little surprised to see the
16 ROD ahead of time and so I don't necessarily see the
17 relevance of it in this record, not necessarily that I
18 oppose it. I'm curious if maybe the applicant can shed
19 some light on that and also the timing issue and what this
20 Commission sees as going on with a process that appears to
21 have frayed a little at the ends as far as culmination
22 between the two agencies.

23 MS. FOLEY GANNON: I think the relevance is I
24 don't think it's necessary for the record. Again, we were
25 providing it. We know that the other parties have been

1 very interested in seeing things like the drafts of a plan
2 and there's been a lot of discussion on is there going to
3 be a final biological opinion, when does that happen.
4 What are the other AGP expert agencies determining about
5 the project. So we were sharing it as a courtesy.

6 And we assume that the Commission might be
7 interested in showing what the federal agency with primary
8 jurisdiction over this land had determined and the
9 decisions they had made. That's why it was provided.

10 Again, I don't think it's necessary. Certainly
11 in many other proceedings the CEC has gone first. So we
12 have not relied on or considered a Record of Decision but
13 prior to making a final determination. And that could
14 have happened here, too. It just so happens in this case
15 the federal agency had finished its process first. It had
16 gone through, finalized its FDIS. It had made its
17 response to comments. It completed everything it's
18 required to do under federal law. It got its biological
19 opinion and took it -- took the action that it is
20 authorized to take and it issued the ROD and signed the
21 right-of-way grants. So I don't think there's anything
22 that's inconsistent with the Memorandum of Agreement
23 between the two agencies, and I'm not sure that would be
24 relevant to this proceedings anyway.

25 But that's how it happened from our perspective,

1 and that's why we submitted it for your consideration and
2 for the other parties to be able to review.

3 HEARING OFFICER KRAMER: I think it's fair to say
4 that the footprint re-set got the Energy Commission behind
5 the BLM on the schedule. But as far as relevance goes, we
6 are -- we'll discuss more later. We're entertaining the
7 option of taking official notice of the final document --
8 the federal document. We do want to make sure that
9 everyone has a complete copy, however. And we are most
10 interested in it for the explanation from the source both
11 land use policy about donated lands about their
12 interpretation of whether that policy is satisfied. But
13 it may be as we just talked that the internal memorandum
14 that was shared with us by staff last week is just as
15 relevant to that point.

16 But in our minds, that was a loose end that
17 needed further clarification. So we welcome and we're
18 happy to see that the BLM got back to us, if you will, and
19 with their interpretation of that policy, because we had
20 a -- as I say, a loose end in the land use section.

21 While we're on that topic, I've heard the
22 suggestion that the memo last week, the federal internal
23 memo cannot accurately describe all the lands that were --
24 that are in the project footprint that are donated land.

25 MS. FOLEY GANNON: It accurately described the

1 donated lands. It didn't describe the acquired lands that
2 were made with the funds. So there's two issues that the
3 policy applies to. One is donated lands and one is
4 acquired lands with the special funding. So we described
5 the donated lands without the acquired lands. Now the
6 record's decision addresses both.

7 HEARING OFFICER KRAMER: Okay. Well, let's go
8 back to the applicant's proposed revisions to the PMPD and
9 work through those. And then we'll go through the
10 staff's. And then we'll go through the comments the other
11 parties have filed to date. And I'd like to at least know
12 from the railroad's perspective when we get to you. So if
13 you went first the last time, I kind of thought you would
14 be last this time perhaps, or at least near the end, to
15 find out even though you haven't identified them yet in
16 the filing. And I expect you will be doing so either
17 today or on Monday which conditions you think were not --
18 we didn't get right as far as the agreement goes between
19 the parties.

20 And maybe we can then hear the applicant's
21 response to that. That will be more efficient in our
22 having to find of flag the line when you file something on
23 Monday and we don't have an opportunity to hear back from
24 them.

25 So that's just a head's up, Mr. Lamb, that we are

1 offering you that opportunity.

2 MR. LAMB: For the record, we don't need to
3 quibble. But to say that we need to identify something
4 that we've identified time and time again I think is
5 unfair. And then for the Commission to say that you're
6 concerned about flying blind when we've been jumping
7 through hoops and doing hearings until 1:00 and 4:30 in
8 the morning is just not an accurate reflection of the
9 record.

10 And I cannot state it more clearly than I stated
11 earlier. We've identified it a number of times. We have
12 stipulations on the record. We've done briefs. We've
13 submitted evidence. So it's in the record. And whether
14 we talk about it again or not now -- I don't think there
15 is an ongoing requirement administratively for us to go
16 over and over and over again the same thing when it's
17 clear that it's not adopted and it's not commented on and
18 it's not referred to. That's the problem we have. I
19 mean, we're here. We want to work through this. But it's
20 a very difficult process. And to say that the Commission
21 is flying blind because they haven't heard from us today I
22 just take umbrage to.

23 MS. BURCH: And I take umbrage too with the fact
24 that we had people fly out from Texas to negotiate on
25 Tuesday with these people with the applicant. We had

1 experts flown in to negotiate on the substance of our
2 concerns and they walked out. And to come to this hearing
3 and be told that we need to go through those details, we
4 will get you what we can by close of business, the 4:00
5 deadline. We are working with the client on how to
6 approach and resolve these issues one way or another.

7 HEARING OFFICER KRAMER: Well, I think we have a
8 bit of a misunderstanding here. I'm just trying to
9 understand which conditions you think we didn't get. And
10 I guess I'm a bit confused by Mr. Lamb's assertion that
11 it's obvious, it's unchanging, your request. And it's
12 something somebody could find in any portion of the record
13 where it's been discussed and just pick it up there with
14 no fear that it hasn't been subsequently changed by some
15 other conversation. Because in the same few paragraphs
16 that you folks just spoke, you suggested that everything
17 is still being negotiated.

18 So I'll just lay my confusion out on the table.
19 You don't have to do anything. But we're asking for your
20 help in at least telling us, giving us a heads up about
21 which conditions you think are going to be proposed for
22 modification, whether it's new modification or it's a
23 correction to compensate for our failure to pick up
24 something that was previously agreed to.

25 There is one particular discussion that doesn't

1 involve the railroad that we'll get to a little later
2 where the Committee consciously did not go along with what
3 the parties said they stipulated to. And that's the
4 worker safety condition about the fire mitigation. But
5 we'll come to that in a minute.

6 So let's -- Ms. Bellows, I have a feeling that
7 you want to address the allegation that you didn't --

8 MS. BELLOWS: We walked out on the meeting, if
9 you want to say that.

10 HEARING OFFICER KRAMER: It's largely irrelevant
11 to us. But if you feel the need to address that --

12 MS. BELLOWS: I do, unfortunately. I'm probably
13 going to jump out of my skin.

14 But it's true; we did walk out on the meeting.
15 But it certainly because we were getting into the
16 conditions pieces of it. In fact, that's where we really
17 thought we were going to start at the meeting. But
18 instead when we got there, we started in on access and
19 that sort of thing and that was fine. We walked out of
20 the meeting because we were being screamed at (inaudible)
21 and my counsel was being called a liar. I've been doing
22 this for a long time. Never been in a meeting like that.
23 Ever. We walked out.

24 However, I will tell you that day before
25 yesterday I called you, Cynthia, and asked you if you'd be

1 willing to send me a draft of what you wanted to have
2 changes made to so that we could try to work through that
3 over e-mail. And that she was to talk to her client and I
4 never heard back. So I mean, the door is open. I would
5 be more than happy to work through that.

6 MS. BURCH: Again, we did not scream. And we did
7 have on a board the proposals we've had for conditions.
8 We had experts waiting in the other room to come in after
9 lunch and you walked out. And I would say that we have
10 basically tried as many ways as we can to present these
11 issues to staff, to the applicant, to the Commission, and
12 we do think they are there. And we will continue to work
13 to put them in front of you by close of business on
14 Monday.

15 I had left words with Christopher Myers asking
16 him right after the last hearing closed for guidance as to
17 how to proceed procedurally here and I did not hear back.
18 I asked for ways to talk with them. We flew people out.
19 They left the meeting. And then I get a call late on
20 Wednesday afternoon when I'm leaving at noon the next day
21 saying can you get your team together to negotiate with us
22 before the hearing on Friday. Realistically, that's just
23 not possible. We went to great efforts to meet with you.
24 So I can't help you.

25 COMMISSIONER EGGERT: Yeah, I'll just say I guess

1 from the Committee's perspective, I think we are very
2 interested if we have certain important items that were
3 previously agreed to. And I think we would request that
4 if it's at all possible that, you know, I think we have
5 the opportunity to have a discussion about some of those
6 today. If there's any chance that the two parties could
7 provide a joint agreed-upon set of revised conditions, the
8 Committee is very interested in receiving those and
9 considering those.

10 I just want to repeat something Mr. Kramer said.
11 I think we did take significant effort to try to go
12 through the record and reflect a lot of discussions, a lot
13 of the important issues that you brought forth that were
14 of concern to BNSF. We modified conditions that have been
15 proposed by the staff to incorporate specifically BNSF's
16 concerns, review of plans. So if we miss something that
17 was previously agreed upon, I can apologize for that. But
18 I think in the interest of actually being productive and
19 constructive if there is any opportunity to do that before
20 Monday, you know, that's something that could be
21 accommodated in the form of errata ideally, we'll consider
22 that. So I guess that's all.

23 MS. BURCH: Does that include our simply giving
24 you what our concerns are? That seems to be the best we
25 can do. We tried and we were unsuccessful.

1 HEARING OFFICER KRAMER: It's more productive if
2 you have proposed language. But if the best you can do is
3 describe your concerns, that makes it a little more
4 difficult in we have to try to then craft it. I guess --

5 COMMISSIONER EGGERT: Yeah. I guess Mr. White
6 was just commenting as well. I mean, we have the
7 submission from the applicant in terms of their
8 suggestions for proposed changes. I don't know if there's
9 anything in there that reflects any of the discussion.
10 But if there's opportunity to comment on those as well,
11 you know, we would welcome that, too. I don't know if
12 that actually accomplishes everything that we're talking
13 about here.

14 MS. BURCH: Excuse me, Commissioner. Are you
15 talking about their errata sheet?

16 COMMISSIONER EGGERT: That's correct. Yep.

17 MS. BURCH: We were going to address the one
18 change they made. (inaudible).

19 COMMISSIONER EGGERT: And we would --

20 MS. BURCH: We'll address that.

21 HEARING OFFICER KRAMER: Okay. Well, it sounds
22 as if the visual change was the only one that the
23 applicant was going to highlight for us.

24 Let's put aside the worker safety condition for
25 the moment. Did you want to add --

1 MS. FOLEY GANNON: Could I say one thing with
2 regard to stipulation?

3 There were agreements that we recognize were not
4 reflected in the PMPD that we did not comment upon. And
5 part of that is just like the worker safety there's some
6 things that we thought we gave you what we had agreed on.
7 If you chose not to incorporate it, we also thought that
8 may have been an active choice on your part. And if we
9 thought, you know, we can live with what's in here and we
10 think it's not a problem, we didn't comment on it because
11 we were trying to be very targeted and specific in things
12 that we felt were important to address. And assuming when
13 BNSF has the opportunity to say what those specific things
14 are, we can give you our thoughts on what we've agreed to,
15 but just because we didn't comment -- like the Blair
16 study. We had agreed to do a Blair (phonetic) study. It
17 was not the conditions.

18 The way we read the analysis was it was a choice
19 that you as the Committee had made. And we weren't
20 objecting to whatever choices you made because we felt we
21 could do that privately and contractually to address their
22 needs and that you were making decisions based on your own
23 needs. That's the only other thing I'd like to highlight.

24 The other comments as I said, I think they are
25 fairly self-explanatory as they're set out here. And we

1 can hear about the people think things are controversial
2 or need further explanation for what we're requesting.

3 HEARING OFFICER KRAMER: I'm going to begin with
4 the railroad. You said that you had a specific condition
5 about one of their proposals. Which one is that?

6 MS. BURCH: It says page 44. It's comment number
7 16, Mr. Kramer. Page 6.

8 HEARING OFFICER KRAMER: Okay. Of their
9 comments. If this is relating to soil and water resources
10 page 44 --

11 MS. BURCH: And our comments were that we were
12 very concerned with subsidence and how it could effect the
13 railroad track. And we had worked on this provision with
14 Mr. Weaver and the way it was written was what we believe
15 is protective of the situation and it changed to required
16 nothing be done until there's a six-inch subsidence could
17 be catastrophic. So we would request that you not make
18 that change.

19 MS. FOLEY GANNON: With the condition as you
20 drafted it, we just thought it was monitoring five feet
21 drop in groundwater may or may not be related to
22 subsistence, but we can live with it.

23 HEARING OFFICER KRAMER: I'll mark that down as
24 withdrawn by applicant then.

25 MR. ADAMS: Staff supports the withdrawal, I

1 think.

2 MS. FOLEY GANNON: I think we may have
3 misinterpreted the way was written. So we have no
4 problems with the condition as proposed.

5 HEARING OFFICER KRAMER: Well, let me just ask,
6 the stipulations that we may have failed to put in, were
7 those contained in the briefs the revised condition
8 language? Because we basically worked from the last
9 compilation that I believe was the applicant prepared of
10 what was supposed to be the agreed upon language.

11 MS. FOLEY GANNON: There were things that
12 happened at the last hearing that was after the briefing.

13 HEARING OFFICER KRAMER: Okay. But then I
14 believe after the last hearing didn't you produce another
15 version of the master conditions?

16 MS. FOLEY GANNON: One second.

17 PROJECT MANAGER MEYER: Was that Exhibit 113?

18 MS. FOLEY GANNON: We believe it was BNSF's
19 Exhibit 1202, which had the language in it.

20 HEARING OFFICER KRAMER: Okay. Well, it may have
21 been inadvertent that was overlooked. So I would
22 encourage counsel for the railroad to call to our
23 attention those --

24 MS. BURCH: I actually did circulate right after
25 the last hearing the request to correct something that I

1 had seen on the -- we've asked for the hydrology study.
2 They agreed to pay for it and to do the mitigation and to
3 pay for the mitigation. The way the actual soil and water
4 came out in the PMPD it left off the bottom half of our
5 stipulation.

6 MS. FOLEY GANNON: Wasn't that in your
7 Exhibit 1202 is we just referenced?

8 MR. LAMB: 1209.

9 MS. FOLEY GANNON: We just offered that. That's
10 what we stipulated to. We just suggested that.

11 MS. BURCH: Okay. And I can only say you made a
12 decision against including it because --

13 MR. ADAMS: Staff -- go ahead.

14 MS. BURCH: We will work with you to -- I'm
15 afraid you're going to tell me you're not prepared here
16 today at this point to go back and do that. But we will
17 work hard this weekend.

18 COMMISSIONER EGGERT: Just to clarify though,
19 except for that last paragraph, the condition as you put
20 forth was included in the PMPD?

21 MS. BURCH: Half of the stipulation is in. Half
22 is out.

23 COMMISSIONER EGGERT: Okay.

24 HEARING OFFICER KRAMER: And by out, you mean
25 just not there, as opposed to some other version of the

1 program.

2 MS. BURCH: Nothing else. Half is missing.

3 HEARING OFFICER KRAMER: That sounds like a
4 failure in cut and paste.

5 MR. ADAMS: Well, I might be able to shed some
6 light on it because I think staff filed soil and water
7 conditions that may be exact deletion you're talking
8 about. Staff was not part of the stipulation to that
9 exact language and staff was concerned about requiring
10 mitigation -- unspecified mitigation based on the future
11 study without identified performance standards. So I
12 suspect the language in your -- I think it's soil and
13 water twelve came from the -- may have come from our
14 filing. That was the reason we deleted that from the
15 language that was out there.

16 As far as resolving that, we did lead the study
17 in an acknowledgement that I think there was wide
18 agreement that further study to address BNF's concerns
19 were warranted. I think staff's concerns might be
20 addressed if that study could be folded into some
21 moderation which has some performance standards or if
22 other performance standards could be derived.

23 MS. BURCH: I very much appreciate your
24 explanation. And just so you know, our new draft is all
25 the soil and water conditions and they put performance

1 standards in one and eight, and so we worked very hard to
2 try to address your concerns and we had hoped to talk
3 about them on Tuesday.

4 I mean, we are willing to live with these, and if
5 you want to talk from them today, we can. I just don't
6 know what -- I offered them to you to tell me -- this is
7 why I called and asked for guidance as to how to do this.
8 I tried to work with the applicant. That didn't work.
9 And we're just trying to make this happen. So --

10 COMMISSIONER BYRON: Mr. Kramer, who was that
11 speaking, please?

12 MS. BURCH: Cynthia Burch.

13 COMMISSIONER BYRON: Thank you.

14 COMMISSIONER EGGERT: Counsel to BNSF.

15 HEARING OFFICER KRAMER: Let me ask you -- well,
16 hold on a minute. Let's go off the record.

17 (Off the record from 11:17 a.m. to 11:18 a.m.)

18 HEARING OFFICER KRAMER: Would there be any value
19 in the parties meeting over lunch to discuss the draft?
20 Is your draft of condition language in such a shape that
21 you could share it with the other parties?

22 MS. BURCH: Yes.

23 COMMISSIONER EGGERT: We could have somebody make
24 copies.

25 MS. BURCH: Yes. There is a one fundamental

1 question that we have, and it really does require I think
2 some input from the Commission or Commission staff. And
3 that is that we relied on the work that had been done and
4 presented in the es say and that in reaching this
5 stipulation -- this stipulation envisioned a review of the
6 work that had already been done to see if we thought
7 anything else needed to be done and any further mitigation
8 needed to be appropriate. That was back in August. And
9 if you recall our testimony at the hearing in September,
10 what very much concerned us was that the premises and the
11 documents that we relied on in that stipulation were now
12 being contradicted by a new expert who was recommending
13 the deletion of all the hydrological measures.

14 So there's an easy fix to this. But there is a
15 fundamental question. At this point in time, given the
16 timing that the applicant's looking for, rather than -- it
17 seems to us that a decision should be made if we are going
18 to rely on those documents that were done because they
19 appear to be good work to us and revisions were going to
20 be made to the plan requirement to Soil and Water 8 and
21 the design documents in Soil and Water 8. And if so, do
22 something like a concurrence review where they're revising
23 documents, we get them with the Commission staff. And we
24 work -- instead of doing it after the fact, do it with
25 you. So there is that fundamental question which would be

1 actually a change in the stipulation.

2 So I actually reword to say prior to or
3 concurrent with or -- and it be some guidance on that
4 issue I think staff needs to be involved in that
5 discussion and tell us what is acceptable to it and what
6 would work for it.

7 HEARING OFFICER KRAMER: So are you then asking
8 to be able to provide feedback during the formulation of
9 the strategy rather than just comments after a lot of work
10 has gone into some particular products and --

11 MS. BURCH: Exactly.

12 HEARING OFFICER KRAMER: And to redesign it as
13 requires more overall time because of the delay?

14 MS. BURCH: Exactly. Given -- this is supposed
15 to be a pre-construction site mobilization document,
16 number one. And at this point, I mean, I hate to subject
17 experts to this, but between now and Christmas it's my
18 understanding they need to be up there. So we're trying
19 to find a way given the current situation to work. And
20 this was going to be our proposal. So --

21 HEARING OFFICER KRAMER: Does the applicant
22 understand that?

23 MS. FOLEY GANNON: We understand that and we have
24 no objection to it, as we have always stipulated all
25 along. We recognize the study should be done. We want to

1 come to agreement about performance standards. There is
2 this continued discussion about how everything changed.
3 We don't think it has. And we think that study is being
4 done.

5 The performance standards need to be met. We
6 always agreed we would do whatever is needed to meet the
7 performance standards. So it doesn't really matter. I
8 mean, that's going to ensure that the minute that the
9 impact is mitigated if the study shows there has to be
10 some protection basin, we will do that. If the study
11 shows something else has to be done, we will do that. And
12 there was a lot of testimony and it talked about that the
13 performance standards particularly related to protecting
14 BNSF are pretty -- there are performance standards that
15 can be set and there are various ways that you can meet
16 them. Shed basins are one in (inaudible). And we can do
17 that. So we're fine to work with them in an iterative
18 process on our study. Thanks a lot.

19 MS. BURCH: And to -- to expedite this, our
20 experts have recommended it's consistent with the
21 testimony they gave that even that certain FEMA
22 guidelines, some San Bernardino County guidelines with
23 which that level of detail will be followed to reach these
24 conclusions. So if you would like us to meet over lunch,
25 we'll meet over lunch.

1 I do not have my experts and my clients with me,
2 however. They aren't here.

3 HEARING OFFICER KRAMER: It sounds as if most of
4 their thoughts are encapsulated in the draft language that
5 you have.

6 MS. BURCH: They are.

7 HEARING OFFICER KRAMER: Applicant, or staff, do
8 you have any objections to --

9 MS. FOLEY GANNON: Our only concern would be if
10 the power to make -- if they're trying to discuss these
11 that there was something we were proposing, some change we
12 have some question on we have the power to be able to
13 discuss that today or to respond to it by today. That
14 would be our concern. Or if it's just this has to go
15 through the client's review, we don't know when they're
16 going to be able to do that, that could be less than
17 productive.

18 MS. BURCH: Well, I can't --

19 HEARING OFFICER KRAMER: I guess that's always a
20 risk. But it seems to us that making the effort -- and
21 today's probably better than Monday -- would be
22 potentially helpful to the resolution of the railroad's
23 concerns.

24 MS. FOLEY GANNON: We are happy to do that.

25 PROJECT MANAGER MEYER: And staff will be happy

1 to provide feedback on the proposed conditions at lunch.

2 HEARING OFFICER KRAMER: Okay. Could we get
3 started on the xeroxing of that so -- you don't need to
4 make any copies for the Committee just yet.

5 Ms. Burch or Mr. Lamb, did you have any other
6 comments about the applicant's proposed changes?

7 MR. LAMB: Well, there is one general global
8 concern that arises from the comments that I just heard
9 from counsel for the applicant. What I heard was if we
10 have to put in detention basins or our structures, we have
11 to do so. We know from the prior plans there was depicted
12 600 acres, 600 acres of potential basins. So if we wind
13 up having 600 acres here -- and we clearly do not have a
14 663.5 megawatt project, and part of the problem with this
15 whole process that we're undergoing is you're basing
16 decisions based on override based on something that
17 there's no way the Commission can go what's really going
18 to happen, because they don't know.

19 MS. BURCH: That's just one of the questions that
20 we had left with Mr. Myers at the beginning was how did
21 the Commission -- just to speak generically, but put it in
22 context about 600 acres appear to have be involved in the
23 creation of detention basins. And if you take out 600
24 acres to do that as a result of these studies but you've
25 already approved the megawatts based upon that, then how

1 does it get done? Or is there some way to phrase the
2 decision on how many megawatts this project will be
3 allowed to build based upon the outcome of these studies?
4 You know, maybe incremental decisions as to whether
5 megawatts can be added as opposed to granting them ahead
6 of time before we know the answer. The same issue goes to
7 glint and glare actually.

8 HEARING OFFICER KRAMER: Goes to which?

9 MS. BURCH: Glint and glare.

10 HEARING OFFICER KRAMER: You said that in a way
11 that I wasn't expecting. What I thought I was going to
12 hear was would the Commission override if the project were
13 600 acres less of producing sun catchers.

14 MS. BURCH: That's another question.

15 HEARING OFFICER KRAMER: And at this point, I'll
16 just say that's an interesting question.

17 PROJECT MANAGER MEYER: Can I adjust a clarifying
18 question before with we go too far down that? Could the
19 applicant clarify now that we're looking at a much smaller
20 project and I know it changes which drainages actually
21 impact the project. Do you have an estimate of what the
22 acreage of detention basins would be approximately on the
23 new -- on the 5.5?

24 MS. FOLEY GANNON: I don't have that number right
25 here.

1 First off, we don't think there's going -- we
2 think the studies are going to show we don't need
3 detention basins. Just as a starting point. If there
4 was, there would be a per rata drop. So it's a percentage
5 difference. And it wasn't 600 acres of basins. It was
6 like 480 acres or something in the last version when we
7 had the acreage calculations done. So it would be a
8 percentage back off from that. So we lost -- we reduced
9 by a third of the project sites. Say it was a 500-acre
10 basin -- who has a calculator or is better at numbers off
11 the top of their head than I am?

12 MS. BURCH: We did look back. The actual -- this
13 best detail on this is not in your documents. It's in the
14 FEIS document, at least the publicly available.

15 And Mr. Lamb has actually looked hard at that
16 question, because the federal process looked back and
17 forth between multiple versions of the project and we had
18 the drawings of detention basins associated with those.

19 MR. LAMB: Every version is 600 acres.

20 MS. BURCH: It's every version.

21 MR. LAMB: Six-hundred acres if you assume nine
22 acres for 60 sun catcher grid would wind up being about
23 (inaudible)

24 (Inaudible).

25 MS. BURCH: That's what your documents show.

1 MS. FOLEY GANNON: They're probably conservative.
2 They just kept it the same way. I mean, it's just not
3 accurate so --

4 MS. BURCH: It's what's available to us.

5 MS. FOLEY GANNON: It was distributed with the
6 project. It showed the detention basins. And the answer
7 is I guess with the numbers it would be 356 acres. If you
8 adjusted the pro rata reduction.

9 MR. ADAMS: Is that in the record?

10 MS. FOLEY GANNON: No. That was -- that was a
11 question that was just asked. We don't believe there's
12 any detention basins necessary. So we have not calculated
13 size for detention basins as we think are not necessary.
14 We think there's evidence that shows they're not
15 necessary, but we are willing to do the study as there was
16 also evidence that was presented it says detention basins
17 are one form that can be used to address this issue. It
18 is not the only thing that can be done. BNSF experts also
19 testified to that. So it doesn't say just because there
20 has to be some sort of drainage control on the site it has
21 to be 400 acres of detention basins. We don't think
22 that's factually accurate. There certainly isn't any
23 evidence in the record that would say that.

24 MR. LAMB: Okay. Every alternative that this
25 Commission and the federal government analyzed, every

1 alternative that included a build, included detention
2 basins.

3 MS. BELLOWS: There's also --

4 MR. LAMB: Can I -- and that's clear on the
5 record. And there are 600 acre detention basins. And
6 they shift -- you know, I got to tell you something.
7 You've been hearing cases for a long time and I understand
8 this is not a court of law. But I do not appreciate the
9 shaking of the head, the smiling and the mocking. We're
10 trying to work through this process. But that does not
11 help. You're doing it right now. And it doesn't help.
12 It really --

13 HEARING OFFICER KRAMER: You are, however,
14 commanding my attention to you. And so my peripheral
15 vision I guess is not that great because I don't think
16 we're noticing that. So --

17 MR. LAMB: Well, it was distracting to me and it
18 was distracting to my client on Tuesday, frankly. And it
19 doesn't advance the ball at all.

20 HEARING OFFICER KRAMER: Okay. Well, as I
21 understand it, the project is now at the point where the
22 sun catchers are as close to each other as they can be.

23 MS. BELLOWS: That's correct.

24 HEARING OFFICER KRAMER: And there was a time in
25 the evolution of the project where you could get the same

1 output on a reduced footprint because you just moved them
2 closer together.

3 MS. BELLOWS: That's correct.

4 HEARING OFFICER KRAMER: But you hit a wall
5 there. So you can't do that anymore.

6 MS. BELLOWS: Right. But the one thing to
7 note -- which is actually something we discussed is the
8 issue about putting detention basins should there prove to
9 be a need for that and the setback for the BNSF
10 right-of-way. So there's the north -- north of your
11 right-of-way from our setback that would allow put in a
12 line of detention basins. So that's something that I
13 believe that your client has suggested.

14 MR. RITCHIE: And I would like to make one point
15 on that. Although it's a conclusion that we disagree
16 with, staff has noted that corridor, the setback is one of
17 the reasons for its conclusion that the Mojave fringe-toed
18 lizard would be able to -- would be able to traverse the
19 site. And that could potentially affect that issue as
20 well, and so we just don't want that to also be ignored in
21 this discussion.

22 MS. FOLEY GANNON: I agree. And a question would
23 be and that to staff whether -- our understanding was that
24 was related to the south of the railroad. The finding was
25 about the corridor south of the railroad, not north of the

1 railroad. But that may not be. We would seek
2 clarification on that.

3 HEARING OFFICER KRAMER: Mr. Huntley, do you
4 understand that clarification?

5 MR. HUNTLEY: This is Chris Huntley.

6 Staff considered the corridor both north and
7 south of the railroad to play an important role in
8 removing the cumulatively significant impact.

9 HEARING OFFICER KRAMER: Okay. Well, we're going
10 to break for lunch around the noon hour. Let me ask, is
11 an hour enough, do you think? Well, we can start with an
12 hour and see how it's going. Because we would like to if
13 nothing else through your discussions you'll have some
14 more thoughts that will better inform the Committee about
15 what the actual issues are that remain.

16 And one thing that might be helpful to know is
17 roughly sun catchers or how many megawatts of sun catcher
18 generation would be lost per -- if the 600 acres had to be
19 --

20 MS. BELLOWS: A little less than 100 megawatts.

21 HEARING OFFICER KRAMER: Okay.

22 MR. RITCHIE: I'm sorry. Can I ask just a quick
23 clarifying question on that and understand how these
24 calculations are coming?

25 Does that straight line -- because it seems like

1 we've equated an acre to a megawatt at some ratio. Does
2 that always work the way that these units structures are
3 created? If you take off one-tenth of one block of 60 sun
4 catchers, does it change? Does it matter where these
5 acres are falling?

6 MS. BELLOWS: It generally is somewhere between
7 six and seven acres per megawatt. So in general that's
8 accurate.

9 What ends up happening is if you have to do some
10 splits and you're not able to do a complete blocks, then
11 your price goes up a little bit. So that impacts us, but
12 not the amount of megawatts that you get out.

13 MR. RITCHIE: So your price --

14 MS. BELLOWS: My cost. My cost, because I have
15 to break them up. Because they're from our return goes
16 down --

17 MR. RITCHIE: Thank you for that.

18 HEARING OFFICER KRAMER: Okay. Any other parties
19 have any comments on the applicant's proposed changes to
20 the PMPD? That's leaving out the -- of course, the worker
21 safety condition about fire. We're going to have to have
22 a bit of a discussion about that, I think.

23 MS. BURCH: Could you alert us as to what that
24 issue is?

25 HEARING OFFICER KRAMER: What the applicant has

1 said is that we did not adopt -- I believe it was the
2 applicant. It was either the applicant or staff.

3 MR. ADAMS: Staff.

4 HEARING OFFICER KRAMER: Staff -- that we did not
5 adopt the formulation of Worker Safety 7 and 8, that they
6 thought was agreed to among the parties.

7 And what I can tell you is that -- that the
8 Committee did discuss that and it consciously decided to
9 adopt the formulation that is in the PMPD. But this is
10 the time to try to convince the Committee to go either
11 back to the proposed formulation or some other
12 formulation. So we'll give the floor first to the staff
13 and the applicant and then to the county.

14 MS. HAMMOND: Thank you, Hearing Officer Kramer.

15 This is Christine Hammond for staff.

16 And staff did review the PMPD and was interested
17 to note that there were some pretty significant changes to
18 the conditions Worker Safety 7 and 8. And staff did have
19 some initial comments. And you know, preliminary said in
20 its initial comments that the condition as set forth in
21 the applicants's Exhibit 113 was the product of a
22 stipulation between staff, the applicant, the county as
23 well as the San Bernardino County Fire Department. So
24 that's between four parties. There had been a number of
25 iterations of that condition before that filing of that

1 stipulation. There was a lot of evidence in the record,
2 mostly from staff, and supported by the San Bernardino
3 County Fire Department.

4 There was some testimony by other parties. On
5 balance, staff felt that its evidence was strong, the
6 dollar amount that was included in the condition that
7 staff put forward and that the other three parties
8 stipulated to was supported by the evidence. There was a
9 disagreement about the dollar amount, but the applicant
10 had decided that with the three options that were put
11 forward in the stipulation that that was sufficient and
12 flexible enough and supported by the evidence.

13 Since the time of the initial comments being
14 filed, staff will prepare some additional comments. We
15 finished them today. We have hard copies for the parties.
16 I'm happy to go through them orally here. And they will
17 be passed around right now.

18 Having heard the Committee's comments however,
19 that the changes were made very consciously, staff is
20 going to respectfully disagree and explain why it
21 disagrees. In particular, with respect to the evidence
22 being submitted by the community services district
23 underscoring the need for further risk analysis and
24 consideration of the project's appropriate mitigation
25 funding, there was tons of pages of testimony and that

1 testimony concerned the impact of a significant event at
2 the Calico project and the need to call on its mutual aid
3 partners. And in particular, this was cross-examination
4 done by the community -- Newberry Springs Community
5 Services District. That testimony concerned the current
6 service levels of the county. And with the current
7 service levels of the county, a major event would
8 require -- and I will note that calls on mutual gauge
9 agreements are done by calls. It's not always an
10 automatic response, is my understanding.

11 But the emphasis there during the testimony was
12 on current service levels, with the implementation of the
13 condition as presented by the four parties, staffing would
14 be adequate to serve events at the Calico facility. The
15 fire department may decide to call on mutual aid
16 agreements in the event of significant events, but we
17 think the Newberry Springs Fire Department's concerns are
18 addressed with the stipulated condition as it was
19 presented.

20 HEARING OFFICER KRAMER: So just a question for
21 the relevant parties is what -- what was included in the
22 staff's initial comments on PMPD is reflective of the
23 condition that was stipulated to. Is this similar to the
24 one that you mentioned or was this revised in any way to
25 reflect --

1 MS. HAMMOND: The stipulated condition is the
2 stipulated condition. We're not proposing any changes.
3 And staff put that forward and I think the last iteration
4 was in Exhibit 13 of the applicant's submission.

5 HEARING OFFICER KRAMER: You mean 113?

6 MS. HAMMOND: 113. I'm sorry.

7 COMMISSIONER EGGERT: So this -- yeah, the
8 Committee would be interested in hearing from both the
9 applicant and county on this item. I think the
10 Committee's interest is basically trying to make sure that
11 an appropriate level of compensation is provided for the
12 specific project, you know, that it be adequate to cover
13 any cumulative significant or current impacts to the
14 services. We felt fairly confident that the condition as
15 written through the PMPD would accomplish that. But I
16 guess I'm curious as to why or if any of the parties think
17 it would.

18 MS. FOLEY GANNON: From the applicant's
19 perspective, we had stipulated to the earlier language and
20 we didn't have any objection to the earlier language. We
21 also don't have any objections to the language that was in
22 the PMPD and that's what we didn't actually comment on.

23 As the county had said in the beginning of
24 proceedings, discussions with them are going very well.
25 We're very confident we're going to quickly have an

1 agreement with them. The funding will be established
2 based on what they have determined to be their needs and
3 we are confident that these alternative provisions are
4 actually not going to be necessary, because we will have
5 an agreement with them.

6 And the county can speak for themselves. I won't
7 speak for them.

8 But again, we have no objection to what the
9 Committee drafted in the PMPD. We also have no objection
10 to what we stipulated. So we can -- either way is fine.

11 COMMISSIONER EGGERT: Is that -- Mr. Brizzee and
12 Mr. Brirety, I don't know if you want to chime in.

13 MR. BRIZZEE: Bart Brizzee calling, Deputy County
14 Counsel from the County of San Bernardino.

15 I guess if we had to have conditions, we would go
16 along with the ones --

17 COMMISSIONER EGGERT: Could you speak up a little
18 bit? Sorry. Before --

19 MR. BRIZZEE: Yeah.

20 COMMISSIONER EGGERT: There we go.

21 MR. BRIZZEE: To the extent that the conditions
22 are going to be required, we would concur with those that
23 are being proposed by staff, but I'll leave it to Mr.
24 Brirety to talk about the -- how the negotiations are
25 going with the applicant.

1 MR. BRIRETY: Yes, this is Peter Brirety with San
2 Bernardino County Fire.

3 We have had successful meetings with the
4 proponent and we have a working document that is going
5 back and forth between the proponent and ourselves. And
6 all indications are that we will have successful
7 resolution to that agreement. And that agreement for
8 mitigation for fire emergency response would then be
9 ratified by our Board of Supervisors in a contractual
10 agreement with the proponent to satisfy those mitigation
11 measures.

12 It is a good business practice to always pack a
13 parachute, of course. But at this point, our negotiations
14 with the proponent have been very successful, particularly
15 relative to other projects. There have been very open
16 discussions and very agreeable discussions in terms of
17 getting to agreement on adequate mitigation for fire and
18 worker safety.

19 HEARING OFFICER KRAMER: So thank you.

20 MR. GREENBERG: This is Alvin Greenberg of the
21 staff.

22 Ms. Hammond, should I opine at this moment?

23 MS. HAMMOND: Please, if you have some
24 information that can help the Committee, which you always
25 do.

1 MR. GREENBERG: Thank you.

2 I think Commissioner Eggert is wondering perhaps
3 what the main objection is to the condition as written in
4 the PMPD. As written in the PMPD, the requirement would
5 be for funding to be triggered no later than operations,
6 the beginning of operations, which could leave the
7 construction of this facility vulnerable to lack of fire
8 and emergency response resources if negotiations somehow
9 are delayed.

10 Staff very much prefers the language from other
11 PMPDs and decisions which are and the language is in the
12 stipulated agreement that no construction of permitted
13 above-ground structures shall occur. I think that there
14 are many other minor details -- or I shouldn't say minor,
15 but less important details throughout the condition that
16 as written in the PMPD that cause staff to want to just
17 change the entire PMPD version into the version that was
18 stipulated to.

19 If you decide you want to maintain the bulk of
20 what is in the PMPD, I certainly urge you to change the
21 dates for verification. We would not want to have the
22 funding absent so that the San Bernardino County Fire
23 Department could not plan adequately all the way up -- all
24 the way up to the time of operation. We'd like to have
25 the verification read permanent -- be up to the time of

1 permanent above-ground structures or as also written in
2 the verification up prior to November 30th the project
3 owner shall provide --

4 COMMISSIONER EGGERT: Mr. Greenberg, sorry to
5 interrupt. Just to clarify. I agree with you in terms of
6 basically requiring or needing to have adequate resources
7 available. In terms of Worker Safety 8, is that not
8 adequate to serve that purpose in your opinion?

9 MR. GREENBERG: Let me take a look here exactly
10 on Worker Safety 8. I'm looking at our proposal right
11 now.

12 COMMISSIONER EGGERT: I should probably say the
13 reason the Committee is quite interested in these
14 particular conditions is that there is similar issues that
15 are faced by quite a number of the projects that are under
16 review currently. So we want to be able to adequately
17 address the issue to the greatest extent possible and be
18 sufficiently consistent across projects, which is why
19 we're I think interested in taking a little bit of time to
20 get this right.

21 MR. BRIRETY: This is Assistant Chief Brirety.

22 We agree with Dr. Greenberg's observations in
23 terms of necessity of having emergency response capacity
24 during construction. And you made it clear it's very
25 clear to you that the potential for accident disruption

1 injury, et cetera, during construction is rather high and
2 in some cases higher than operations. And we have
3 discussed that with the proponent as well as discussed it
4 with Ivanpah, just if we can talk about that for a second,
5 if that they have agreed to pay for mitigation additional
6 fire fighters if you will or paramedics, staffing, we're
7 just say staffing and operations costs during the
8 construction phase and prior to operation. So Dr.
9 Greenberg's review of this is accurate to the point that
10 we absolutely do need -- and it should be noted in the
11 record we do need operations costs for fire service and
12 emergency response during the construction phase.

13 COMMISSIONER EGGERT: So Mr. Brirety, I don't
14 know if you have the actual PMPD if front of you, but if
15 you do, I would appreciate if you would take a look at
16 Worker Safety 8.

17 MR. BRIRETY: Yes.

18 COMMISSIONER EGGERT: Which is a condition that
19 as triggered if the Worker Safety 7 is not satisfied by
20 the time the project owner in consultation, et cetera,
21 determines construction must commence. There are specific
22 provision for expenditures on the -- for the purposes of
23 San Bernardino Fire Department.

24 MR. GREENBERG: This is Alvin Greenberg.

25 I'm looking at it. And it appears as if Worker

1 Safety 8 does take into account that. But Worker Safety 7
2 then is in conflict with that, because if Option 1 of
3 Worker Safety 7 is fulfilled, then the project owner does
4 not need to provide anything prior to plant operation.
5 It's a little unclear to me.

6 COMMISSIONER EGGERT: Right. I think that's the
7 purpose of the first sentence of Worker Safety 8.

8 MR. GREENBERG: Well, in Worker Safety 8 if the
9 project owner has not satisfied conditions in Worker
10 Safety 7 by the time of construction. But Worker Safety 7
11 does that it has to be -- it's fulfilled only prior to
12 plant operations. So I am a little bit confused there.

13 MS. HAMMOND: This is Christine Hammond.

14 I went over this in my mind and knowing the
15 evolution of this whole Worker Safety 7 and 8 and the
16 number of cases, and there was some mention of these
17 conditions being based on the Colusa type decisions.

18 COMMISSIONER EGGERT: Somebody needs to mute that
19 phone. Try it again here.

20 Can you detect the echo?

21 HEARING OFFICER KRAMER: Darcy Pauser?

22 MS. PAUSER: Yes?

23 HEARING OFFICER KRAMER: Could you mute your --
24 you're actually using I guess the web?

25 MS. PAUSER: Right.

1 HEARING OFFICER KRAMER: Could you mute your
2 outgoing audio for a minute? Let's go off the record.

3 (Off record at 11:53 a.m. to 11:53 a.m.)

4 HEARING OFFICER KRAMER: Do you want to continue?

5 MS. HAMMOND: Thank you.

6 The facts in the Colusa case are very different
7 from the facts that concern these very large solar
8 projects. And I think the idea in Colusa was that a fire
9 station which was in a very remote area or any upgrade to
10 the fire services in a very remote area for a plant of a
11 size that comes nowhere near the size of this project
12 here, that the upgrade to services could be done pretty
13 quickly.

14 The construction of this project takes place over
15 perhaps four years -- I'm basing that on Imperial Valley.
16 So the initial payment -- which this two-part condition
17 which is based on Colusa, the initial payment was intended
18 for year one and that fulfillment of the first part of the
19 condition could be accomplished before construction
20 actually of that project. So there is a disconnect in
21 timing between Worker Safety 7 and 8 in this case, because
22 of the factual differences.

23 COMMISSIONER EGGERT: Again, just so I'm clear,
24 you're saying because of the phasing of Worker Safety 8 --

25 MS. HAMMOND: Worker Safety 8 --

1 COMMISSIONER EGGERT: Just to make it to Mr.
2 Greenberg point, I think the sequence here at least as my
3 understanding actually makes sense. It basically says you
4 either figure it all out up front or if you haven't been
5 successful in doing so, you have these payments that are
6 based on estimation of impacts associated with the project
7 construction phase, which is I think an evolution from
8 Colusa as I understand that particular case.

9 MS. HAMMOND: Correct.

10 COMMISSIONER EGGERT: So maybe I guess another
11 question to Mr. Brirety or Mr. Brizzee, and that is you
12 mention the fact that negotiations and discussions are
13 ongoing and they're positive and constructive. Do you
14 expect them to deliver an agreement and you also mention
15 the need for a parachute. Is there a difference between
16 the size and color of the parachute compared to what is
17 currently in the PMPD versus what's been proposed?

18 MR. BRIRETY: No. I think Worker Safety 8
19 actually provides more of a hammer --

20 HEARING OFFICER KRAMER: Is this Chief Brirety?

21 MR. BRIRETY: This is Chief Brirety with County
22 Fire.

23 The number identified in Worker Safety 8 are
24 actually larger than the numbers in Items Number 1 and 2
25 of Worker Safety 7.

1 But a key issue is working with the proponent to
2 negotiate at what point "construction" begins. Because
3 there was some degree of construction, say, putting up
4 fences and grading and that type of a thing that we
5 wouldn't need to have a capacity to respond. And then as
6 we get into the phased portion of the construction, we
7 would need to ramp that up.

8 So we anticipate like we have one with Ivanpah
9 discussing kind of a schedule of which they would be
10 ratcheting up to a point of having enough personnel on
11 site and enough activity that would cause us to need to
12 have a capacity to respond.

13 But in terms of the numbers identified in Worker
14 Safety 8 that I can see, those numbers are larger than
15 actually what's provided for at least in Number 2 which
16 Item Number 2 of Worker Safety 7 are taken straight out of
17 our Hoffman report.

18 And I think it would be good to note if there --
19 if it's possible that those numbers are identified from
20 the San Bernardino County Hoffman report that we worked
21 very cooperatively with the California Energy Commission
22 staff, particularly Dr. Greenberg to develop. And I think
23 these are very successful document and it would be
24 important to note that. But I think if things don't come
25 out the way we want Worker Safety 8, as long as there's

1 protection for getting operational costs provided prior to
2 significant construction going on would be successful.
3 Actually more than what we are discussing right now. So
4 that would be a very good parachute.

5 COMMISSIONER EGGERT: Applicant have any comment?

6 MS. FOLEY GANNON: I think that the witness is --
7 your intent of this working makes a lot of sense and if
8 you have the agreement done figured out up front, you do
9 whatever you agree to. In the event that it takes longer
10 to get that agreement done but know that agreement has to
11 be done before your project is operational, you have to
12 have the final solution done by then. So if there is an
13 interim period between construction and operation, we have
14 Worker Safety 8 to deal with it.

15 And I think that you may just be able to fix it
16 by putting in the verification. Part of the problem is in
17 Worker Safety 8 says in the event that Worker Safety 7 has
18 not been satisfied it can be because of verification is
19 all related to payment of the mitigation money, which only
20 has to happen prior to open rags of the project. So
21 technically, you would only not be in compliance with
22 Worker Safety 7 just before you went into operation.

23 So you may need to put in the verification just a
24 clarifying sentence that says that this agreement has to
25 be in place for this -- or the study has to be done for

1 Worker Safety 7 to be satisfied. So I think that the
2 timing of the payment makes assistance. I think the way
3 they work together makes sense. I think we're missing one
4 sentence.

5 COMMISSIONER EGGERT: Okay. So I think unless
6 others have comments, I guess I would invite that
7 suggestion in terms of an addition. I would also invite
8 any further comment from the staff if there is a way to,
9 you know, keep the original conditions while addressing
10 their concerns or at least perhaps if there is a specific
11 addition that needs to happen to address their conditions
12 that that be provided in their final comments.

13 MS. HAMMOND: They are in the comments that we
14 handed out today and that will be docketed as soon as
15 possible.

16 And Dr. Greenberg referred to one and that is
17 that Worker Safety 7 should provide that no construction
18 of permanent above-ground structure should occur until
19 full funding of mitigation measures or signing the
20 agreement. The PMPD talks about (inaudible) of the
21 condition prior to operation.

22 COMMISSIONER EGGERT: Right. But this works
23 because it's paired with 8. I think that's the key.

24 MS. HAMMOND: Okay.

25 COMMISSIONER EGGERT: Yeah.

1 MS. HAMMOND: The comments also point to the
2 selection of an independent contractor which should be
3 done selected by and approved by the CEC, CPM. The PMPD
4 modified that to have the contractor selected by the
5 applicant and approved by the CPM. And we just wanted to
6 note that that was a term to which all the stipulating
7 parties had originally agreed.

8 COMMISSIONER EGGERT: Okay. I think we can make
9 that change.

10 Actually, this is a question of I guess
11 curiosity. Has that effort been initiated over --

12 MS. FOLEY GANNON: The study?

13 COMMISSIONER EGGERT: Yeah.

14 MS. FOLEY GANNON: We don't think it needs to be
15 done under this process because we're going to use Option
16 1, which is have an agreement with the County Fire
17 Department.

18 COMMISSIONER EGGERT: Okay.

19 HEARING OFFICER KRAMER: So is the suggestion
20 then to just let the CPM select the contractor or -- there
21 was a theme I recall at least being banded about where the
22 project owner would give three names and the CPM would
23 select. Is that in any of the other conditions?

24 MS. HAMMOND: That was never staff's proposal.
25 It was ultimately adopted in the Abengoa proceeding.

1 HEARING OFFICER KRAMER: Is there anybody else on
2 the worker safety question? Well, we talked quickly. We
3 will actually break for lunch right at 12 noon.

4 MR. BRIRETY: If I can just mention -- this is
5 Assistant Chief Brirety.

6 Although we are area having a pretty evolved
7 discussion today, I don't think we would be in the
8 position we are with Calico in an advanced discussion on
9 this type of mitigation procedure unless -- if we would
10 not have had the support from the CEC staff and particular
11 of note Dr. Greenberg. He has been a significant
12 importance to us being successful, not only at the county
13 but with our negotiations with Calico.

14 COMMISSIONER EGGERT: Thank you for that comment.
15 We greatly appreciate the expertise and the input that we
16 receive from Dr. Greenberg as well.

17 HEARING OFFICER KRAMER: So Assistant Chief
18 Brirety can perhaps have his afternoon free, is it fair to
19 say parties that we're done with this issue and there's no
20 need for him to return after lunch?

21 Nobody disagrees with me, so Assistant Chief
22 Brirety, have a nice afternoon.

23 MR. BRIRETY: Thank you very much.

24 HEARING OFFICER KRAMER: So we're going to break
25 for lunch. Let's be back to see how we're doing at 1:05

1 by the clock in the room here which currently shows 12:02.
2 And folks on the phone, I'll leave the phone active but
3 muted. And you can call in then and we'll see if we need
4 to take a little more time or if we are ready to
5 reconvene.

6 But during lunch, actually the parties will be in
7 the room here will be discussing the soil and water
8 conditions. So is there anybody on the telephone who --
9 first let me ask Ms. Burch if somebody wants to get
10 electronic copy of the draft, is that something you can
11 send out?

12 MS. BURCH: I'll contact my office.

13 HEARING OFFICER KRAMER: Okay. So let me ask
14 first. Is anybody that's on the telephone want to present
15 participate in the lunchtime discussion? And if so, do
16 you desire an electronic copy of the marked up conditions
17 for soil and water?

18 MS. HOLMES: Hearing Officer Kramer, this is
19 Caryn Holmes.

20 Is the discussion going to be held via Web Ex?

21 HEARING OFFICER KRAMER: Well, it could be. I
22 don't see why not. The line is going to be active. So
23 I'm wondering if anybody -- I'm wondering if anybody out
24 there in Web Ex land wants to participate or monitor via
25 that.

1 COMMISSIONER BYRON: Mr. Kramer, this is
2 Commissioner Byron. I will not be monitoring or listening
3 in on the call during lunch.

4 HEARING OFFICER KRAMER: Okay. Nor will the
5 Committee.

6 Okay. Well, I guess nobody is interested in the
7 copy so we'll save Ms. Burch the effort.

8 Is somebody speaking?

9 MS. HOLMES: This is Caryn Holmes again. I have
10 worked on some of the soil and water issues on the project
11 and I would be happy to participate, but I'm concerned
12 that people will not have the opportunity to get food if
13 they couldn't to work in Hearing Room A or Hearing Room B,
14 whichever room you're in.

15 HEARING OFFICER KRAMER: Well, what we'll do is
16 come back at those of us who are not participating at
17 1:00. If they feel the need for a little more time, I
18 think we'll allow it. We want to try to see what can be
19 done to at least make sure the parties fully understand
20 and can convey to the Committee their concerns and
21 positions on the soil and water issues. So be back here
22 on the telephone or in the room at 1:05 to see where we
23 stand. And we're off the record.

24 (Thereupon a lunch recess was taken from
25 12:06 p.m. to 1:39 p.m.)

1 way to address getting into Phase IA if the project is
2 approved quickly, even if there are other issues that are
3 other parts of the plan and studies are still being done.
4 So we're looking at ways of accomplishing that.

5 We're going to go and work on that this weekend
6 and be able to come back and discuss it on Monday. And we
7 would request direction from the Committee to have a
8 workshop on Monday if the Committee so desires. And we're
9 working right now to find availability on times, but we're
10 thinking of Monday morning at some point.

11 HEARING OFFICER KRAMER: Okay. Do you think it's
12 possible that you may need more time to submit the results
13 or would you be able to produce conditions Monday
14 afternoon?

15 PROJECT MANAGER MEYER: The goal would be to have
16 Version 2.0 to start the meeting on Monday and then work
17 through to something that could be shared with the parties
18 and the Committee by -- well, I wouldn't say close of
19 business on Monday, but late Monday, but before Tuesday.

20 HEARING OFFICER KRAMER: Applicant?

21 MS. FOLEY GANNON: I think we can get something
22 in on Monday. I would anticipate that you will probably
23 still be getting various versions. But hopefully they
24 will be closer and the difference will be minor and minor
25 in terms of how many. But they may be things we may be

1 asking the Committee to make a determination on because I
2 think there's many things we were talking about today that
3 we can agree with conceptually, but there's other things
4 where I think we do have difference about the approach.
5 So I think we can make progress and we can focus. And
6 then hopefully we can give you some concrete options to
7 choose from by the end of Monday.

8 COMMISSIONER BYRON: Hearing Officer Kramer,
9 we've been silent for a while. I'm wondering if I've gone
10 off line here.

11 HEARING OFFICER KRAMER: No. You're good,
12 Commissioner Byron. We were just discussing whether the
13 Committee should as a precautionary measure when we get
14 done with the hearing today continue it to sometime early
15 next week in case we need to sit down with the parties and
16 have a dialogue about their respective positions. Because
17 if they are leaving a few big issues to be decided, it
18 might be more efficient for us to be able to discuss the
19 parameters with them. It's not something we would
20 automatically use, but if we create the ability for it,
21 then we can use it if we need it.

22 COMMISSIONER BYRON: Okay. Thank you.

23 HEARING OFFICER KRAMER: Except for the need to
24 be here again, do any parties see any fatal flaws in that
25 approach?

1 MR. RITCHIE: Mr. Kramer, I just had a question
2 to the extent that the changes are happening procedurally
3 so that we understand. Could this be triggering a revised
4 PMPD or what's -- my understanding of the process is that
5 if there is a revision, a revised PMPD triggers a public
6 comment period. Would that be -- would we be cascading
7 this out again or what do we propose as far as that.

8 HEARING OFFICER KRAMER: Well, not all revisions
9 to PMPD's trigger new public comment period. And until we
10 know what the revisions are, we can't say for sure whether
11 or not one would be required. But --

12 MR. RITCHIE: I guess my question is what does
13 trigger -- what constitutes a revised PMPD?

14 HEARING OFFICER KRAMER: That is a legal question
15 that requires a finding that the standards to the facts
16 and with the facts not quite established I really couldn't
17 answer that question. And you may disagree with my answer
18 anyway.

19 MR. RITCHIE: Noted.

20 HEARING OFFICER KRAMER: So at the end of the
21 day, we will do the mechanical things to both authorize
22 the staff workshop on very quick notice and also continue
23 this meeting until Monday afternoon or maybe Tuesday
24 morning, something like that.

25 MS. BURCH: Our comments are due Monday at 4:00.

1 HEARING OFFICER KRAMER: So maybe Tuesday would
2 be better after you've had a good night's sleep.

3 MS. BURCH: To be doing the conference or put our
4 comments in?

5 HEARING OFFICER KRAMER: Yeah, I am thinking that
6 Tuesday morning probably makes more sense, because you
7 will barely get out either a completely stipulated-to set
8 of conditions or a definition of what still remains to be
9 decided Monday afternoon. And so you need a little bit of
10 time to rest so you can come talk to us about it.

11 MS. BURCH: Thank you.

12 HEARING OFFICER KRAMER: So is it fair to say
13 then there's not really much to report or not enough to
14 report though we have agreement at this point we should
15 discuss soil and water further?

16 PROJECT MANAGER MEYER: That's correct. We
17 should hold soil and water until after the workshop.

18 HEARING OFFICER KRAMER: Okay. And I believe we
19 finished with the applicant's comments. So now let's turn
20 to the staff's comments.

21 MS. FOLEY GANNON: (inaudible) any comments in
22 our comments, is that right?

23 HEARING OFFICER KRAMER: Aside from the few we
24 discussed --

25 MS. FOLEY GANNON: Okay.

1 MR. ADAMS: On that subject, we have staff in the
2 room here and on the phone. If any of you think we are
3 overlooking comments you have on the applicant comments,
4 please speak up now.

5 MS. VAHIDI: Hi. This is Najar Vahidi.

6 HEARING OFFICER KRAMER: If you can speak up,
7 Najar.

8 MS. VAHIDI: Yes. I don't have a comments on the
9 applicant changes. I actually and when we get to the
10 donated and acquired lands discussion, I can clarify. I
11 just found some acreage discrepancies in the Record of
12 Decisions. So I just wanted to bring that up. But we're
13 going to need to discuss that.

14 PROJECT MANAGER MEYER: Najar, we're still having
15 trouble hearing you.

16 MS. VAHIDI: Sorry. I don't know how much louder
17 I can speak. Can you hear me now or --

18 COMMISSIONER EGGERT: Maybe just project very
19 loudly.

20 MS. VAHIDI: At any rate, I don't have any
21 disagreements with the applicant at this point, but we're
22 going to have to clarify acreages for the Committee on the
23 project and the donated and acquired lands, because the
24 BLM record's of decision has been acreages. I just want
25 to make sure we talk about that when we get to it.

1 COMMISSIONER EGGERT: Okay. I would just clarify
2 to the requests and that is that just because parties
3 don't have any specific comments on the applicant's
4 proposed changes doesn't imply agreement with those
5 changes. It's just this is an opportunity to provide
6 speed back on them.

7 MR. WHITE: This is Scott White. And we have one
8 comment on biology, if this is the right time to jump in.

9 MR. ADAMS: Yes.

10 MR. WHITE: Our only comment or only response to
11 the applicant's comments have to do with the conservation
12 status of Nelson's Big Horn Sheep. The applicant asked us
13 to -- or asked the Committee to remove the fully protected
14 status for the discussion of it. And we've looked at the
15 Fish and Game Code and looked at Fish and Game's
16 publications and talked about it with the Department of
17 Fish and Game biologists. And we acknowledge that it's a
18 little bit ambiguous. But the best answer that we can get
19 from any of these is that Nelson's Big Horn Sheep should
20 be considered a fully protected species.

21 MS. FOLEY GANNON: Can you say where in the code
22 that is?

23 MR. WHITE: Is this Ella?

24 MS. FOLEY GANNON: Yes.

25 MR. WHITE: It's -- well, Section 4700 states --

1 forgive me for reading -- Big Horn Sheep except Nelson's
2 bighorn sheep as provided by Subdivision B in section
3 4902. So that leads me to think that I can go turn to the
4 page section 4902 and find what exceptions are made for
5 the fully protected status. But it doesn't make any
6 specific exceptions. Section 4902 Subsection B direct the
7 Department of Fish and Game to take evaluation of the
8 population status and authorizes sport hunting, but it
9 doesn't particularly accept any particular part of the
10 geographic range of the bighorn sheep. So we did talk to
11 the Department of Fish and Game biologists and their best
12 understanding is that it should be considered a fully
13 protected species.

14 MS. FOLEY GANNON: Did you just say it allows for
15 sport hunting?

16 MR. WHITE: The Fish and Game Code allows the
17 Department of Fish and Game to take assessment of Nelson's
18 bighorn sheep population statewide and to allow for sport
19 hunting of a specified number or percentage. But it does
20 not expressly take away that fully protected status.

21 MS. FOLEY GANNON: But then it wouldn't be a
22 fully protected species, because under the fully protected
23 species law there is any way that any agency can authorize
24 take on a fully protected species. So you certainly could
25 not allow for sport hunting of a fully protected species.

1 That is an absolute -- you couldn't do it. There's no
2 provision that allows for the take of fully protected
3 species. That's what's clear.

4 MR. BASOFIN: There's certain populations that
5 are divided by populations that is some populations.
6 There's some sport hunting allowed.

7 MS. FOLEY GANNON: But then that (inaudible).

8 MR. BASOFIN: But other populations they're fully
9 populated.

10 MS. FOLEY GANNON: But then that part of the
11 population is not fully protected.

12 MR. BASOFIN: Right.

13 MS. FOLEY GANNON: And there is no distinction
14 about the populations of the bighorn sheep.

15 MR. BASOFIN: I think there is.

16 MS. FOLEY GANNON: I don't. Then I would like
17 someone to point to the regulation so we can see. This is
18 not -- I don't know where that would be. So if you could
19 submit that in comments on Monday, that would be helpful.

20 MR. ADAMS: If we are -- our staff legal office
21 wasn't engaged in this issue. But if we have a break this
22 afternoon, maybe we can advance -- come back and give our
23 opinion on it.

24 HEARING OFFICER KRAMER: Well, let me ask this.
25 If it's not SPs, the (inaudible)

1 MS. FOLEY GANNON: It's not State threatened or
2 endangered.

3 MR. WHITE: It's not State listed threatened or
4 endangered. The Section 4700 states that Nelson's bighorn
5 sheep is fully protected species except as provided by
6 that other sections. And then that other section does not
7 exclusively state any particular population where it is
8 not a fully protected species. So our advise is to retain
9 that status.

10 HEARING OFFICER KRAMER: But if it didn't retain
11 the status, then it would have no particular status in the
12 table, right?

13 MS. FOLEY GANNON: Not State status.

14 MR. WHITE: It still would be (inaudible)
15 species.

16 HEARING OFFICER KRAMER: Okay. We understand the
17 issue and we'll entertain any additional comments that the
18 parties want to submit before the deadline.

19 Anything else?

20 MR. BASOFIN: Can I just ask besides being just
21 an issue of clarity within the PMPD, is there any other
22 mitigation issues that are tied to whether or not it's a
23 fully protected --

24 MS. FOLEY GANNON: No. We just thought it was
25 inaccurate and we question the accuracy.

1 MR. BASOFIN: Just asking clarification to the
2 status.

3 MS. FOLEY GANNON: I'm actually very interesting
4 in seeing if you find it. Because I've looked at the
5 list, I've looked at this and I couldn't find it on the
6 list. So if it's there, I'm also intellectually
7 interested.

8 MR. BASOFIN: We can do an academic exercise.

9 MS. FOLEY GANNON: It's a status that is there
10 that does have significant meaning if there could be no
11 take of the species. It so seems like it's something that
12 would be important to have it be accurate.

13 HEARING OFFICER KRAMER: Okay. Any other staff
14 or party comments they wish to make on the comments on the
15 applicant's PMPD comments?

16 Okay. Let's move onto the staff's --

17 MS. MILES: Sorry. One thing I did want to
18 comment on and it was related to the PMPD comment on the
19 introduction. And the applicant I believe changed the
20 number of sun catcher units constructed on the site. And
21 that number will be tied to whether there are sediment
22 basins, detention basins. So I think when you're looking
23 at what number you need to put there, it's going to have
24 to be a range and it's going to have to incorporate the
25 fact that there is not clarity as to what is going to be

1 the megawatt output and acreage of the project.

2 HEARING OFFICER KRAMER: And Ms. Bellows, again,
3 what was the maximum number of sun catchers?

4 MS. FOLEY GANNON: She just stepped out. But I
5 believe it was -- sorry what? 26450.

6 HEARING OFFICER KRAMER: No. No.

7 MS. FOLEY GANNON: If it had to be reduced. It
8 was 100 megawatts is what she said. But she will be back
9 in a moment and we can get that.

10 MR. LAMB: I calculate it as roughly 4,000. It
11 works both ways, 4,000 sun catchers being approximately
12 100 megawatts.

13 HEARING OFFICER KRAMER: Okay.

14 Moving on to the staff's comments --

15 MR. ADAMS: I guess I'll jump in. We have at
16 least two people here for cultural, not a lot to offer.
17 So if we could deal with that first. On pages 27 through
18 29 of our comments we have suggested changes to cultural
19 and that's it. So if anyone has -- would someone like an
20 explanation of that? Or do they have comments on it?

21 HEARING OFFICER KRAMER: What page is that?

22 MR. ADAMS: Twenty-seven through 29.

23 HEARING OFFICER KRAMER: Looks like one of the
24 time frames is maybe increased. Does this have any effect
25 on the ability for work to begin on the project site?

1 MR. ADAMS: Sarah Allred might be able to answer
2 questions about this.

3 MS. ALLRED: I have to say that Kathleen Forrost,
4 my colleague who is dealing with the built environment,
5 wrote this. I'm not sure why she changed the dates, the
6 time frames.

7 MS. FOLEY GANNON: The applicant doesn't view it
8 as a problem.

9 HEARING OFFICER KRAMER: Okay. Good enough. Any
10 other questions about the cultural changes to condition on
11 cultural 6? Thank you.

12 MR. ADAMS: Mr. Meyers has reminded me that CURE
13 has comments on cultural as well. So in light of that --

14 HEARING OFFICER KRAMER: Sure.

15 MR. ADAMS: Ms. Allred, are you going to be
16 available for a while if you leave here?

17 MS. ALLRED: I could be. But I could also easily
18 address these if you'd like.

19 MR. ADAMS: Would it be possible to have other
20 cultural comments dealt with now? Jump around a bit?

21 HEARING OFFICER KRAMER: That's fine.

22 MR. ADAMS: Sorry. We're having communication
23 break down here. CURE apparently did not suggest changes
24 to cultural conditions. I got --

25 MS. MILES: That's incorrect.

1 MR. ADAMS: That's incorrect?

2 MS. MILES: Yes.

3 MR. ADAMS: Are you wanting to present something
4 on --

5 MS. MILES: Certainly we have comments regarding
6 cultural resources. But in terms of changes to
7 conditions, on page 23 of our comments, we did make a
8 suggestion that you strike Cul 3 from the PMPD. If you
9 read Cul 3, it would authorize the applicant to basically
10 expand the project on to off-site areas that have not been
11 studied as a part of the project so long as the applicant
12 does some analysis of the cultural resources in those
13 areas and there's no requirement that the applicant do any
14 analysis of biological resources or comply with CEQA.

15 So we think that Cul 3 is completely in violation
16 of CEQA and should be stricken.

17 HEARING OFFICER KRAMER: Can staff explain if the
18 rational for the condition's presents here?

19 PROJECT MANAGER MEYER: I'm looking into that.
20 In my comments I thought I had stricken it out early on.
21 I didn't realize it made it far enough to actually make it
22 into the PMPD. So hold on a second while I take a look at
23 something.

24 HEARING OFFICER KRAMER: Because it does seem to
25 be basically restating the obvious that if you're going to

1 change the footprint you might have to analyze the new
2 area.

3 MS. MILES: Without public process or analysis of
4 other resource areas.

5 MR. BABULA: Probably require an amendment.

6 PROJECT MANAGER MEYER: I think was stating the
7 obvious. But it doesn't go clearly enough that any type
8 of a change as suggested in Cul 3 would require a major
9 amendment or basically a major amendment that would go
10 through the full public process and go back in front of
11 the Commission. But --

12 HEARING OFFICER KRAMER: And it's the general
13 conditions that explain in broad strokes what the need for
14 an amendment and the process. So it's a little bit odd
15 that details like this would be buried if you will in one
16 of the more substantive topic areas. So does staff object
17 to removing it?

18 MS. ALLRED: No objection there.

19 MR. BABULA: It was just a test. Good job, CURE.
20 Thanks.

21 HEARING OFFICER KRAMER: Okay. Does staff want
22 to respond to any of the other comments that CURE made
23 about cultural section? Or the applicant for that matter?

24 MS. ALLRED: I could respond if you'd like me to.

25 MR. BABULA: Just before you do, I want to make

1 sure -- CURE has stated this in their brief and in their
2 own testimony and we have our testimony. So Sarah's
3 trying to respond, but it seems to be it's really just
4 responding to issues the Committee has already heard and
5 already heard testimony on.

6 HEARING OFFICER KRAMER: Okay. Well, we can
7 accept that as your position as well. Okay.

8 MS. FOLEY GANNON: The applicant has a similar
9 view of that. I think this was an area that was in
10 dispute. There was evidence on both sides. We think
11 there's substantial evidence to support the Committee's
12 decision on these points and we agree with your approach.

13 HEARING OFFICER KRAMER: Okay.

14 COMMISSIONER EGGERT: Give CURE an opportunity.
15 Is there anything in here that's new that hasn't been
16 previously articulated or argued?

17 MS. MILES: Well, there was definitely a lot of
18 new information that came out after we filed our briefing
19 regarding cultural resources. And certainly I sited to
20 for example, a letter from September 17th, 2007, that I
21 quote here from the staff relating to the potential for
22 subsurface resources below well developed pavement. And
23 that's something that had been brought up but really
24 hasn't been fully vetted or analyzed prior to their
25 briefing schedule. So I don't feel like it was addressed.

1 And I feel like the PMPD really glosses over a lot of
2 substantial evidence in the record and staff and the
3 SHIPO? Both determined there was a potential for
4 significant subsurface resources under wealth on desert
5 pavement. And the PMPD does not recognize that. And
6 repeatedly states that under desert pavement there are no
7 desert resources. So I don't believe that the PMPD
8 acknowledges the weight of the evidence in the record on
9 this.

10 MS. ALLRED: I can provide some clarification, if
11 you'd like. So the statement buried cultural deposits are
12 not like to be found beneath desert pavement is -- staff
13 agrees with that.

14 In the letter of September 17th, the discussion
15 that buried artifacts can be found below subsurface
16 pavement is a different matter, meaning that the technical
17 study prepared by the applicant addressed the potential
18 for buried deposits with no surface manifestations. So
19 we're talking big habitation deposits that wouldn't have
20 been found during a survey. And on desert pavements,
21 that's very unlikely.

22 However, what staff was trying to point out is
23 that we're looking at we think extraction sites when don't
24 have deeply buried subsurface deposits. It's a lithic
25 extraction site. But that doesn't mean there's not

1 information that can be had from such a resource. It's
2 just that how you would investigate that resource is
3 slightly different. You're not going to be digging the
4 holes in the ground. It's looking at the lithic reduction
5 technologies and on desert pavements, those resources are
6 very shallow so they should be tested or investigated
7 through what people -- what they call surface scrapes,
8 which are shallow but broad units. So the letter of
9 September 17th was just trying to clarify that.

10 There could be some data potential by
11 investigating a lithic extraction site. However, not a
12 deeply buried deposit with no surface manifestation. So
13 there may be desert pavement out there with no lithic
14 debris, no surface manifestations whatsoever. It would be
15 very unlikely that anything would be below that surface.
16 And because there's nothing on the surface, there would be
17 no lithic reduction technology analysis to be done on that
18 surface. So it's only those desert pavements surface that
19 already have surface manifestations that we would even
20 want to investigate further.

21 MS. MILES: I thought staff concluded that there
22 was a likelihood that surface resources had been taken off
23 of the project site. It's in the staff assessment,
24 supplemental staff assessment part 2 where staff
25 concluded -- I can't remember if it's because it's been

1 open to the public.

2 MS. ALLRED: Oh. Oh, right. You mean due to
3 looting?

4 MS. MILES: Yes.

5 MS. ALLRED: Well, that would diminish the
6 quantity and variety and probably the more interesting
7 artifacts that people who are looters are going for formed
8 artifacts, not flakes. So there would still be surface
9 manifestation. I don't think there's ever a case where
10 looters have wiped clean the surface and there's no
11 evidence whatsoever. And the point there was just there
12 could be more variety out there than meets the eye due to
13 looting. That may or may not be the case.

14 MS. MILES: I guess CURE is going to stand on the
15 comment that it perhaps is a language issue. If you would
16 like to distinguish between subsurface resources and
17 resources that are just below the surface, I'm not sure.

18 But we're going to stand on our comment that the
19 analysis is not complete because you have not looked at
20 what the resources are that are below the surface and that
21 we've determined subsurface resources. And additional
22 testing is going to be necessary as I believe was outlined
23 in your letter in terms of surface scrapes and we argued
24 regarding the methodology for doing that testing and we
25 felt that that was not something that was flushed out

1 through this process as to what would be an appropriate
2 methodology for doing that testing.

3 MR. SHEARER: CURE would have a better
4 understanding had they accepted one of the three
5 invitations to come out on the site visit with the tribes,
6 with the various other interested parties on the project.

7 MS. MILES: Unfortunately, there's been a lot of
8 activity at the Energy Commission with the number of
9 projects going forward. And so it hasn't always been
10 possible to make it out to the site. However, we have
11 certainly called in every chance that we had an
12 opportunity to participate in these meetings.

13 MS. ALLRED: We are working under the
14 programmatic agreement with the BLM and the other
15 consulting parties to develop treatment of these resources
16 and we will be doing testing at selected sites throughout
17 the project area where appropriate.

18 MS. MILES: Right. And CURE's comment on that is
19 that that's something that would happen after the project
20 is approved and it's something that is not necessarily a
21 process that's open to the public. And so this has been
22 briefed and it is before the Commission. And it is
23 something that we feel is legally inadequate.

24 MR. SHEARER: It's legally admit under the PA
25 that the SHIPO and the BLM is executed, which is legal

1 document that provides for further analysis after the
2 Record of Decision and after everything's granted. And
3 it's been done with the concurrence of the SHIPO and it is
4 currently executed.

5 HEARING OFFICER KRAMER: Okay. Well, I guess
6 it's time for the Committee to decide. We put out the
7 preliminary decision in the PMPD and we will consider the
8 comment. And modify it if necessary.

9 Anything else on cultural from any party?

10 Okay. Thank you, Ms. Allred.

11 Let's return then to the staff's comments.

12 PROJECT MANAGER MEYER: Sorry to interrupt,
13 Hearing Officer Kramer. With soil and water, do we
14 anticipate needing soil and water staff further or --
15 because I know that CURE and certain other parties had
16 questions on soil and water. Was your intention to hold
17 all soil and water conversation until Tuesday or were we
18 going to talk about other parties comments on soil and
19 water today?

20 HEARING OFFICER KRAMER: I understand from your
21 standpoint that you didn't want to discuss any of it
22 today. Did any other party wish to make any points to the
23 Committee today about soil and water?

24 Seeing none, I guess that will be the end of soil
25 and water for today.

1 MS. MILES: We would like to see what the
2 proposed mitigation is and we would hold our final
3 comments until we can actually review the Conditions of
4 Certification that come out of this workshop.

5 HEARING OFFICER KRAMER: Realizing you'll have
6 very little time to do that.

7 MS. MILES: Well, we may argue that additional
8 time is going to be necessary under the law. But we'll
9 see.

10 HEARING OFFICER KRAMER: Well, I would encourage
11 you instead of adopting that strategy to assume that you
12 have your own position about the existing conditions to
13 provide those comments, because we're not trying to set up
14 a situation where we continually create a strawman that
15 other people use as a reason to further delay their own
16 work on it.

17 MS. MILES: Okay. Well, I do have a comment
18 regarding the water supply that we could certainly address
19 today.

20 My other comment is related to soil and water
21 resources for the detention basins. So it's directly
22 relevant to what comes out of the condition.

23 HEARING OFFICER KRAMER: And you'll be
24 participating in those discussion.

25 MS. MILES: I'm not sure if I will be in person

1 or by phone.

2 HEARING OFFICER KRAMER: So go ahead with your
3 comment about the supply. I don't think that was really
4 on the table at lunch today.

5 MS. FOLEY GANNON: No, it wasn't. But I would
6 also say to the extent we can get through any substantive
7 comments that are not specific proposals for how to tweak
8 or refine like Soil and Water 8 or Soils and Water 1, it
9 seems this is the appropriate place for us to address it
10 if the way I read CURE's comments on Soil and Water 8
11 there were more global comments and it seems that would be
12 appropriate to discuss today if possible.

13 HEARING OFFICER KRAMER: Okay.

14 MS. MILES: So our first comment regarding soil
15 and water resources is the water supply and the PMPD
16 concluded that there was a reliable water supply and at
17 the same time the PMPD includes a condition of
18 certification that would require if it turns out that the
19 water supply is not reliable, that the applicant institute
20 a water conservation and alternative water supply plan.
21 And based on the record in this proceeding, the applicant
22 has struggled to find a water supply in the past. And so
23 there isn't substantial evidence in the record that, A, an
24 alternative water supply will be able to be found by the
25 applicant, that there is a reasonable likelihood of that,

1 and B, water conservation that the applicant would be able
2 to implement a water conservation strategy.

3 I know that the applicant had already
4 substantially reduced the amount of water they anticipated
5 to use through using soil tacifiers instead of watering to
6 control dust on construction sites.

7 So I don't really see any evidence there is going
8 to be a potential for water conservation and additionally
9 an alternative water supply seems very unlikely. So our
10 comment is that the PMPD should acknowledge that there is
11 potentially not a reliable water supply considering that
12 the PMPD has soil and water conditions that address the
13 potential if it's not reliable. And staff provided
14 testimony that applicant's testing did not show that this
15 is going to be a long-term reliable water supply and
16 really this is going to have to be proven out overtime.

17 MS. FOLEY GANNON: Now I understand.

18 MS. WHITE: Just a point of clarification on my
19 part. So in terms of the way that the PMPD currently
20 restricts the water as proposed and analyzed in the
21 current decision, Soil and Water 4, what about that
22 condition do you think is insufficient in the event that
23 that supply is not adequate, considering that they would
24 have to come back for an amendment that would trigger a
25 staff analysis? So looking back if you would go to soil

1 and water 4. Last sentence of the first paragraph of that
2 condition.

3 MS. MILES: I don't have the PMPD up in front of
4 me right now.

5 MS. WHITE: The Committee did take into
6 consideration CURE's comments to this effect and
7 essentially states Soil and Water 4, "The proposed
8 projects use of ground water for all construction activity
9 shall not exceed 145 acre feet a year. The proposed
10 project use of groundwater for all operational activity
11 shall not exceed 21 acre feet a year. The use of
12 groundwater or other water sources in excess of these
13 limits are prohibited, unless the project owner seeks a
14 project amendment." And then it goes on to discuss the
15 rest of the condition.

16 MS. MILES: Our concern goes to the fact that the
17 PMPD, it's misleading in the language that says the
18 project has a reliable water supply when we don't feel
19 that the analysis supports that conclusion.

20 MS. WHITE: Okay. So it is your opinion then
21 that a project must have a backup whether they choose to
22 propose it or not?

23 MS. MILES: We think that the Commission needs to
24 rely on substantial evidence in making its conclusions and
25 that there is not substantial evidence in the record to

1 support a conclusion that there is a reliable water supply
2 based on the fact that there was not adequate testing
3 done.

4 MS. WHITE: So your point is not that they would
5 need in excess of 21 acre feet, but that in fact the
6 source of their water supply could not produce 21 acre
7 feet for their use?

8 MS. MILES: Right. That there is a lot of
9 concern around whether that source is going to be adequate
10 and if that was actually included in the staff's analysis
11 and it was something that CURE's expert testified to as
12 well.

13 MR. WEAVER: I think I can lend some
14 clarification to that.

15 The issues with finding the water on site were
16 largely due to drilling errors. The initial contractor
17 that was used to explore for water may have been not
18 really capable of accomplishing that goal. They
19 subsequently contracted with another drilling contractor
20 that drilled and constructed an appropriate well.

21 The testing that occurred in that proper well,
22 well number three, was done -- let's see. They went up to
23 the maximum 100 gallons per minute without really having
24 any draw down that showed it was a good capable well,
25 reasonably reliable. That still restricted to the well

1 itself. So the reliability issue could be things like
2 fouling of the screens, pumps going down. That's the kind
3 of reliability.

4 The basin itself appears to be adequate. The
5 amount of water projected to be used was between like 13
6 and 20 percent of the recharge throughout the basin. So
7 the reliability of the basin isn't necessarily the
8 problem. It would be more to the functioning of the well.
9 So as far as the supplemental well, one of the
10 recommendations that we have in there is the installation
11 of a monitoring well that intersects that water bearing
12 unit. That well could also be used as a backup well if
13 needed.

14 MS. MILES: Right. I guess when I'm talking
15 about the reliability of the water supply, I'm not
16 necessarily just saying the reliability of the basin. I
17 mean, I'm talking about in general whether the applicant
18 is going to be able to rely on this well, whether it might
19 be effecting other wells, whether it might have -- and
20 also whether the applicant's well is going to require a
21 different permitting process from the county. So the
22 actual design of the well goes into whether the applicant
23 will need a different permit through the county's
24 groundwater ordinance. So that's why it's really -- and
25 that process would require a CEQA process. And it would

1 evaluate -- and the county would need to evaluate whether
2 the project is going to be -- if this would satisfy yield
3 requirements so -- under the ordinance.

4 So there is a whole slough of issues relating to
5 whether this water supply is going to be reliable for this
6 project. And I'm not just talking about whether it's
7 going to be a reliable water supply in terms of the basin.
8 So my point is that we do not believe there is substantial
9 evidence in the record to support that this is a reliable
10 water supply for this project.

11 HEARING OFFICER KRAMER: It sounds like staff
12 agrees to disagree with you.

13 MR. WEAVER: I mean, the science indicates that
14 it is. And I don't know anything other than that.

15 HEARING OFFICER KRAMER: I don't -- I don't think
16 the Committee considers the potential requirement that a
17 contingency plan be developed to be a refutation of its
18 finding that the well appears to be an adequate supply.
19 As the gentleman said earlier, I think parachute.

20 COMMISSIONER EGGERT: Right. And if I understand
21 this condition, there actually is a protection for the
22 purposes if it's not adequate. So it's actually just
23 layering on another protection that sort of restricts them
24 from going off site if for some reason what we think is
25 adequate is not.

1 MR. WEAVER: That's correct. Soil and water four
2 requires metering of the well to assure it doesn't exceed
3 that allocated. And in Soil and Water 9 addresses the
4 additional investigation if needed to --

5 MS. MILES: Right. Is there any evidence that
6 the applicant is -- mitigation that's likely to be
7 effected or feasible for the applicant to find an
8 alternative water supply or to be able to reduce their
9 usage on site?

10 MR. WEAVER: Yes. Additional water is likely to
11 be found if for whatever reason if the particular areas
12 compartmentalize where the existing soil is due to fault
13 boundaries or a particular isolated aquifer that could
14 show draw down and actually not be able to produce. The
15 basin is so large that you get -- if it is in a
16 compartmentalized condition, you can find another area
17 outside of that particular well location. We don't think
18 that that's the case. We'll know more with the monitoring
19 wells installed.

20 HEARING OFFICER KRAMER: Well, as I said, I think
21 we understand the issue and the arguments. We'll respond
22 as we think is appropriate.

23 MS. FOLEY GANNON: And from the applicants
24 respectively, we also direct the Committee to look at the
25 testimony that was provided both written and oral from

1 Robert Scott. It was Exhibit 77, particularly dealing
2 with this issue as well as the 8-6 hearings in Barstow.
3 And we think that provides more than substantial evidence
4 to demonstrate there is a sufficient water supply.

5 HEARING OFFICER KRAMER: You said Exhibit 77?

6 MS. FOLEY GANNON: Exhibit 77 was the written
7 testimony and then he gave oral testimony on this on
8 8-6-10. I believe it started on page 72 of the reporter's
9 transcript.

10 MS. MILES: CURE's other comment regarding soil
11 and water resources is related to the debris basins as a
12 mentioned.

13 The PMPD variously refers to on-site debris
14 basins and then at other times it will not be on-site
15 debris basins unless triggered by conditions. So we think
16 that the design for these debris basins needs to be worked
17 out prior to project approval at a time when the public
18 and intervenors can review that information and comment on
19 it.

20 And this last minute tinkering is not going the
21 provide an opportunity to do that. I think that's
22 becoming quite evident here today. There needs to be an
23 additional layer of public review of this, as is mentioned
24 today, there is the potential for the debris basins to be
25 put, for example, just north of the railroad track. And

1 there is a dispute as to whether there's going to have
2 biological implication. There is a lot of lens to look at
3 each of these changes with a lot of resources that we need
4 to think through when we're proposing a change like this.
5 And so I do not believe that it's going to be appropriate
6 under CEQA to just make a decision at the last minute as
7 to how these debris basins are going to be configured or
8 actually after the project is approved without having
9 public input on that process. So under CEQA, you know,
10 the project description, the design of the project that's
11 sort of a fundamental basis for the public to be reviewing
12 the project. And the debris basins can have significant
13 environmental impacts.

14 HEARING OFFICER KRAMER: Okay. Thank you.

15 Back to staff's comments then.

16 MS. FOLEY GANNON: Can we respond to CURE's last
17 comments on the detention basin, debris basins?

18 HEARING OFFICER KRAMER: Sure.

19 MS. FOLEY GANNON: We think it's entirely
20 appropriate as the evidence we submitted during the
21 hearings to make a determination that says these are the
22 performance measures that will be met and these will be
23 the various ways the performance standards can be
24 satisfied. And as long as it's reasonable to make a
25 determination based upon the substantial evidence in the

1 record, these measures can be carried out and meet those
2 performance standards, that is a completely accepted long
3 accepted practice under CEQA and under various state
4 agencies approvals. So we think that's appropriate that
5 we think that's what you've adopted.

6 In determining saying there is some specific
7 environmental impacts associated with debris basins that
8 we need to have a special look at, that is just not
9 consistent with the way these things are often approved.
10 Again, it's meeting an environmental standard. It is --
11 we take it as clarification that the biology staff at the
12 Commission was relying on the setbacks for both north and
13 south of the railroad in making its determination there is
14 no cumulatively significant impact to the Mojave
15 fringe-toed lizard. Therefore, the detention basins
16 couldn't go there without having to come back and consider
17 that and recognize that.

18 For any place on the site where they would be
19 placed or not just detention basins or whatever stormwater
20 controls were necessary, the analysis that has been done
21 is really looking at this and saying it's being in this
22 whole site and recognizing these features are in a
23 somewhat -- going to be placed on the ground when they're
24 out there. So I don't think this is going to be any
25 different or can't be any different impact that would need

1 to be studied. So we believe the record is sufficient as
2 it exists.

3 HEARING OFFICER KRAMER: Okay. Other staff
4 comments that you wish to highlight?

5 MR. ADAMS: Yeah. And in the interest of time,
6 we're not planning to go through them sequentially. But
7 there is an acreage discrepancy on the donated and
8 acquired lands between what staff filed and what applicant
9 filed. And Najar Vahidi is on the phone the address that,
10 to explain why we called it 80 acres and maybe try to get
11 resolution.

12 MS. VAHIDI: Yeah. Actually, Steve -- can you
13 all hear me okay?

14 HEARING OFFICER KRAMER: Yes. I turned your
15 volume up a little bit.

16 MS. VAHIDI: I've been reviewing the BLM Record
17 of Decision as we've been on the phone and the 80 acres --
18 and actually as the pointed out is an incorrect number
19 that's in the BLM. The October 7th memorandum.
20 Unfortunately, we originally deferred to the BLM thinking
21 those lands are under their jurisdiction they would have
22 correct acreages. I'd like to clarify for the Committee
23 those acreages based on the BLM's Record of Decisions.
24 But before I do that -- maybe the applicant can speak to
25 this -- the Record of Decision has a different total

1 acreage for scenario 5.5 than we as staff have analyzed.
2 They state an approval for 4,604 acres where we get a
3 4,613. I wanted to point that out that's just a
4 general -- I don't know why that is if anyone knows --

5 MS. BELLOWS: I'll -- this is the applicant,
6 Felicia. When I went through with Jim Stobaugh and the
7 BLM, GIS people along with our GIS people and we narrowed
8 it down to varied differences and decided that
9 approximately as long as BLM had an approximate
10 right-of-way grant, which they do have a right-of-way
11 grant, then that would be good enough. They recognized
12 the boundaries, the map is actually in the right-of-way
13 grant and in the ROD. But the GIS people just couldn't
14 get there.

15 MS. VAHIDI: Okay. So I'd like to just clarify
16 for the Committee -- and I don't know if, Steve, if we are
17 going to make other edits, but the numbers for the donated
18 and acquired lands need to be corrected to a total of 96
19 acres. That would be 37 acres for acquired lands and 59
20 acres for donated lands according to the BLM's Record of
21 Decision. And the applicant can sort of chime in on this
22 as well. I tend to go with the Record of Decision more so
23 than the Deputy State Director's memorandum on the issue.

24 HEARING OFFICER KRAMER: Can you give me those
25 numbers again?

1 MS. VAHIDI: Yes. Acquired lands is 37 acres.
2 Donated land is 69ed acres. And I can give you the page
3 number from the ROD if it helps you. It's page 23 of
4 Section 3.0, which is their management and it's entitled
5 management considerations.

6 HEARING OFFICER KRAMER: That's the ROD?

7 MS. VAHIDI: That's of the Record of Decision,
8 yeah. And the first paragraph on that page discusses the
9 acreage and then the acreage of the acquired lands and the
10 acreage of the donated lands they're approving. And I
11 believe the applicant in their comments has -- was it 69
12 acres or 69.2 acres? I think your hearing exhibits were
13 96.2 acres which is what we used for our SSA (inaudible).
14 I don't know if that's just a matter of semantics. But I
15 think we can agree on 96 acres for donated and acquired
16 land.

17 MS. FOLEY GANNON: The applicant has no objection
18 to that.

19 HEARING OFFICER KRAMER: And is it your
20 understanding that the rational in the BLM memo that just
21 addressed donated lands also applies to the acquired lands
22 as far as their consistency with that BLM policy goes?

23 MS. VAHIDI: Yes. I would imagine so, because
24 they do mention acquired lands, but they don't really get
25 specifics in that memorandum. And again, the Record of

1 Decision I would assume supercedes if signed by a higher
2 authority than the State -- the State Deputy Director that
3 that would stand. And again, that memorandum, the October
4 7th, was not an authorization. It was a recommendation
5 for authorization. So the ROD is the actual decision
6 document.

7 HEARING OFFICER KRAMER: Okay. Anything else
8 about land use that you wanted to point out to us?

9 MS. VAHIDI: No. That's about it. I guess the
10 only question I would have is do we -- do we stay with our
11 total project acreage of 4,613 or do we make it consistent
12 with the BLM? Anybody have any thoughts on that or --

13 HEARING OFFICER KRAMER: Well, BLM said
14 approximately you said?

15 MS. VAHIDI: They didn't say approximately. They
16 said 4,604 project footprint.

17 MS. FOLEY GANNON: Was in the right-of-way grant
18 they use approximately?

19 MS. VAHIDI: They did. Yeah. In the actual --

20 MS. FOLEY GANNON: In the ROD.

21 MS. VAHIDI: In the CDCA plan they don't use
22 approximately. That's the semantics. I wasn't sure if
23 you wanted that corrected -- not corrected, but made
24 consistent.

25 MR. ADAMS: I'd suggest that staff has been

1 analyzing for the last few weeks the certain number of
2 acres the applicant's indicating that's not incorrect and
3 that BLM did its own map analysis. So I'd suggest we
4 stick with what we have.

5 HEARING OFFICER KRAMER: Yeah. I even recall I
6 think it was this case seeing 4614 acres once in a while.
7 So I think that's where it started out. And then when I
8 realized 131, the vote count I had to make a lot of
9 changes.

10 MS. VAHIDI: Well, as far as land use goes, it
11 doesn't effect our analysis.

12 HEARING OFFICER KRAMER: Okay. Anybody wish to
13 make a case for changing from 4613 to 4604?

14 Hearing none, thank you.

15 Do any of the other parties of land use specific
16 issues they'd like to raise while the staff witness is
17 available?

18 Okay. Thank you, Ms. Vahidi.

19 Staff, other comments you want to highlight for
20 us?

21 MR. ADAMS: I don't think we have anything else
22 to highlight. But of course, if or parties have
23 questions, be happy to answer those.

24 HEARING OFFICER KRAMER: Okay. Let's continue
25 them with CURE's comments.

1 MS. FOLEY GANNON: The applicant has a couple of
2 questions on staff's or comments or clarification on
3 staff's comments.

4 HEARING OFFICER KRAMER: Please go ahead.

5 MS. FOLEY GANNON: The first is on the comments
6 that start on page 18, Bio 10 and this is just -- I'm just
7 curious as to what the real intent of this clarification
8 of changing from a non-wasting capital amount to a
9 long-term maintenance and management fund. Did the use of
10 the non-wasting account is what's typically used with
11 conservation easements and distinction between the types
12 of funds that can be put together and can be utilized and
13 trying to stress that the type of account it's going to be
14 held in and then it's being held for the purpose of
15 long-term maintenance and management? So I'm not quite
16 sure why here and throughout the next couple of comments
17 you're making that change.

18 MR. HUNTLEY: This is Chris Huntley.

19 We were advised by staff counsel that non-wasting
20 was an archaic term and wasn't necessarily appropriate and
21 it was more appropriate to place long-term maintenance and
22 management. So it was just maybe a term of art.

23 MR. ADAMS: Chris, let me add to that.

24 My understanding that in particular NFWWF, the
25 National Wildlife Fish and Wildlife Foundation, which may

1 be managing funds at project owners' discretion to use
2 them was concerned with that language, because of new
3 uniform -- uniform charitable services bill which I don't
4 have the name of. I am sorry. It provides more
5 flexibility on investment of what are essentially
6 endowment funds and the term -- the term non-wasting was a
7 concern that it would limit the kinds of investments if
8 they come to hold some of these funds. So we thought it
9 was would provide a little more flexibility.

10 MS. FOLEY GANNON: Okay. That makes sense. I'm
11 archaic now.

12 MR. ADAMS: The intent hasn't changed. We would
13 expect this might be available over the decades to --

14 MS. FOLEY GANNON: I was just concerned making
15 sure there is an appropriate type of accounts. It said
16 you can have accounts put together and therefore for the
17 same types of purposes. It seems consistent with what
18 you've just described. So agree with that.

19 The next comment or question relates to on page
20 22, the comment in Soils and Water 2. And this is just
21 again a clarification or question for staff. You had
22 removed in Soil and Water 2 that we needed to develop an
23 industrial and replaced with a construction SWPPP. The
24 way that I read the waste discharge requirements which
25 with the shadow waste discharge requirements which were

1 provided by the Regional Board, they required compliance
2 with both the industrial and the construction general
3 stormwater permits, which would require SWPPPs that
4 satisfy both of those permits requirements. So it seems
5 like instead of taking out it necessarily should say an
6 industrial and construction or a SWPPP that satisfies the
7 requirements of the industrial and the construction
8 permits. Because both permits are referenced.

9 PROJECT MANAGER MEYER: I will defer to staff.
10 My understanding from our dealings with SWPPPs in the past
11 is you would have a construction and an industrial SWPPP.
12 So I'll let Casey -- is there any clarification on that?

13 MR. WEAVER: I thought that this section was just
14 concerned with construction, but we can certainly put
15 industrial in there with it.

16 MS. FOLEY GANNON: It's just referencing the
17 Appendix C I think it is which references both of the
18 general permits. It just seemed like a clarification we
19 should have to be consistent that those --

20 MR. WEAVER: So SWPPP industrial.

21 MS. FOLEY GANNON: Yes. That's correct.

22 MR. WEAVER: Okay.

23 HEARING OFFICER KRAMER: Can one plan satisfy
24 both of those masters or are they so different --

25 MS. FOLEY GANNON: They're usually going to be

1 different.

2 PROJECT MANAGER MEYER: That's staff's
3 understanding as well.

4 HEARING OFFICER KRAMER: So then industrial and
5 construction SWPPP.

6 MR. WEAVER: We'll start with construction and
7 industrial.

8 HEARING OFFICER KRAMER: Okay. And if they're to
9 be filed at different times, does the verification
10 properly time this?

11 MS. FOLEY GANNON: Actually, the way that you did
12 this is by acquiring compliance with Appendix B in which
13 in B, C, and D which are the things that are issued by the
14 Regional Board. And the applicant will have to comply
15 with the general permits because those are federal permits
16 that are issued. So they have independently to comply
17 with those. So I think it's okay.

18 HEARING OFFICER KRAMER: Yeah. I'm trying to
19 find the leveraging in here that specifically requires the
20 construction SWPPP.

21 MS. FOLEY GANNON: It goes into the cross
22 reference. And it's one other point. The appendices are
23 not actually attached to the PMPD. They are in the SSA.
24 But they weren't actually provide organized the PMPD and
25 they should be attached to this. And the appendices are

1 in the supplemental staff assessment C.789 to 7141.

2 HEARING OFFICER KRAMER: Okay. Ms. White, are
3 you confident you understand the point? We're going to
4 have to wordsmith this obviously. But we're looking at
5 how we did this in Imperial to see if that's a good model.

6 Did you have another comment we could move on to?

7 MS. FOLEY GANNON: I do. The next one is a
8 simple clarification. I'm not sure why staff was
9 requesting this clarification. It is on page -- sorry. I
10 lost it.

11 HEARING OFFICER KRAMER: You're referring to a
12 page in the comment or --

13 MS. FOLEY GANNON: I was referring to a page in
14 the comment. And I just lost it somehow. On page 25 of
15 staff's comments, staff has suggested changing the
16 description of the State Water Resources Control Board
17 resolution and their authority. And I think the PMPD got
18 it right. The State Board is -- is the agency with
19 jurisdiction over both water quality and water quantity as
20 in water rights. So I think that the PMPD's description
21 was more accurate of the actual wording.

22 HEARING OFFICER KRAMER: Which comment is that?

23 MS. FOLEY GANNON: It's the comment that starts
24 up on the top of Page 25.

25 HEARING OFFICER KRAMER: Okay.

1 MS. FOLEY GANNON: Relating to page 30. Because
2 the State Board just doesn't have the water quality
3 divisions. They also have the water rights divisions
4 which is obviously has the jurisdiction over water
5 quantities.

6 MR. WEAVER: I mean, we could change quantity to
7 water rights, if that makes sense.

8 MS. FOLEY GANNON: That makes sense.

9 MR. WEAVER: We can add it. It certainly is a
10 function of the State Water Board is in control of the
11 water rights.

12 MS. FOLEY GANNON: I think that makes sense, yes.

13 MR. WEAVER: So it goes --

14 MS. FOLEY GANNON: Water rights and water --

15 MR. WEAVER: RCV primarily considers protection
16 of water quality. In its resolution it also addresses the
17 beneficial uses of water based on water quality
18 characteristics and water rights.

19 MS. FOLEY GANNON: Yeah.

20 MR. WEAVER: (inaudible).

21 MS. FOLEY GANNON: Administers water rights.
22 Yeah.

23 The next comment --

24 HEARING OFFICER KRAMER: Well, are we ready to
25 put the previous comment to bed?

1 MS. WHITE: Yes.

2 HEARING OFFICER KRAMER: Did you need to say
3 anything about it?

4 (inaudible).

5 MS. FOLEY GANNON: The next comment on Page 25
6 where staff has raised the suggestion that the PMPD
7 referenced the fact that public comments were received on
8 this area and that they responded to in the SSA, we
9 completely support that suggestion and we also would note
10 that in all of the other substantive section that is
11 similarly addressed in the supplemental staff assessment
12 and we would suggest that the PMPD for each one of those
13 substantive areas incorporate a reference to those
14 response to comments, the comments received and the
15 response to comments which is contained in each one of the
16 substantive areas.

17 HEARING OFFICER KRAMER: Are you saying there was
18 a comment in each of the substantive areas?

19 MS. FOLEY GANNON: In almost every area, that's
20 responded to in the supplemental staff assessment. I
21 wouldn't say with confidence it was every area, but most
22 areas.

23 MR. ADAMS: I think the reason staff called this
24 one out specifically was because it was inaccurate in
25 saying no comments were received. But certainly wherever

1 we responded to comments in the SSA would have no
2 objection to that being noted.

3 MS. FOLEY GANNON: We can point to that in our
4 comments on Monday. I just didn't have a chance to do
5 that before today.

6 HEARING OFFICER KRAMER: Okay.

7 MS. FOLEY GANNON: And other than that, we have
8 no objections to any of staff's comments.

9 HEARING OFFICER KRAMER: Okay. Do any other
10 parties have any comments (inaudible) -- any comments on
11 staff's comments or proposed changes to the text or the
12 conditions?

13 MS. WHITE: This is a question for the applicant.
14 If for clarity purposes related to the national pollution
15 discharge elimination system requirements the need to
16 split up construction related compliance requirements and
17 industrial operational compliance requirements, would that
18 be acceptable, rather than contain it all in one
19 condition? We were able to break it up in Imperial.

20 MS. FOLEY GANNON: I think that's clear.

21 MS. WHITE: Rather than trying. We'll make an
22 attempt to keep it clear in one condition, but if it gets
23 too muddled, we'll take our example from Imperial.

24 MS. FOLEY GANNON: They're two separate permits
25 that you're operating under. So I think that it certainly

1 makes sense.

2 MS. WHITE: Okay. Staff, is that acceptable?

3 PROJECT MANAGER MEYER: I believe I can convince
4 the compliance project manager to work with both of those.

5 MS. WHITE: Thank you very much.

6 Other parties? Just for clarity purposes to
7 ensure that we're clear on what the compliance
8 requirements are, without having to split up the condition
9 if it's required the NPDES permits requirements?

10 HEARING OFFICER KRAMER: Okay. CURE's comments.
11 Are there any that you specifically wish to highlight and
12 ask for response from?

13 MS. MILES: Yeah. I would like to highlight my
14 comment that begins on page 8 and goes on to page 9.
15 Proposed language for a new Condition of Certification in
16 the reliability section of the PMPD, I based it upon a
17 condition or a condition equivalent within the Imperial
18 Valley Record of Decision. Basically, the PMPD has to
19 certify that the project will be safe and reliable and
20 that it is appropriately designed and sited.

21 And the PMPD's quotes that the applicant
22 indicated there would be a 9 percent availability factor
23 and that the manufacturers warrantee obligation would
24 maintain a 98 percent availability factor and already
25 there is one condition of certification reliability one

1 that really is to monitoring the progress at the Maricopa
2 plant. This reliability 2 would just require that a
3 project actually perform as promised in order for the
4 applicant to proceed to Phase 2. And this is consistent
5 with the Imperial Valley Record of Decision.

6 HEARING OFFICER KRAMER: Well, this defines --
7 this defines availability in terms of their actual
8 generation of power rather than their being able to
9 generate power. Maybe I'm missing something.

10 MS. MILES: I lifted this language directly from
11 the record of a decision. If it's different than the
12 Record of Decision, then you can look at the Record of
13 Decision. Because I'm certainly not trying to propose
14 language that the applicant did not already -- isn't
15 already committed to complying with through the Imperial
16 Valley project. Yes.

17 HEARING OFFICER KRAMER: To me this --

18 MS. MILES: This is the same technology.

19 HEARING OFFICER KRAMER: I understand that market
20 forces are expected to want your power any time you can
21 generate it. But you know, markets also get weird once in
22 a while. And if for some reason the market turns you down
23 for any period of time, you might not --

24 MS. FOLEY GANNON: That concept -- we worked for
25 a long time on this language and that concept was good

1 here.

2 MS. MILES: It is in here. If you look at number
3 four it says and the power purchaser is willing to take
4 the energy.

5 HEARING OFFICER KRAMER: Oh, okay.

6 MS. FOLEY GANNON: I think that's the same
7 language. I think that's the same language that was from
8 the ROD. And the ROD's language was taken from language
9 that we worked with. So we don't have any problem with
10 the definition of availability.

11 As is described in the PMPD, Reliability 1 was
12 something that staff and the applicant agreed to in one of
13 the hearings in Barstow. In discussing it you indicate
14 that -- and we think this is appropriate. In looking at
15 this, this is not a measure that's actually being included
16 to mitigate any significant impact or potentially
17 significant impact something that we had discussed that
18 staff would like to have this information. We agreed to
19 give this information. To add on now another reliability
20 condition we don't think it's necessary. We don't think
21 that there is any reason to include this here. We have
22 agreed to it in Imperial Valley that came about through
23 various discussions with groups who filed planned protests
24 and there was a way to run -- there is also in their
25 planned protest issues and that was part of that

1 discussion. So it's not something that's anything really
2 to do with these proceedings. So we don't think it's
3 necessary.

4 HEARING OFFICER KRAMER: Is it being required in
5 the right-of-way permit for this project?

6 MS. FOLEY GANNON: No, it is not.

7 HEARING OFFICER KRAMER: Do you want to add
8 anything else, Ms. Miles? Otherwise, we'll take it under
9 submission.

10 MS. MILES: Yeah. I'd like to add it's been a
11 serious concern all along that project -- that the project
12 would be approved and the technology would not be viable
13 long term. So we would like to protect the land and make
14 sure that no development is allowed on that land, if the
15 project does not function as advertised. So I think this
16 is a really important in fact critical condition to
17 include in the PMPD.

18 HEARING OFFICER KRAMER: I see this basically
19 introduction a one-year delay between the operation of
20 Phase I and start of construction on Phase 2. I wonder if
21 that's -- if that would potentially slow the start of
22 construction of Phase 2.

23 MS. MILES: That language was taken just from the
24 Imperial Record of Decision also. So I'm not sure. I
25 can't imagine it would have been included in there if it

1 was going to cause -- I'm sure --

2 MS. FOLEY GANNON: (inaudible) Imperial and
3 Calico are not the same project.

4 MS. MILES: There's correct.

5 MS. FOLEY GANNON: So they have different --

6 MS. MILES: Is there anything different about the
7 Imperial where this language would apply and it shouldn't
8 apply here?

9 MS. FOLEY GANNON: The way it's presented, it's
10 one year -- I mean, this is taken sort of out of context
11 and being put into a situation which this language was
12 designed to address one set of issues. This was something
13 we negotiated with a certain set of groups to address a
14 certain set of issues with a specific project, which was
15 the Imperial Valley project. So we did not do that with
16 this project with these resources. We were not looking at
17 the relationship. There were other measures that clearly
18 you weren't trying to impose into this project because
19 clearly they have nothing the do with this project.

20 So I'm not sure again -- we don't think this is
21 necessary to mitigate any impacts. Not sure it's a
22 perfect fit in terms of the timing. I guess we haven't
23 really thought about this because we haven't -- it's one
24 year I think between the start. As long as -- there has
25 to be a year delay between the end of Phase I and Phase 2,

1 that would be a problem for the Calico project.

2 MS. MILES: Is there a delay you're expecting in
3 Imperial because of this condition? This condition caused
4 a delay in the Imperial --

5 MS. FOLEY GANNON: Is that your intent by
6 including this in this condition? What are you looking to
7 get from that?

8 MS. MILES: That there would be two points of
9 certification. So that the Commission would be relatively
10 confident that the project is actually meeting the
11 availability criteria on two different points, I think
12 it's important to have that redundancy. If you just
13 certify it as one static point this time, that doesn't
14 necessarily reflect the operating capacity of the project.

15 HEARING OFFICER KRAMER: But what's motivating
16 the concern? I gather it's your concern that these units
17 are not going to be as reliable as you're told.

18 MS. MILES: That's correct. And that then if
19 they are not reliable, we would like to have a restriction
20 on the project being able to proceed.

21 HEARING OFFICER KRAMER: So don't take up any
22 more land with technology that didn't prove itself.

23 MR. BASOFIN: Yeah, if I could, having been
24 involved in those discussions on Imperial and in the draft
25 language for the resolution on the land use, I think it is

1 a similar situation where you have the same technology in
2 a phased approach and you know, we ask for in Imperial
3 there was certification there was availability met for the
4 project. And I'm not sure that I see a difference here in
5 terms of how this project is faced and how the technology
6 is deployed.

7 MS. FOLEY GANNON: But again, we agreed to that
8 condition in order to settle a planned protest. This is
9 not something that any agency determined was necessary.
10 We offered it to get a resolution and to give us a level
11 of certainty.

12 This is not -- now they're trying to take
13 something that we developed under those context and say
14 it's required in this project. You did not put some
15 requirements in the Imperial Valley project. You did not
16 determine that was necessary for your approval to be valid
17 and to be sustainable and justifiable. So we would say
18 here again you should not do it here and this year delay
19 would cause a problem for the Calico problem and we ask
20 you do not include it.

21 MR. BASOFIN: I don't really think that's an
22 argument on the merits. I mean, there may have been a
23 specific circumstance in the protest resolution where this
24 type of a condition was developed, but that doesn't mean
25 it doesn't -- that the CEC certification doesn't merit it

1 just because there is a specific circumstance in the
2 resolution process. It may very well be merited here and
3 that's an issue now that CURE has submitted it, it's an
4 issue for the Commission to determine.

5 MS. FOLEY GANNON: It's the same technology in
6 Imperial. It's the same Commission that approved Imperial
7 Valley weeks ago. They did not think this condition was
8 necessary to be able to support a condition. It's the
9 same technology. There are issues with the technology
10 will not be different in Imperial or on Calico so they did
11 not --

12 MS. MILES: We did not see the language before
13 the record decision came out. If we had seen this
14 language, we would have definitely proposed it for the
15 Imperial project. We think it applies equally and we
16 think it's just as justified here.

17 MR. LAMB: Hearing Officer Kramer, if I may,
18 Steve Lamb for BNSF. It seems to me one of the predicated
19 facts that the Commission is assuming in all of its
20 override determinations is that this works and that it's
21 viable and generates electricity. It's never been tested
22 en mass before.

23 Obviously, in Imperial Valley, there was an
24 agreement to do it in a phasing manner so -- so assets
25 would be used in terms of environmental assets unless sun

1 catchers be on the ground. I don't understand why it was
2 a year delay. That doesn't make any sense. Obviously, if
3 it works, it works. They represented it works. If it
4 works, there won't be a delay. They'll go right into the
5 next phase. But if it doesn't work, we won't commit, you
6 know, several thousand acres for unproven technology.

7 HEARING OFFICER KRAMER: Mr. Eggert.

8 COMMISSIONER EGGERT: Yes, certainly this
9 Commissioner understands and appreciates the proposal and
10 I think we have adequate information to determine whether
11 or not it should be included.

12 HEARING OFFICER KRAMER: Well, I'll just note
13 that 98 percent standard is I believe higher than the
14 bench mark we applied to our natural gas projects. With
15 that, we will --

16 MR. RITCHIE: I would add it's lower than what I
17 believe was stated would be met in the Barstow
18 proceedings.

19 COMMISSIONER EGGERT: Right. But generally the
20 Commission in analyzing reliability is looking for
21 projects that are no less reliable than the fleet that's
22 out there. So they don't bring the reliability down. But
23 so far we haven't been trying to gradually ratchet it up by
24 increasing that standard. And with that, I think we
25 believe the arguments are fully fleshed out and we'll

1 consider that.

2 COMMISSIONER BYRON: Commissioner Eggert, just to
3 let everyone know, Commissioner Eggert and I have
4 discussed this in some detail. I agree with him. I think
5 we have adequate information here to make a determination
6 on this.

7 COMMISSIONER EGGERT: Thank you very much,
8 Commissioner.

9 HEARING OFFICER KRAMER: Okay. Other points, Ms.
10 Miles?

11 MR. LAMB: Can I ask a point of clarification
12 then? Is the Commission saying that it analyzes solar
13 projects which use 40, 50 times the amount of available
14 resources in land in the same manner that it analyzes
15 hydrocarbon?

16 HEARING OFFICER KRAMER: Well, no. Your question
17 is very broad.

18 MR. LAMB: It is very broad.

19 HEARING OFFICER KRAMER: On the reliability --

20 MR. LAMB: What I heard from you --

21 HEARING OFFICER KRAMER: I was speaking to the
22 reliability issue. And --

23 MR. LAMB: But they're different. Vastly
24 different.

25 HEARING OFFICER KRAMER: Well, your question I

1 think is trying to wrap in values related to -- crux
2 disciplinary values, cultural resources, visual,
3 biological, and -- but we're talking specifically here
4 about reliability. And what I'm merely telling you what
5 the standard that's normally applied in our decisions is
6 will it make the system less reliable? If it will, that's
7 not good. If it will not worsen the reliability of the
8 system, that's been our basically our threshold. And if
9 that's met, we are generally happy with the reliability of
10 the project.

11 COMMISSIONER EGGERT: But I think also I want to
12 recognize that the Commission recognizes that there is
13 distinct differences in the operation of the different
14 generating technologies and their contribution to the
15 reliability of the system. Solar and wind have distinct
16 challenges that of integration that are associated with
17 the uncertainty about whether patterns, cloud passover,
18 you know, these are all things we're well aware of. So I
19 think, yes, we recognize these are different technologies.

20 HEARING OFFICER KRAMER: Okay. Anything else,
21 Ms. Miles?

22 MS. MILES: Yes. If you look at page 15 of my
23 comment letter, number five, PMPD, it relates to the 4614
24 acres of the compensation land that may be satisfied by
25 compliance with enhancement requirements of BLM. And the

1 BLM mitigation as I say here is not subject to CEQA's
2 requirements that they be defined, feasible, effective,
3 and capability of implementation or any of the stringent
4 requirements that apply to mitigation under the California
5 Environmental Quality Acts.

6 Additionally, I learned through workshop that as
7 you know BLM land is multiple use land that cannot just
8 say it will not be developed. So it's completely possible
9 the enhancements would occur on lands that is developed
10 during the life of this project. So we do not believe
11 that it is appropriate to allow the acreage to be -- if
12 mitigation land required to be satisfied by some other
13 means that are approved by the BLM. And so we recommend
14 that you delete the provision that would allow the use of
15 4614 acres of the mitigation land requirement to be used
16 as directed.

17 HEARING OFFICER KRAMER: Now, if we were to do as
18 you suggest, we would have to reach out to some of the
19 deposits and estimates of acres to be provided; correct?

20 MS. MILES: I'm not sure if that's actually going
21 to be required. I believe that you also estimated them at
22 the maximum amount, the 10,302 acres.

23 MR. ADAMS: I believe our security requirements
24 include the BLM portion of the mitigation.

25 HEARING OFFICER KRAMER: Okay. But we would have

1 to modify the amount of lands that would have to be
2 acquired.

3 MS. FOLEY GANNON: The way you calculated it out
4 as if all of this land is going to be acquired, the whole
5 10,000 and change, and then you put in this condition and
6 we think appropriately the availability of the BLM would
7 on its own require one to one mitigation. That's it's
8 requirement. The way that the BLM mitigates this would be
9 acquiring land would be one way they would mitigate it.
10 But they would also -- they also retained the distinction
11 to use that money to do other things they find equally
12 benefit the species. And we think that's an appropriate
13 mitigation to rely upon. You are already requiring more
14 than one to one mitigation. You're sure there's more one
15 to one mitigation of land acquisition under this scenario
16 and that you're allowing the BLM to use a manager of many
17 of the important areas of land that are designated and
18 held for the benefit of this particular species to be
19 further enhanced. And we think that -- overall can be an
20 overall net benefit for this species. And it is a good
21 option to leave them there. Special tables wouldn't have
22 to change.

23 HEARING OFFICER KRAMER: Okay. Thank you. We
24 understand your point.

25 MS. MILES: And then also on page 17 related to

1 the golden eagle nesting mitigation, the PMPD conditions
2 do not explicitly state that the project -- that the
3 mitigation lands that are purchased meet the requirements
4 of golden eagle foraging habitat. So we think that that
5 needs to be stated explicitly in the Conditions of
6 Certification. And as it is for the habitat for Mojave
7 fringe-toed lizard it can only be nested mitigation if it
8 meets the requirements for Mojave fringe-toed lizard
9 habitat as well as streambeds and burrowing owls. So we
10 think to make that consistent and for it to be effective
11 it would need to actually include this language that we
12 proposed in the conditions for golden eagles.

13 HEARING OFFICER KRAMER: So are you saying this
14 language is modeled upon similar language --

15 MS. MILES: Yes.

16 HEARING OFFICER KRAMER: With the fringe-toed
17 lizard and the --

18 MS. MILES: That's correct.

19 HEARING OFFICER KRAMER: With the burrowing owls?
20 And your way of thinking, is it possible that tortoise
21 lands could serve the needs of all four species?

22 MS. MILES: Well, we're concerned that may not,
23 and that's why we think it needs to have this specific
24 language. There's possibility. I'm not a biologist.

25 MR. OTAHAL: One thing that I would add to that

1 though is that the land that was issued was not
2 necessarily part of the eagle compensation that the
3 compensation for eagles is actually more geared toward the
4 avian protection plan and those kind of aspects so that I
5 don't think there's any requirement of X number of acres
6 of eagle habitat that has been called out. I'm not aware
7 of that. The mitigation is not habitat based,
8 necessarily.

9 MR. HUNTELY: This is Chris Huntley.

10 I think it's a little bit different from that.
11 We have proposed that the tortoise mitigation lands would
12 be used to offset the loss of foraging habitat for golden
13 eagles in the staff assessment. We're not fundamentally
14 opposed to the language requested by Ms. Miles, because we
15 basically believe that the tortoise mitigation lands will
16 provide foraging habitat for golden eagles, although we do
17 acknowledge it is possible that the acquisition of the
18 mitigation area could be many, many miles away from a
19 range that supports active golden eagles, but we feel
20 relatively confident it will serve the dual purpose.
21 Again, we're not opposed to that revision.

22 HEARING OFFICER KRAMER: Applicant?

23 MS. FOLEY GANNON: As we have presented testimony
24 in the hearings and consistent with what Mr. Otahal was
25 discussing, we don't believe there is really a requirement

1 to mitigate this impact by providing foraging habitat. We
2 believe that the avoidance measures are necessary. We
3 believe that the extensive agricultural lands in the areas
4 west of the project site are actually likely the preferred
5 foraging habitat for the golden eagles in this area and
6 that area is not going to be impacted by the project
7 development. So we don't think that there is any need to
8 address this.

9 We provided evidence on this issue in Exhibit 7
10 3, which was testimony that was prepared by Dr. Mong. And
11 for the reasons stated in that testimony we don't think
12 this is necessary.

13 If it is necessary, we do believe that the desert
14 tortoise mitigation lands will provide similar habitat and
15 will provide foraging opportunities for golden eagles.

16 MR. HUNTLEY: This is Chris Huntley.

17 In both written and oral testimony, I believe
18 we've identified that the (inaudible) species would be
19 considered an impact and that condition of certification
20 Bio 17 which is the compensatory mitigation plan for
21 tortoise would be used to compensate for this habitat
22 loss.

23 HEARING OFFICER KRAMER: Are you saying then that
24 you believe just by its own natural operation that Bio 17
25 eliminates the need to be more precise about the

1 mitigation as Ms. Miles is proposing?

2 MR. HUNTLEY: I think as we just highlighted,
3 we're not opposed to identifying potential -- how do I say
4 this? We don't mind if the mitigation for desert tortoise
5 has language that says it should be within the range of a
6 golden eagle or something or meets the general foraging
7 requirements. We know golden eagles forage in a wide
8 range of habitat, not just agricultural fields and that
9 area. And we do consider the losses over 4,000 acres of
10 foraging habitat to be something that requires
11 compensation. We do believe that the acquisition
12 enhancement of the tortoise mitigation land would provide
13 that mitigation and I guess -- yeah, tortoise habitat is
14 foraging habitat -- excuse me -- for this species as well.

15 HEARING OFFICER KRAMER: So Mr. Huntley, in Bio
16 17, are you basically assuming that all tortoise habitat
17 is going to qualify as eagle foraging area?

18 MR. HUNTLEY: By and large, the habitat
19 requirements of both species largely overlap, considering
20 the prey base for this particular species, the golden
21 eagle and what it feeds on: Large rabbits, mice,
22 tortoise, sheep, other things. We believe that the
23 acquisition of the tortoise habitat would more than
24 compensate for the loss of eagle habitat.

25 MR. RITCHIE: This is Travis Ritchie with Sierra

1 Club.

2 One of those issues is that assumes necessarily
3 though that it's within the range of golden eagles.

4 Chris, is that an equally valid assumption to
5 always make?

6 MR. HUNTLEY: I think that's a fair point. But
7 eagles have some pretty broad ranges. They tend to forage
8 within a few miles on average from their nest. But if you
9 look at even the nest location, golden eagles can have
10 multiple nests. It could be quite a broad area that's
11 foraged. So we feel fairly confident that most of the
12 habitat land within that area is likely within the range
13 of the golden eagle. But we have to do some homework for
14 sure.

15 HEARING OFFICER KRAMER: So therefore, this
16 requirement would likely be met without much additional
17 work by the tortoise habitat.

18 MR. HUNTLEY: Yeah, I think that's true. And Mr.
19 White just pointed out something to me this also includes
20 wintering habitat for birds that are moving through an
21 area. They forage over a broad range. So we feel fairly
22 confident that it will achieve what it's required to do.

23 HEARING OFFICER KRAMER: It being the existing
24 Bio 17?

25 MR. HUNTLEY: It being Bio 17. For the addition

1 we think would be okay and would be likely to meet the
2 mitigation requirements. We don't see a problem with it,
3 frankly.

4 HEARING OFFICER KRAMER: An addition would be to
5 Bio 20, right?

6 MR. HUNTLEY: Yes, sir. The reference to the
7 tortoise habitat.

8 HEARING OFFICER KRAMER: Any last words?

9 MR. OTAHAL: One of the things that I'm just
10 looking at here is defining what eagle habitat is then
11 under suggested changes. Because that does mean it has to
12 be within the home range or can it be migratory habitat?
13 Because I don't think that's being well defined to be able
14 to say what that is -- it's not clear to me at least.

15 MS. MILES: Yeah, we left that to be determined
16 by staff, by Energy Commission staff.

17 MR. HUNTLEY: Because -- this foraging habitat is
18 as important as home range habitat.

19 MR. OTAHAL: Because basically if you're
20 including migration habitat, then basically all habitat in
21 the desert is that -- is eagle habitat of some point and
22 therefore you know, adding this clarification wouldn't add
23 anything to Bio 17 as it exists.

24 MS. MILES: Well, we see that the project -- the
25 incubating golden eagle theme relatively close to the

1 project site and that there were a number of nests that
2 were found very close to the project site. So to actually
3 mitigate the impact to nesting golden eagles, I think that
4 would actually be the intent of, you know, to mitigate for
5 foraging habitat. They could interfere with the nesting
6 activities, the golden eagles. I think this should be
7 really developed so it includes mitigation in order to be
8 -- to meet -- to actually mitigate the impacts that are
9 proposed by the project, I think this should include
10 requirements for mitigation land that would actually
11 provide foraging habitat for nesting golden eagles.

12 MR. OTAHAL: Okay. So you're saying you're
13 defining eagle habitat as within the home range of the
14 eagle.

15 MS. MILES: Yes. And I think home range, the
16 definition, that would be taken out of the U.S. Fish and
17 Wildlife Service guidance on golden eagles.

18 HEARING OFFICER KRAMER: Okay. So --

19 MS. FOLEY GANNON: We would suggest it would be
20 three-to-one ration because we are providing much more
21 mitigation land to 10,000 acres mitigation lands for the
22 desert tortoise, and we currently don't think that all
23 10,000 acres have to be within eagle foraging home range
24 of an eagle nest in order to mitigate this impact to a
25 less than significant level. Like Mr. Huntley said, we're

1 confident these lands are going the mitigate this.

2 MS. MILES: Well, the project will be impacting
3 an eagle home range and I guess actually migratory home
4 eagles foraging habitat. So the entire project site
5 perhaps not the project site plus the three-to-one ratio.

6 MS. FOLEY GANNON: That's what I'm saying.

7 MS. MILES: Yeah.

8 MR. OTAHAL: And again, I would argue that your
9 clarification is not needed then because all desert
10 habitat is going to be either migratory or within home
11 range.

12 MS. MILES: So you're mitigating an impact to an
13 actual migratory. Saying the clarification is needed
14 because you're mitigating impacts to not only migratory
15 golden eagles but golden eagles that are nesting. So I
16 think that it should be clarified in this condition to
17 require that the land purchased be verified to be golden
18 eagle habitat not only for migratory but also for within
19 golden eagle home range.

20 MR. OTAHAL: Well, now you're saying both.

21 MS. MILES: Well, home lands does serve as both
22 so you're mitigating impacts to -- the land serves both
23 purposes. So if you want to mitigate the impact --

24 MR. OTAHAL: Not necessarily, because some of the
25 lands could be used for migration and some could be used

1 within their home range. So you're trying to say it needs
2 to meet both those criteria, whereas there are some areas
3 that would be used for migration that would not
4 necessarily be within a home range of a nest. And that's
5 where the clarification that -- I wouldn't know how to
6 enforce this if you just said it had to be eagle habitat.
7 We need to define what that means.

8 HEARING OFFICER KRAMER: Let me suggest
9 something, because we need to move on. In the proposal on
10 the fifth line it talks about habitat for golden eagle.
11 And if we modify that to say nesting or foraging habitat
12 for golden eagle, would that sufficiently describe the
13 land?

14 MS. MILES: Yes.

15 HEARING OFFICER KRAMER: And then the point about
16 the ratio in the first clause, subclause A it says
17 adequate acreage. And then down below though it says if
18 you don't find tortoise land to do the job and then you go
19 back to the 4614. I guess that should be 13. But I saw
20 it somewhere. But is the somewhat loose term adequate
21 acreage up above there concern anyone? Okay.

22 MS. MILES: It was taken modeled directly after
23 the other Conditions of Certification. So it's a loose
24 term and perhaps you should correct it throughout --

25 HEARING OFFICER KRAMER: The applicant says she's

1 not worried, so we'll let it go.

2 MS. MILES: You might want to be worried
3 depending on whether that's legally enforceable or not for
4 the CPM.

5 MR. ADAMS: It would be better to have an acreage
6 there I think.

7 MR. HUNTLEY: No more than one to one.

8 HEARING OFFICER KRAMER: Is it wrong to say 4614
9 acres of habitat?

10 MR. HUNTLEY: That probably would be okay
11 considering again a one-to-one mitigation acreage would
12 likely be appropriate for that species.

13 HEARING OFFICER KRAMER: Okay. All right.

14 MS. MILES: And to clarify, when you said
15 foraging and nesting, I would say foraging and nesting to
16 the extent that the project impacts nesting habitat.

17 MR. HUNTLEY: Yeah. At some point I think
18 there's going to be challenges. Is this going to
19 necessitate a helicopter survey of every mountain range
20 within these areas. Some of these foraging habitats or
21 home ranges can be 75 square miles.

22 HEARING OFFICER KRAMER: What I was thinking it
23 was nesting or foraging. So --

24 MR. HUNTLEY: I would leave it as nesting or
25 foraging.

1 HEARING OFFICER KRAMER: Because that allows the
2 -- either one is a good thing, from what I understand.
3 And chances are, it's not going to be nesting because
4 tortoises don't climb so well. But might be in some
5 cases.

6 MS. MILES: Well, the concept is that you're
7 impacting the ability for a nesting eagle to forage. So
8 like the eagles parents to forage.

9 HEARING OFFICER KRAMER: Then maybe we should
10 just -- I think you're arguing that we should just say
11 foraging habitat then on the --

12 MR. RITCHIE: Then that was the issue Mr. Otahal
13 was bringing up is that you could have migratory foraging
14 habitat versus habitat --

15 MS. FOLEY GANNON: Within the home range.

16 MR. OTAHAL: Because was Mr. Huntley just pointed
17 out, if we do get -- sorry to belabor this. But if we say
18 it's only foraging habitat for the nesting birds, that
19 would then say every time we look for a piece of desert
20 tortoise habitat, we could also have to do analysis to see
21 if there's eagles nesting within whatever -- ten miles or
22 whatever the buffer we decide is correct.

23 MR. RITCHIE: Right. But that's the point.
24 Because what we're sacrificing here is to the extent that
25 home range nesting foraging habitat which exists on the

1 Calico site is being lost and we're compensating for that,
2 you would want to compensate for something of equal value.

3 And I would from a lawyer hearing this say that
4 just pure migratory foraging habitat which Mr. Otahal said
5 cover the entire desert would be less valuable than
6 foraging habitat that can support a nesting species. So
7 just assuming that these two things will always coincide I
8 think is the point that we're wrestling with here. And to
9 the extent that we're mitigating impacts that have been
10 identified, we should mitigate those impacts and be sure
11 that we're mitigating them.

12 HEARING OFFICER KRAMER: Okay. So what is being
13 lost here is foraging habitat then, not nesting.

14 MS. FOLEY GANNON: But if there is a known nest,
15 then the project is within the home range.

16 HEARING OFFICER KRAMER: Okay. Give me some
17 magic words. We started out with nesting or foraging --

18 MR. HUNTLEY: How about one to one within the
19 known -- or potential nesting territory within a ten mile
20 radius. And the BLM considers an active nest to be any
21 nest used within five years. And I know they have a
22 variety of existing data scattered across the forest --
23 scattered across the forest out there.

24 MS. MILES: That sounds reasonable.

25 HEARING OFFICER KRAMER: Okay. Somebody want to

1 put it on paper in a further comment?

2 MR. HUNTLEY: Sure. We can do that.

3 MS. MILES: And just for the record, I'd like to
4 say we also submitted comments that the applicant -- we
5 believe the applicant needs to get a take permit and that
6 the staff had concluded that it was not possible to
7 determine I believe. If I'm misquoting staff, feel free
8 to correct me. But it was not possible to determine right
9 now whether a take permit was required. We think that no
10 construction should go forward until the applicant has a
11 take permit because of the potential for the construction
12 and disturbance for the project site to interfere with the
13 breeding activities with known golden eagle nests within a
14 relatively short distance from the project site as the
15 eagle flies.

16 HEARING OFFICER KRAMER: You're talking about
17 federal or State take permit?

18 MS. MILES: Federal.

19 MR. HUNTLEY: The State will not issue a take
20 permit for the species because it's a fully protected
21 species. Staff at this time doesn't also any believe they
22 need to acquire a take permit for this. The intent of the
23 mitigation is to ensure that construction activities do
24 not result in the disturbance of the nest. It is 3.5
25 miles away from the project right now. If Fish and

1 Wildlife Services believes a take permit is warranted,
2 we'll look into that. But right now we're not requiring
3 that.

4 HEARING OFFICER KRAMER: Well, and wouldn't that
5 have been resolved as part of the right-of-way permit and
6 the biological opinion?

7 MR. OTAHAL: Yeah. And having dealt with it, we
8 will be compliant with the golden eagle fact and that will
9 be through the further development of the avian protection
10 plan, and I believe the final avian protection plan needs
11 to be 30 days after issuance of the ROD or the CEC
12 determination, which if I remember is first. And since
13 the ROD came out first, I believe the mitigation measure
14 indicates that the aging protection plan needs to be
15 completed in 30 days.

16 MS. FOLEY GANNON: It was the Eagle Protection
17 Act administered by the U.S. Fish and Wildlife Service.
18 There was a Section 7 consultation in which we've been in
19 discussion between BLM and U.S. Fish and Wildlife Service
20 about which species they issued the biological opinion.
21 They have not required or said a take permit for the eagle
22 is required for the project.

23 MR. OTAHAL: And just as a point of
24 clarification, the golden eagle isn't actually covered
25 under the endangered species, right?

1 MS. FOLEY GANNON: It's administered -- my point
2 was it's administered by the same agencies who does the
3 Endangered Species Act. And just as a point of example
4 for other projects that I have worked on that there has
5 been discussions about need for a permit it's come up when
6 you're discussing things for the service about other
7 impacts to endangered species, they have certainly raised
8 this issue.

9 MR. WHITE: If I can jump in, this is Scott
10 White.

11 It's my understanding that when the Fish and
12 Wildlife Service reviews the project avian and bat
13 protection plan, they will be looking for measures in
14 there to protect and avoid impacts to golden eagles. And
15 they would make a determination at that point whether some
16 additional take permit might be necessary for golden
17 eagles. But that determination is the Fish and Wildlife
18 Service's rather than the Energy Commission.

19 MR. OTAHAL: Yes. Also just as clarification,
20 I'm trying to remember if there was a correspondence that
21 went back and forth between Fish and Wildlife and BLM.
22 There were ten fast track projects that we did basically a
23 golden eagle letter process between the Fish and Wildlife
24 and BLM asking them to make a determination if there would
25 be take or not on these ten projects, including Calico,

1 and I believe that their determination is that there would
2 not be take in this particular instance but that we would
3 still need an aging protection plan.

4 I don't remember the exact wording, but we do
5 have correspondence between BLM and Fish and Wildlife that
6 discusses this specifically. I can give you a copy of
7 that letter before Monday if you would like to see that.
8 If that would be something that would be useful.

9 MS. MILES: If you could provide that to the
10 record.

11 HEARING OFFICER KRAMER: So provide that to Mr.
12 Meyer and he'll get it to everyone.

13 Okay. Moving on, I see that Ms. Miles has page
14 18 of her comments has proposed two additions to Condition
15 Bio 16.

16 MS. MILES: Yes. I proposed those in order to
17 make the condition of certification reflect the statement
18 in the PMPD on pages 41 to 42 that says, "prior to
19 construction tortoises inhabiting the project would be
20 translocated to suitable receptor sites."

21 MR. HUNTLEY: This is Chris Huntley.

22 Bio 15 actually has language specifically
23 requiring that tortoises be moved and translocated in
24 accordance with the translocation plan. It probably
25 wouldn't hurt us either way to have another sentence that

1 prior to construction all tortoises inhabiting the
2 tortoise site would be translocated to suitable receptor
3 sites. That would be okay from our perspective. But it
4 has and was identified in Bio 15 before.

5 MS. FOLEY GANNON: We would say that the way the
6 language is written it's too broad. Project site is a
7 4213 acre site. The 613, all the tortoises will not be
8 cleared from that. What we would say is consistent with
9 both translocation plan is that tortoises would be cleared
10 in the areas where work is occurring.

11 PROJECT MANAGER MEYER: This is Christopher
12 Meyer.

13 I agree with the applicant on that. We want to
14 make sure that it's clear that the intent is to move the
15 tortoises prior to impacts in the phase that's being
16 approved for construction, not just on the off chance that
17 anything goes on and there's no construction of a future
18 phase or the face is delayed significantly. We wouldn't
19 want impacts to those desert tortoise unnecessarily.

20 MR. OTAHAL: Yes, and also as another point, for
21 example, this fall we would not actually be
22 "translocating" any animals to receptor sites. They would
23 be moved into the Phase I A -- Phase IB or the phase 2
24 areas, being quarantine, being held, and then later will
25 be moved to the receptor sites. So that wording is a

1 little bit broad.

2 MS. FOLEY GANNON: And again, what's important
3 it's not just even just the basis. It's where the work is
4 going to occur. You cannot do work in an area until the
5 tortoises have been cleared from that area. That's what's
6 important and that's what this leveraging I think should
7 say and we can propose language.

8 HEARING OFFICER KRAMER: Okay. So then you're
9 suggesting that the language in the text be clarified to
10 say something to the effect that prior to any construction
11 that might effect tortoises would be moved.

12 MS. FOLEY GANNON: Prior -- that the construction
13 only occur -- no construction -- disturbance can only
14 occur in areas where the tortoises have been cleared.

15 MS. MILES: With perhaps a buffer as well. I
16 don't know the staff can weigh in on an appropriate
17 factor.

18 MR. OTAHAL: Why not just say consistent with the
19 translocation plan?

20 MS. FOLEY GANNON: Consistent with translocation
21 plan.

22 MR. OTAHAL: With the buffers and all that kind
23 of stuff.

24 MS. MILES: We don't have a translocation plan at
25 this point, so that's why I just want to make sure that

1 it's really clear in the Conditions of Certification. And
2 I don't -- I am okay with the idea that it be related to a
3 phase. So for example, Phase IA. However, I think it
4 should included a reasonable buffer and perhaps staff can
5 weigh in on an appropriate distance for a buffer. But
6 certainly I would like to just make sure that it is nailed
7 down in these conditions that no disturbance could occur
8 in an area where the tortoises have not been cleared.

9 MR. OTAHAL: Right. And again, I would suggest
10 that that be consistent with the translocation plan
11 because as we start putting buffers as mitigation measures
12 in the document here it may be in conflict with what we
13 have come up within the translocation plan.

14 MS. MILES: The problem is we haven't seen the
15 translocation plan.

16 HEARING OFFICER KRAMER: It could be one of the
17 attachments that's going to be circulated real soon,
18 right?

19 MS. FOLEY GANNON: This afternoon.

20 MR. WHITE: If I could, this is Scott White.

21 I'd like to just step and say although the
22 translocation plan is not a part of the staff assessment,
23 Bio 16 does require that the translocation plan meet the
24 guidance of the Fish and Wildlife Service issued in 2010
25 and that's actually quite a strong performance criteria.

1 And all these considerations are taken up in that Fish and
2 Wildlife Service guidance. So I don't think that we need
3 to spell out these kinds of details here, as long as the
4 guidance is adhered to.

5 HEARING OFFICER KRAMER: I think where the
6 Committee is going is we're just going to make sure that
7 to the extent that the statement that's said to be over
8 broad is in the narrative, we will nuance it
9 appropriately.

10 MS. MILES: And we are concerned that
11 construction could occur without the tortoises being
12 translocated and that just fencing could be put up, for
13 example, around an occupied burrow. And the construction
14 could go on within that base, for example. And that would
15 be inappropriate and that's what I'm trying to get at. I
16 think that's a gray area in the guidance and I don't think
17 that was squarely addressed in the translocation plan
18 versus that we have seen. And I think it's not something
19 that's been addressed by any agency. We have put in
20 comments that that could be a potentially significant
21 impacts.

22 MR. OTAHAL: It's been addressed by Fish and
23 Wildlife, Fish and Game, BLM, Animal Service, CEC, and
24 that is exactly what the intent this fall is to do is if
25 there is an occupied burrow that we will put a fence

1 around it. That would be a non-construction area. And
2 then we will monitor that animal. And as it comes up, we
3 will move it into a quarantine pen off of the Phase IA
4 area. So that has been discussed by all the agencies and
5 agreed to.

6 MR. WEAVER: And that's consistent with the
7 Conditions of Certification that should any tortoises have
8 to be moved past the deadline, it would have to be done in
9 consultation with Fish and Game and service.

10 MS. MILES: But we're not talking about tortoises
11 being moved. We're talking about tortoises being left in
12 the ground and construction proceeding around them. And
13 that's what we have a problem with.

14 HEARING OFFICER KRAMER: Mr. Otahal, I assume the
15 plan allowed for some kind of buffer.

16 MR. OTAHAL: Yes, it does.

17 HEARING OFFICER KRAMER: What was that?

18 MR. OTAHAL: I don't recall the buffer off the
19 top of my head. But it was discussed in the biological
20 opinion that was issued by Fish and Wildlife. So this has
21 gone through the various wildlife agencies for their
22 approval as per the mitigation measure.

23 HEARING OFFICER KRAMER: Mr. Basofin, and then
24 we're going to move on.

25 MR. BASOFIN: I think we are at a significant

1 disadvantage here in that the federal agencies and the
2 applicant have been privy to the biological opinion as
3 well as the translocation plan, purportedly if there is
4 one. And we haven't. And it's impossible to us to
5 comment on or respond to comments that they're making
6 about what kind of -- what's going to happen with a
7 tortoise that's in its burrow when construction begins and
8 what kind of fencing is going to happen. What kind of
9 buffer is going to be in place.

10 I mean, I think if we are going to have this
11 discussion, it's going to be when the biological opinion
12 is available. And if it needs to be tabled, it needs to
13 be tabled. But this seems to me to be not a productive
14 conversation in the absence of the biological pink
15 available.

16 HEARING OFFICER KRAMER: Okay. Well, the
17 performance standards were debated during the hearing.
18 And basically what the Commission has said or is proposing
19 to say is that we are relying on the more knowledgeable
20 parties of the federal agencies and the State and Wildlife
21 agency and we also have our CPM participating in the
22 review of the translocation plan I believe to make sure
23 that the plan that is adopted -- was adopted I guess --
24 right way to phrase it -- will satisfy those standards.

25 So we're -- I don't think we ever intended to get

1 in the business of the Commissioners micromanaging the
2 details of the translocation plan. The compliance process
3 is -- while there are no hearings and you don't get to
4 call witnesses and file briefs, you are allowed to request
5 these various documents and to make comments about them.
6 And if you believe that the Conditions of Certification
7 are not satisfied, then there are legal avenues you can
8 take to attempt to bring back what you believe is a
9 satisfactory result. So I think that's the best we can do
10 at this point in time.

11 MR. RITCHIE: Mr. Kramer, this is Travis Ritchie
12 with the Sierra Club.

13 I understand everything you just said. I would
14 like to add with respect to staff and Mr. White's comment
15 earlier, Sierra Club's opposition is that the
16 translocation plan right now does not exist and therefore
17 the (inaudible) has not been released. The reliance on it
18 by the Conditions of Certification therefore is deferring
19 that mitigation and we do not believe that the performance
20 standards or the criteria that were alluded to were
21 adequate to ensure this would be a feasible mitigation
22 standard. And absent the existence of a final
23 translocation plan prior -- with public comment on that
24 prior to the adoption or approval of the PMPD, we do not
25 think this is in compliance with CEQA.

1 HEARING OFFICER KRAMER: We understand you feel
2 that way.

3 COMMISSIONER EGGERT: I guess I would also ask, I
4 mean, is there any specific comments on the performance
5 criteria in terms of what's been put forth?

6 MR. RITCHIE: Specifically, the performance
7 criteria don't -- they don't provide for any verifiable
8 success criteria for what would be adequate as a
9 mitigation strategy for this mitigation plan. It defers
10 consideration of what a successful translocation plan is
11 and what a successful mitigation plan is to a later date
12 and to a different agency. And we don't believe there's
13 been -- in fact, we believe on the record there is
14 substantial evidence that translocation plan is not a
15 feasible mitigation strategy and therefore it's
16 inappropriate to rely on it.

17 HEARING OFFICER KRAMER: Okay. Well, I think we
18 certainly have fully flushed out this question. And we
19 thank you for the discussion.

20 So anything else, Ms. Miles, that you wanted to
21 highlight?

22 MS. MILES: Nothing that I would highlight here.
23 There are additional comments that I've made that we still
24 stand by that are in this comment letter.

25 HEARING OFFICER KRAMER: Okay. We've done the

1 applicant. We've done the staff. So now how about we
2 congratulate ourselves with a break? So at -- let's go
3 4:05 by the clock on the wall. Off the record.

4 (Off the record from 3:54 p.m. to 4:10 p.m.)

5 HEARING OFFICER KRAMER: Back on the record.

6 We finished discussing CURE's comments. So that
7 leaves Sierra Club and Defenders of Wildlife. Actually,
8 and Mr. Avanian, are you still with us on the phone?

9 UNIDENTIFIED SPEAKER: Yes, we are. Just a
10 moment, please.

11 HEARING OFFICER KRAMER: These folks are members
12 of the public who have been hanging around for a while.
13 So we probably should let them make their comments if they
14 want to get on with other aspects of their day.

15 UNIDENTIFIED SPEAKER: Yeah. Just give us one
16 minute, please.

17 MR. AVANIAN: Hello?

18 HEARING OFFICER KRAMER: Yes, Mr. Avanian. We
19 realize you've been hanging with us for quite a while. So
20 we wanted to offer you an opportunity to make your
21 comments if you're ready.

22 Mr. AVANIAN: Yes, I am.

23 And first of all, I want to thank you and thank
24 the Committee for giving me the opportunity to speak. I
25 really appreciate this.

1 My concern is exactly what it was a few years ago
2 also and the applicant in this case, I don't think they
3 provided any kind of a visibility study for us to see how
4 it's going to impact the land owners and the property
5 rights. That's one of my primary concerns. The
6 visibility was number one (inaudible) was number two with
7 reference to the access or that they are implemented. If
8 they do put the access road, what happens to the road that
9 was previously had been drawn in that area? As a matter
10 of fact, there is an easement attached to my deed given
11 the street address that was connected to the (inaudible).
12 Based on the plans that they have proposed, the applicant
13 completely ignored these streets and access areas. And
14 I'd like to know what happened to them.

15 And my third question is, the not a part of the
16 area. Well, the well that is in question, it's right in
17 the middle of -- not a part of property. So I am not
18 quite sure if that property was acquired or was donated or
19 what happened, but it's not a part of -- my property is
20 also part of it. So those are my concerns. And I was
21 hoping that the Committee can address those issues before
22 they make a decision on their approval.

23 HEARING OFFICER KRAMER: I'm not sure I
24 understand your question about the well.

25 MR. AVANIAN: Okay. If you look at the map on

1 the Phase 2 where it says not a part over where the well
2 is, I mean the Area 1, we're talking about the well that's
3 going to provide the cooling system for the sun catchers;
4 correct?

5 HEARING OFFICER KRAMER: Yeah. I think it also
6 provides water for mirror washing and --

7 MR. AVANIAN: That particular well is on the NAP
8 area, not a part of area, part of Area 1, which is where
9 my property is located. And I'm going based on what the
10 map has been provided to us. Am I reading this
11 incorrectly?

12 HEARING OFFICER KRAMER: No. I think you're
13 putting too much significant in the phrase not a part.

14 MS. FOLEY GANNON: The applicant owns the land on
15 which the well is located.

16 HEARING OFFICER KRAMER: And the path that the
17 supply line will take is on an easement or on land you on?

18 MS. FOLEY GANNON: It's land the applicant owns.

19 HEARING OFFICER KRAMER: Okay. So that's the
20 answer to that question, that the applicant owns that
21 portion of the not a part area where the well is going to
22 be. As far as the access road goes, or your access, this
23 easement you say that is attached to your deed, where
24 precisely does it go?

25 MR. AVANIAN: It's connected to the Hectare Road.

1 HEARING OFFICER KRAMER: Okay. In what way?

2 Directly to the west or --

3 MR. AVANIAN: No. It's directly to the south of
4 it. If I had the opportunity, I would show you the map
5 that I have based on the county records where the easement
6 has been given on the property. This property is size of
7 a 40 acres. Where my property is 36 and a half on both
8 same site and both sides for easement given for the street
9 that is direct connected to the Hectare Road.

10 HEARING OFFICER KRAMER: So what's the route? To
11 the south?

12 MR. AVANIAN: To the south of it, yes.

13 HEARING OFFICER KRAMER: But your property is not
14 due north of the Hectare Road?

15 MR. AVANIAN: It is north of the Hectare Road,
16 north of the railroad tracks. Two of them.

17 HEARING OFFICER KRAMER: Well, it isn't the place
18 for the Energy Commission to try to resolve disputes over
19 property rights. That's not -- that's not in our --
20 really I don't think it's in our legal thought even. And
21 the evidence that was presented to the Committee so far
22 did not indicate that -- well, it was in some ways it was
23 confusing about what the road rights were out in your
24 vicinity. But let me ask the applicant to summarize their
25 position about the access rights to your property and

1 those of your neighbors.

2 MS. BELLOWS: This is Felicia with the applicant.

3 The property again with well number three as well
4 as where the pipeline will be coming down from well number
5 three down onto the BLM land is property that we purchased
6 that the applicant purchased and so that is ours. It is
7 within the not a part area, meaning not a part and not a
8 part of the BLM right-of-way grant private property in
9 this instance, the applicant's property.

10 In terms of access to -- for the public, around
11 the site -- this is part of the POD, the plan of
12 development as well as the filings that we made here at
13 the Commission, the applicant is installing a road
14 completely around the site so that the public has access
15 to the areas north of the site as well as to the not a
16 part. It will have a fence around the site slightly
17 inside the site boundary and then we'll have a desert
18 tortoise exclusionary fence on the outside of that, so
19 there will be a road between those two fences.

20 There will be entrances and exits with cattle
21 guards so that the desert tortoise don't come in, but
22 you're able to get in and out. So we've tried diligently
23 to provide access to the public as they had it previously.

24 HEARING OFFICER KRAMER: So let me ask you then,
25 I gather that the northern -- the northern little stub on

1 the northwest stub, would you be asking people in the
2 lower part of the not a part parcel to have to drive first
3 to the north and then around that stub or can they drive
4 through it?

5 MS. BELLOWS: That is -- they won't have to go
6 around it. It's a Phase 2. They have to do that. In
7 fact, they do that now. Hectare Road, if you actually --
8 (inaudible) the continuation of Hectare Road actually goes
9 up over the BNSF right-of-way, goes north and curves over
10 and cuts directly across the top of Phase 2 and goes down
11 across the site. So in order to get access to those not a
12 part that are within what I call the chimney and the other
13 area of the site, you can just cut off the continuation of
14 Hectare Road down just as being done now. However, on the
15 other hand, if they still have to get across the gated
16 crossing at the continuation of Hectare Road. It doesn't
17 have anything to do with us.

18 HEARING OFFICER KRAMER: And the gated crossing
19 is not on the right-of-way grant from the BLM?

20 MS. BELLOWS: No. It is the BNSF crossing.

21 MS. BURCH: I would note the BNSF crossing was
22 only gated after we received a request.

23 HEARING OFFICER KRAMER: So are you saying that
24 Calico requested that you put a gate on there or that once
25 somebody gave you the impression there might be a lot of

1 use of the crossing you decided to gate it for your own
2 reasons?

3 MS. BURCH: For safety reasons, we had to gate
4 then. But before the Calico project, it was not gated.

5 HEARING OFFICER KRAMER: So the use that these --
6 I guess there are no residents out there in the not a
7 part. But the use of the public and these property owners
8 would make of the crossing was not of a sufficient volume
9 to motivate you to gate it?

10 MS. BURCH: Correct.

11 MR. AVANIAN: That's not true because I
12 previously -- I have gone there quite a few times and I
13 have used that crossing until you decided to put a gate
14 there.

15 HEARING OFFICER KRAMER: I think that's exactly
16 what she said though. When they realized this project was
17 proposed for the area, they were seeing more traffic than
18 they were used to and I guess they have some kind of
19 threshold level where if there is enough traffic they feel
20 the need to put a gate to protect their train traffic.
21 And -- but there's two kinds of gates. One is a gate that
22 just warns you to wait for the train and the other kind
23 says you can't go across here. And you have the second
24 kind right now; correct?

25 MS. BURCH: We don't have a signal now or flag

1 man. We just have a gate. You have to have a lock and
2 key to unlock.

3 HEARING OFFICER KRAMER: And is it possible for
4 property owners such as Mr. Avanian to get a key?

5 MS. BURCH: If they enter into an agreement, have
6 insurance, those kinds of requirements to meet the
7 licensing requirements of the railroad.

8 HEARING OFFICER KRAMER: So are the insurance
9 requirements something that let's just call them a basic
10 citizen is likely to carry or are you talking about
11 millions of dollars of liability insurance?

12 MS. BURCH: I'm not sure about the amount. Maybe
13 Felicia Bellows is.

14 MS. BELLOWS: Off the top, I think it's maybe a
15 thousand, 2000, something like that.

16 HEARING OFFICER KRAMER: To purchase the
17 insurance?

18 MS. BELLOWS: Yes. I think that's probably
19 corporate, right. I don't know if for an individual it
20 would be that much.

21 HEARING OFFICER KRAMER: Anyway, Mr. Avanian, the
22 answer from the railroad is -- have you talked to them at
23 all about getting a key to the gate?

24 MR. AVANIAN: No. If that's the case, does that
25 open all the crossings?

1 HEARING OFFICER KRAMER: Are you asking if one
2 key would cover all the crossings?

3 MR. AVANIAN: I mean, there's only one gate
4 there. But approximately two miles east of there, there
5 is another crossing that you can't very well cross there
6 without any kind of a gate.

7 MS. BURCH: Each time the railroad considers a
8 new kind of situation, it has to do an individual
9 evaluation. So I can't tell him -- I can't even
10 typographical him about this one. I'm just saying that's
11 how one goes about it.

12 HEARING OFFICER KRAMER: But you're saying, Mr.
13 Avanian, that you can cross at right now, or the other
14 crossing?

15 MR. AVANIAN: That's correct.

16 HEARING OFFICER KRAMER: Is that a satisfactory
17 crossing for you?

18 MR. AVANIAN: No. I have to drive approximately
19 three or four miles up from Hectare Road to cross without
20 any kind of a resistance or any kind of a gate crossing or
21 anything like that.

22 HEARING OFFICER KRAMER: Okay. Well, the
23 Commission -- at least the position that -- I don't know
24 if we were expressed, but what certainly is meant to be
25 conveyed by this decision is that the Commission can't get

1 in the business of trying to decide access rights over
2 property such as this. Whatever your rights are visive
3 the railroad is something that you'll have to work out and
4 enforce on your own.

5 If you believe that you have some kind of legally
6 enforceable right to go across the BLM property that BLM
7 is purporting to let this applicant fence off so that you
8 cannot cross it, that's something you'll need to take up
9 either with the BLM who's the land owner or perhaps I
10 guess that would be properly be in federal court, but
11 you'd have to consult a lawyer to make sure you go about
12 that in the correct way.

13 But again, the Energy Commission really isn't in
14 a position and especially where we've soon no concrete
15 proof that there is a legal right of that sort to attempt
16 to address it, decide it, and force a result upon the
17 railroad or this project applicant or anyone else.

18 MR. AVANIAN: Okay. I guess that's a question to
19 be decided in the court. Okay.

20 Let me ask another question. What about the
21 feasibility study as to what type of impact does this
22 project has on our property?

23 HEARING OFFICER KRAMER: What kinds of impacts do
24 you think it might have?

25 MR. AVANIAN: I don't know. Is the property

1 going to be worth less? Isn't that one of the
2 requirements of CEQA?

3 HEARING OFFICER KRAMER: No. If you're talking
4 purely about an economic interest, probably not. But
5 again, that's not something we can advise you about.
6 You're coming a little bit late to this process, because
7 this case is almost over. There's no more testimony.

8 MR. AVANIAN: Yeah, but I've been asking about
9 this for the last three years and nobody really answered
10 those questions. And we discussed this a few years ago in
11 the Barstow also and I raise the same question. What is
12 the feasibility study and what kind of impact is this
13 going to have on our property? And nobody has brought any
14 concerns for even part of our property owners rights in
15 that area. And that's what my question is to you. That's
16 why I'm asking for the Committee to consider before they
17 make any kind of approval is to ask the applicants to
18 provide those information.

19 HEARING OFFICER KRAMER: Well, the Commission
20 believes it has obtained the correct -- obtained the
21 information it needs to obtain. So we're not planning on
22 ordering any further studies about the questions that
23 you've raised. There was the visual impacts of the
24 project were assessed from several different vantage
25 points in the area. I don't recall off the top of my head

1 if one was up on a property near yours, but some of the
2 views from the area representative properties that are
3 described and shown in the decision will give you an idea
4 as to what the project might look like from your property.

5 MR. AVANIAN: Okay. I thank you very much.

6 HEARING OFFICER KRAMER: You're welcome.

7 PROJECT MANAGER MEYER: Mr. Kramer, just a
8 clarification on the access the gate issue. Could I ask
9 just a really quick question?

10 HEARING OFFICER KRAMER: Go ahead.

11 PROJECT MANAGER MEYER: This is probably towards
12 BNSF. Once the applicant is sort of shunted onto their
13 access road using the bridge or even the temporary
14 crossing and then they're no longer -- they would be using
15 that, there wouldn't be an increase from historic over
16 the -- what was originally referred to the crossing that's
17 north of Hectare Road. Would that then be opened up or
18 would that still remain permanently closed?

19 MS. BURCH: It's closed, but I can't see why we
20 couldn't re-look at that at that point in time.

21 PROJECT MANAGER MEYER: So potentially once the
22 bridge is up, that gate could be opened for the local
23 residence like Mr. Jackson and Mr. Avanian and potentially
24 that's something that BNSF could look at.

25 MS. BURCH: Yes, would applications, I would

1 imagine so.

2 HEARING OFFICER KRAMER: Did you hear that, Mr.
3 Avanian?

4 MR. AVANIAN: Yes, I did.

5 HEARING OFFICER KRAMER: Okay. Well, that may be
6 an avenue worth exploring for you then.

7 Do we have any other members of the public who
8 wish to make a public comment? Realizing that you've been
9 with us for quite a while, we'll try to accommodate you
10 all at this point in time. So is there anyone else on the
11 telephone or -- there's no public members in the room here
12 with us who wishes to make a public comment at this time?

13 Okay. Thank you.

14 Let's move on then to the Sierra Club comments,
15 which are in two parts, a request to -- well, I think
16 we'll probably end up treating it as a public comment, but
17 it as an article from the Press Enterprise, Riverside
18 Press Enterprise, I presume, reporting that in the initial
19 work on the Ivanpah project that more tortoises were found
20 in the area that's been surveyed than was originally
21 projected to be in that area. And then they have 40 some
22 pages of comments in a letter dated -- wait a minute.
23 Wrong letter.

24 MR. RITCHIE: Hearing Officer Kramer, Attachment
25 1 to our comments was the September 7th comments to the

1 FEIS that Sierra Club submitted. The comments to this
2 Commission are about twelve pages long.

3 HEARING OFFICER KRAMER: Yeah, I was looking at
4 another document.

5 So I printed the wrong document.

6 COMMISSIONER EGGERT: What's the title of that?

7 HEARING OFFICER KRAMER: PMPD comments 2010.

8 MR. RITCHIE: We labeled them "Sierra Club
9 Comments on Presiding Member's Proposed Decisions" and
10 they're dated October 20th, 2010.

11 COMMISSIONER EGGERT: Thirty-four pages?

12 MR. RITCHIE: The total PDF is probably 34 pages.
13 It's not sequentially that way because Attachment 1
14 re-starts the numbering at page 1.

15 COMMISSIONER EGGERT: I see.

16 MR. RITCHIE: But a single PDP contains both the
17 comments and the attachment.

18 HEARING OFFICER KRAMER: Okay. And then
19 Defenders of Wildlife also filed comments. Given that
20 your comments are likely to be along similar lines, does
21 it make sense to consider to combine the two of you and
22 consider both of you at the same time or would you prefer
23 to go separately?

24 MR. RITCHIE: Sierra Club's additional comments
25 will be brief. We'll be able to I think make our

1 statements and --

2 HEARING OFFICER KRAMER: Okay. Why don't you go
3 ahead then and we'll have Mr. Basofin.

4 MR. RITCHIE: First of all, I'd like to reiterate
5 our position. We stated this in our comments. Sierra
6 Club does not believe this project is ready for approval
7 and recommends that the Commission not adopt the PMPD and
8 I won't go into that any more, given it is stated in our
9 comments.

10 I attached the article from the president
11 enterprise to make a point that I think illustrates one of
12 the things that Sierra Club has been commenting on
13 throughout this proceeding. Again, I'm sure you're very
14 aware of the Bright Source Energy's application in the
15 Ivanpah proceeding. One of the issues in that proceeding
16 which was approved by this Commission and BLM was desert
17 tortoise and desert tortoise habitat similar to the Calico
18 site in many ways. And one of the proposed mitigation
19 measures in that proceeding was the use of a translocation
20 plan. Sierra Club has repeatedly commented that a
21 translocation plan in the Calico proceeding is not
22 appropriate, particularly considering that it doesn't --
23 we haven't seen a final form of it at this point.

24 And in the last hearing, the September 20th
25 evidentiary hearings, we also vigorously argued that the

1 delineation of the boundaries of scenario 5.5 misconstrue
2 what is being drawn and incorporate quality -- high
3 quality desert tortoise habitat in a way that is
4 unnecessary and unacceptable given the impacts it will
5 have on the tortoises. I think there is a misconception
6 that you can count the number of tortoises that are going
7 to be inside the project and outside the project. And I
8 think that the way the scenario 5.5 was created was
9 certainly by looking at a map that showed tortoise
10 sightings and tortoise burrows and just kind of free hand
11 drawing a line that tried to avoid that.

12 And I think this article illustrates why that is
13 problematic in this proceeding in the Ivanpah proceeding,
14 there was a similar statement where they estimated the
15 number of tortoises and as we are moving forward. And I'm
16 sure that the Resource Agencies are very well aware of
17 this, there's great concern moving forward now there are
18 actually a lot more tortoises at the Ivanpah location than
19 the survey identified and that the applicant either
20 identified in that proceeding. I realize it's a different
21 applicant.

22 Tessera had nothing to do with that proceeding.
23 But Sierra Club is very concerned that given the nature of
24 this animal, given the nature of the survey that was
25 conducted, it's not appropriate and the evidence is in

1 adequate to say that we're going to have this -- X number
2 of tortoises inside the site, X number of tortoise outside
3 the site. And our position remains that the impacts to
4 desert tortoise that will be created from this site are
5 unacceptable, have not been mitigated, and for that reason
6 this project is not appropriate to move forward, and we
7 believe that for those reasons for not developing adequate
8 mitigation measure where feasible this project is also in
9 violation of CEQA.

10 Now, we also believe that with respect to other
11 provisions and other species. We've mentioned the golden
12 eagle previously. We also believe that the Mojave
13 fringe-toed lizard, the White-margined beard tongue, the
14 borrowing owl. Several species are impacted by this
15 project and that those impacted have not been fully
16 mitigated.

17 To save us time, I won't go back into that. I
18 would just state that the comments that we've made
19 throughout this proceeding, Sierra Club believes those are
20 valid comments and that the changes to the Conditions of
21 Certification proposed in the PMPD do not change our
22 position on the adequacy of those mitigation efforts.

23 I guess I would finish with we don't have too
24 much more to say in this proceeding. We're here primarily
25 to preserve our ability to raise these issues potentially

1 in a later forum.

2 We think on the federal side that final agency
3 decision has been made. So we think that the record on
4 the federal side is complete and we can address that in a
5 separate forum later. But our general conclusion though
6 is just that this project doesn't meet CEQA adequacy. It
7 doesn't meet NEPA adequacy, and we recommend that you not
8 approve the project.

9 HEARING OFFICER KRAMER: Question for you. You
10 referred to the workshop where scenario 5.5 was created as
11 an off the record workshop. What do you mean by off the
12 record?

13 MR. RITCHIE: I mean that the discussions held at
14 that workshop were not part of the record and we weren't
15 fully -- we didn't fully understand how scenario 5.5 came
16 about and how those exact boundary lines were drawn. Our
17 impression was that there were certain discussions between
18 staff and the applicant as to what would be appropriate
19 and during that meeting -- I mean, this was the meeting
20 where several people were standing up pointing at a
21 projection on a map saying we should draw it there. We
22 should draw it there. We should draw it here. That's
23 what I meant by that comment.

24 HEARING OFFICER KRAMER: So it wasn't recorded
25 precisely. But there was a meeting to which the public

1 was invited. You were present or your counterpart, and
2 you were able to participate, right?

3 MR. RITCHIE: I wouldn't go so far as to
4 stipulate that Sierra Club was invited to and participated
5 in all of the discussions that led to scenario 5.5.

6 PROJECT MANAGER MEYER: Hearing Officer Kramer,
7 Christopher Meyer, staff.

8 I can't speak to what conversations may have
9 happened with other parties. But staff's -- all of
10 staff's information and conversations relative to 5.5 were
11 conducted at the workshop that was publicly noticed
12 workshop, open to the public.

13 No, so I am not aware of any conversations --
14 well, actually I know that staff didn't work anything else
15 outside of that workshop and at that workshop we all
16 went -- left the workshop with fairly clear ideas of what
17 the applicant would produce and the next information we
18 received was the disconnected information from the
19 applicant on what was referred to as 5.5 following up a
20 workshop that took the six alternatives and narrowed them
21 down to number six. And then we decided that we needed
22 something that was somewhere between the two and that
23 ultimately became 5.5. So there may have been discussions
24 with other parties I can't speak to. But I know staff our
25 position was developed at that workshop.

1 MS. FOLEY GANNON: And the applicant can speak to
2 the evolution of it in response to your order to consider
3 ways to reduce the impacts, the applicant team worked very
4 hard to come up with six alternatives. We submitted those
5 six alternatives. We met at the public workshop. As you
6 said, the discussion of between five and six, there may be
7 a way to further reduce it but not to go all the way down
8 to six. That was discussed at that workshop. Then we
9 went back and worked through it based on the information
10 we have not about not only where the tortoises were found
11 on the habitat on the site. And it was really primarily
12 working with the lines that had been drawn to distinguish
13 the levels of mitigation that was required, the five-one,
14 three to one, one to one mitigation ratios which were
15 imposed or requested by CDFG prior to any discussion about
16 how to reduce the project site.

17 So there was no discussion with staff or anyone
18 else outside of the public process.

19 HEARING OFFICER KRAMER: Okay. Thank you.

20 Anything else, Mr. Ritchie?

21 MR. RITCHIE: Nothing else from Sierra Club.

22 HEARING OFFICER KRAMER: Okay. Thank you.

23 COMMISSIONER EGGERT: Maybe just a quick comment.
24 I just want to recognize that the reduced project acreage
25 was basically specifically a result of the evidentiary

1 process and you know much of the testify that was brought
2 forth by the intervenors, including the Sierra Club, in
3 terms of the actual distinction between 6 and 5.5, you
4 know, the Committee's interest was to have an evaluation
5 of scenario six as one that we felt that fully met the
6 conditions of the order. And we were willing to consider
7 another scenario that was developed through the workshop
8 that the parties thought also met the conditions of the
9 order. And we were willing to sort of receive that
10 assessment from staff.

11 So I think in terms of the process that led to
12 that, it was one in which the Committee did have the
13 option to basically choose between the two, evaluating the
14 impacts and the benefits. And the Committee went with 5.5
15 based on that analysis and that information.

16 So I guess I would say also, I mean, again, some
17 of the intervenors I recognize there's still not
18 satisfaction with the impacts to the project site. But
19 the fact they have been reduced by a significant amount,
20 that amount of which is of course also in dispute, is
21 something that you should take some pride in I guess.

22 MR. RITCHIE: I'm thinking of how to say this
23 carefully, but Sierra Club greatly appreciates any effort
24 taken by this Commission, the Committee, or any particular
25 Commissioners to protect desert tortoise. Sierra Club

1 does not support this project, however. We appreciate any
2 efforts now and in the future.

3 I think it's important to understand too this is
4 not probably the last large solar project that will be
5 proposed in the California deserts. It may be the last
6 one on the fast track or at least this fast track. But
7 part of the Sierra Club's efforts in this proceeding and
8 in the subsequent proceedings that will be going on with
9 this particular case are that we really do believe that it
10 is important to create a bookend and a marker for
11 determining how to balance two very important public
12 interest concepts. And that is renewable energy on one
13 hand and sensitive biological resources and habitat on the
14 other.

15 One of my colleagues stated this the other day --
16 I'll leave it at that.

17 Anyway, this process is hopefully going to be
18 informative of other processes down the line. We hope
19 that the Commission will consider this in future
20 proceedings and BLM as well which BLM has a large part in
21 siting these very, very large facilities. And Sierra Club
22 still believes that efforts taken to site these in
23 disturbed lands without these biological resources are
24 better. And I'll leave it at that.

25 HEARING OFFICER KRAMER: Okay. Mr. Basofin.

1 MR. BASOFIN: Thank you, Joshua Basofin on behalf
2 of Defenders of Wildlife.

3 I won't belabor my comments. We've included
4 everything in our comment letter and we don't have any
5 Conditions of Certification. So I don't think we really
6 have a lot to say in this instance.

7 Let's see. What I will say is that we now have a
8 translocation plan and I think that needs to be analyzed
9 specifically by the Commission itself, rather than just
10 deferring the analysis to the federal agencies. I think
11 that's key. And so that's all I have to say.

12 HEARING OFFICER KRAMER: Now, remember that our
13 compliance project manager will also be reviewing it. So
14 if you have any comments, you should share them with the
15 CPM as well as the other agencies when you review that
16 plan.

17 MS. FOLEY GANNON: Can we provide a response to
18 some of the comments raised by Sierra Club?

19 HEARING OFFICER KRAMER: Go ahead. And I may
20 actually have a question for Mr. Basofin. I'll see if I
21 do.

22 MS. FOLEY GANNON: In response to the article
23 that was submitted and we had seen it as well and noted it
24 with great interest, I think there's some things that the
25 Committee should be aware of and the Commission should be

1 aware of about some of the differences which I appreciate
2 you recognize that it's different project, it's a
3 different applicant.

4 The surveys were done at a different time under
5 different protocols. And I think there's some significant
6 differences between when these surveys were done, how they
7 were done, how the projections about the number of
8 tortoises that were found which really do make it a
9 significant difference in trying to take something from
10 what's happened at Ivanpah and translate it into what's
11 anticipated to happen at Calico. The surveys that were
12 conducted at Ivanpah were done in 2007, 2008 which were
13 very dry years. Historically, you're going to get much
14 lower numbers of siting of tortoises when you have very
15 dry years. For instance, when they were conducted at
16 Calico.

17 Equally significantly, the surveys were done
18 under the old protocols. The surveys that were done on
19 Calico were done on the 2010 protocols. The service has
20 changed their protocol 2010 specifically to address the
21 issue that they had determined that there was a really
22 under detection of tortoises when they were out there
23 doing these complete surveys. So to be doing abundance
24 predictions, they were finding under the 2002 protocol it
25 was being significantly under-represented.

1 And based upon that, that is why they came up
2 with this new calculation about not only -- it's a
3 mathematical formula but it's a very complicated
4 mathematical formula, as you remember when we were going
5 through this at the hearings about how you make these
6 predictions. And it takes into account the number
7 effects, the weather that was there when surveys were
8 being done. What the site is as well as the fact that
9 you're not going to detect -- there's a large number that
10 you're not going to detect.

11 So where as again, people are surprised that the
12 numbers that were found early on at Ivanpah or very, very
13 high compared to what was to be found in the entire site.
14 We don't think again that's translateable to what's going
15 to be predicted at Calico because the numbers that were
16 used, that formula that was used to derive what could be
17 on the site was so conservative. It was conservative
18 layer after conservative layer. And again it was to try
19 to address this what the service has found to be a
20 shortcoming in their surveys previously that had been
21 relied upon. So we just wanted to bring that to your
22 attention when you're looking at this article. It's very
23 interesting, but I think it's not again -- again, it
24 doesn't really speak to this site.

25 And the only other thing I would like to mention

1 again is the notion and there is abundant evidence in the
2 record on this point about how the line was drawn between
3 high quality, medium quality, and low quality habitat on
4 the site. And there's been representations or speculation
5 that really was based just on counting bureaus and
6 tortoises and it should have been done based on more
7 modeling work.

8 And we'd like to reinforce the fact this was
9 really done based upon thousands of hours in the field by
10 desert tortoise biologists walking the field, seeing if
11 they all concurred and we heard testimony also from Chris
12 Huntley where he went out there and said yeah, he saw the
13 same line on the site. Other people looking at
14 photographs, they saw the same line on the site. So I
15 think it's not a fair or accurate representation to say
16 that this is just based upon counting bureaus on the map.
17 This was really based on a lot of on the ground work. Are
18 there other ways you can do this with desktop modeling?
19 I'm sure there are. But this was based on real field
20 experience. And so again, we think it's a good
21 representation and it is a good way to be dividing the
22 sites, looking at the value of the site. And I think
23 that's all. Thanks.

24 MR. RITCHIE: If I could make one more point on
25 that. And we went over this quite a bit around 2:00 a.m.

1 I think a month ago.

2 Sierra Club's concern again is that the record
3 doesn't contain that information. It contains conclusions
4 from biologists hired by the applicant. And it's --
5 Sierra Club is very concerned that those conclusions are
6 not based upon evidence that's on the record other than
7 the evidence of tortoise bureaus and tortoise site
8 locations. And that was really our concern with those
9 comments and that remains our concern moving forward.

10 MS. FOLEY GANNON: The only point I would make in
11 response to that is that professional judgment by
12 qualified biologists is something that is commonly relied
13 on, which is evidence. And we recognize that you may have
14 questions about that and I think that was all aired.
15 That's all in the record. But that is substantial
16 evidence and we think it's sufficient.

17 HEARING OFFICER KRAMER: Okay. It turns out I
18 did not have a question for Mr. Basofin.

19 As far as I know, we've exhausted all the
20 comments. I'll just note that Ms. Burch during lunch also
21 e-mailed a copy of the changes to conditions Civil 1 that
22 basically are coordinating it with the soil and water
23 studies and those provisions. So I'm presuming that this
24 is something that should be discussed along with the or
25 water conditions. And so we'll wait for a more thorough

1 report present the parties on Monday I guess.

2 PROJECT MANAGER MEYER: That's correct.

3 MR. ADAMS: Hearing Officer Kramer, could I
4 circle very quickly back to an earlier issue, and that was
5 the status of Nelson's big horn.

6 HEARING OFFICER KRAMER: Yes, please.

7 MR. ADAMS: I've taken the opportunity to look at
8 the code sections. And I think at best they are -- I've
9 lost them. At best, they're ambiguous. But read
10 narrowly, which this is written as an exception, the
11 section 4700 of the Fish and Game Code lists big horn
12 sheep with the scientific name, except Nelson big horn
13 sheep in the sub-species name as provided by Subsection B
14 of Section 4902. So that reference subsection is for
15 sport hunting. It specifically authorized the Commission
16 Fish and Game Commission to allow sport hunting of the
17 Nelson big horn. So I think reading this narrowly
18 consistent with the rule of statutory interpretation of
19 reading exceptions narrowly, you would conclude that the
20 exception is limited to the sport hunting authorized by
21 the Fish and Game Commission.

22 So I'm not saying there is not another possible
23 read of it, but given that and the fact that staff has
24 presented this as a fully protected species in its
25 analysis, I urge you to not make that change.

1 MS. FOLEY GANNON: If you can just tell me how
2 you can hunt -- not right now. But you can think about
3 this and tell me how can you hunt a fully protected
4 species. I'm just baffled.

5 HEARING OFFICER KRAMER: You better miss.

6 MR. ADAMS: So I take that as a rhetorical
7 question.

8 MS. FOLEY GANNON: Yes.

9 COMMISSIONER EGGERT: I don't want to drag this
10 on too much longer. I know Mr. Basofin had a comment on
11 that. Is it case of overcrowding of a particular area of
12 habitat or? I can see some potential rational.

13 MR. BASOFIN: I think it -- yeah, I think it
14 contemplates separate populations. I mean, so there's
15 separate bighorn sheep population by range. And some of
16 those populations are quite low. In the case of the Cady
17 population, it's actually -- there's been evidence had the
18 record quite large 300 or more animals. But there are
19 other populations that are quite a bit smaller. So I
20 think that the regulations consider that those are
21 separate and discrete populations and some of them may be
22 amenable to hunting. Still overall it has protected
23 status.

24 HEARING OFFICER KRAMER: So it's not hunting for
25 the purpose of protection. I'm a native from Wisconsin,

1 so they issue licenses based on healthy population so you
2 don't have an overabundance, but then consumes all of the
3 available food and then the population crashes.

4 MS. FOLEY GANNON: It's just odd they have a
5 list -- Fish and Game produces a list of fully protected
6 species and it's not listed on the list. So it's just
7 odd.

8 MR. ADAMS: Well, it is -- go ahead, Chris.

9 MR. HUNTLEY: The animal is on the list. And we
10 did a little homework on this as well. I can't speak to
11 the exact mechanism regarding the management of the
12 species. But for Tule elk and other species, they manage
13 the heard by calling the heard and they do that by issuing
14 specific hunting permits to do so. That may be the case
15 for the Cady mountain heard. And it's specifically been
16 written in the code to allow hunting. So Section 4700 is
17 the list. So it should be visible there. We saw it just
18 the other day.

19 MR. ADAMS: Nelson big horn is one of three big
20 horn sub-species in California. The only one that's not
21 listed. And the hunting permit authorization is in a
22 section of the code on management for the -- of various
23 management units of big horn sheep. So I think it is
24 clear for the least threatened and probably most numerous
25 sub species they allow this.

1 MR. RITCHIE: And it's important to note too that
2 generally speaking with this concept while it sometimes
3 seems odd, you know, shooting an individual of the species
4 in many, many cases is far less destructive than habitat
5 infringement and habitat fragmentation and things like
6 that. So I mean, to the extent there is a differentiation
7 made there, removing the academic legal argument, there's
8 a big difference between encroaching on habitat and
9 foraging ability and movement and connectivity an
10 individual hunting.

11 MS. FOLEY GANNON: It's just the academic legal
12 argument, because you can't authorize take of a fully
13 protected species. So it just seems totally bizarre to
14 me. So I will not (inaudible) --

15 PROJECT MANAGER MEYER: I think it's supportive
16 of Josh Basofin's statement on the segmentation on the
17 populations, I just in a very quick look at it, it looks
18 like the talk about it on the Fish and Game website, they
19 were -- they talked about it per area. It was divided by
20 area that could hunt and couldn't. And so it does seem to
21 support the idea that the population do need management
22 rather than just the Nelson on a grand scale.

23 HEARING OFFICER KRAMER: Okay. We have the
24 request from staff to reopen the record for purpose of
25 receiving the BLM memorandum on the use of donated lands.

1 It's dated October 7th of this year to the State Director
2 from -- the Deputy State Director of Resources. And in
3 two pages discusses and concludes that the use of a
4 donated lands for -- the use of some donated lands for
5 this project us not inconsistent with the previously
6 adopted policy that required specific approval of that use
7 because the lands are already subject to prior easements
8 for power lines. What this didn't discuss is at least
9 specifically is the acquired lands that are acquired with
10 federal funding. So do we have any objections to
11 reopening the record and taking this particular document
12 into evidence?

13 Seeing none, let me find the exhibit number for
14 it. Make it staff's Exhibit 318.

15 (Thereupon, the above referenced document was
16 marked by the Hearing Officer.)

17 MS. FOLEY GANNON: In relationship to the
18 exhibits, in our comments we noted in the PMPD exhibit
19 list it did not update to reflect the totality of the
20 documents that were admitted into evidence.

21 HEARING OFFICER KRAMER: I apologize for that.
22 That's one of the things I'll be fixing.

23 MS. FOLEY GANNON: Okay.

24 HEARING OFFICER KRAMER: So if any other party
25 notices a document that's missing, you can either put it

1 in our comments or shoot me an e-mail. And if, for
2 instance, you know which page of the transcript it was
3 discussed, that would be helpful to include.

4 Then we have the question of the ROD and the
5 right-of-way permit.

6 MS. FOLEY GANNON: We have just disconnected the
7 complete ROD with the attachments.

8 HEARING OFFICER KRAMER: Was it have mailed?

9 MS. FOLEY GANNON: It was just disconnected.

10 HEARING OFFICER KRAMER: Somebody behind you
11 said --

12 MS. FOLEY GANNON: Documented 4-12.

13 MR. RITCHIE: A quick question on that. So
14 Attachments 5 and 7 don't exist or aren't available yet?

15 MS. FOLEY GANNON: They don't exist.

16 HEARING OFFICER KRAMER: And what were those?

17 MS. FOLEY GANNON: They missed the numbers.

18 HEARING OFFICER KRAMER: Okay. Just a numbering
19 problem.

20 MR. RITCHIE: I think they're identified as maps
21 and tables in the table of contents. But apparently maps
22 and tables are not there.

23 MS. FOLEY GANNON: We included an e-mail from Jim
24 Stobaugh of BLM saying there are no Attachments 5 and 7.

25 MR. RITCHIE: And I'm not imputing anything. I

1 want to make sure I'm checking the right e-mails.

2 HEARING OFFICER KRAMER: So we should have three
3 e-mails; is that correct?

4 MS. FOLEY GANNON: Yes.

5 HEARING OFFICER KRAMER: I do.

6 Is there any objection to the Commission taking
7 official notice of these federal government documents?

8 MS. BURCH: For what purpose?

9 HEARING OFFICER KRAMER: Well, of course, we want
10 to know if somehow we've created a situation where the
11 Commission decision is inconsistent with the federal
12 decision in a way that creates a difficulty in complying
13 with both sets of conditions.

14 I suspect the applicant would be much more
15 interested in identifying those problems than perhaps the
16 intervenors. But -- and then we're specifically
17 interested in getting the information about the park lands
18 and the donated lands to put a period on that what was an
19 open question in the analysis that we received and then
20 had to reflect in the PMPD.

21 But it may also be useful to respond to some of
22 the comments, for instance. And we encourage the parties
23 to review -- the translocation plan, is that a part of the
24 package? So you now have a final approved translocation
25 plan.

1 MR. RITCHIE: Sorry. I missed that one. Where?

2 MR. ADAMS: I don't believe it's final in and
3 approved from the staff perspective.

4 MS. FOLEY GANNON: We had an e-mail this morning
5 saying it had been approved.

6 HEARING OFFICER KRAMER: Which staff are you
7 speaking of, Mr. Adams? Commission staff?

8 MR. ADAMS: I need to confer.

9 PROJECT MANAGER MEYER: This is Christopher
10 Meyer.

11 (inaudible) project manager I'm going to move
12 into as the compliance manager, but the applicant is
13 correct that the compliance project manager that's helping
14 me out until I officially move into that role of if the
15 project is approved did send an e-mail out that Commission
16 staff did review the translocation plan and has been
17 involved in it throughout the process and did take note
18 that the translocation plan that was in the ROD was the
19 one that had gone through and been reviewed by staff
20 throughout the process. And it had all the changes that
21 staff felt were necessary. I have to double check to see
22 if it's received the official written response, but there
23 was at least an initial e-mail from staff stating that the
24 plan had been approved. But I will have to follow up on
25 that.

1 MR. HUNTLEY: Christopher, this is Chris Huntley.

2 It's my understanding that the Fish and Wildlife
3 Service has not approved the plan. I was speaking to Fish
4 and Wildlife Service today about that. I'm not certain we
5 have closed our comments from a staff perspective on it.
6 Although I'll coordinate with Dave on that.

7 HEARING OFFICER KRAMER: So any intervenor who's
8 interested in attempting to speak to approving authorities
9 should contact I suppose Mr. Meyer so he can keep them
10 abreast of the opportunities if there remain any that they
11 have to make comments.

12 MR. TRAVIS: I guess I'm still confused of
13 where -- because I don't believe unless it's attachment --

14 MS. FOLEY GANNON: I thought it was in the
15 biological opinion. Because when we got the signed
16 biological opinion, that's where it was. But now because
17 we just got the full document and I haven't looked at
18 since it was disconnected while we were here. I'm having
19 trouble. I don't see it here.

20 MR. RITCHIE: That's just my question. I don't
21 see it.

22 MS. BURCH: This is why I recommended it not be
23 admitted into evidence.

24 MS. FOLEY GANNON: But this is the complete --
25 it's not called out as an appendix. It's called out as --

1 I thought it was an attachment to it. This is the
2 complete ROD that's been issued by the BLM. So if you are
3 taking judicial notice of the full document from the BLM,
4 this is it.

5 MS. FOLEY GANNON: I thought that the
6 translocation was behind it but it's not.

7 MR. RITCHIE: And that's the clarification is to
8 the extent that the ROD does not include the translocation
9 plan, we still don't have the translocation on the record
10 and --

11 MS. FOLEY GANNON: We will disconnect that right
12 now.

13 MS. BURCH: But what opportunity does that give
14 anyone at this point in this proceeding to comment on
15 anything?

16 MS. FOLEY GANNON: As we have discussed earlier,
17 we don't think it's necessary for that level of detail.
18 But everybody is interested in seeing it, so we're doing
19 it as a courtesy.

20 MS. BURCH: Well, as a courtesy, we don't need to
21 have it provided by you. We're U.S. citizens and we can
22 get the same documents.

23 MS. FOLEY GANNON: It just takes longer through
24 FOIA. But if you want to do it through FOIA, that's fine.

25 MS. BURCH: Actually, Jim Stobaugh is project

1 manager. We'll send things if --

2 MS. FOLEY GANNON: That's great.

3 MS. BURCH: Thank you.

4 MS. FOLEY GANNON: Would you like us to send it
5 to you?

6 MR. RITCHIE: I'm curious of what you would send.
7 Jim Stobaugh sent earlier today to Sarah the biological
8 opinion -- a version of the biological opinion that had
9 the translocation plan attached to it.

10 MS. FOLEY GANNON: When we got the biological
11 opinion when it was issued from the Fish and Wildlife
12 Service, it was sent in an e-mail which also had the
13 translocation plan. There were two PDFs. We got a
14 separate PDF.

15 MR. OTAHAL: Let me add a little clarity here.
16 The biological opinion, there is a version of the
17 translocation plan dated October 14th. That's the most
18 current version. It's kinds of a misnomer to call any a
19 final plan because all the agencies involved understand
20 this is a living document and that this is continuing to
21 evolve as we've moved forward. And that's part of the
22 adaptive management that is built into the plan. So it's
23 kind of difficult to call anything a final plan for one
24 thing.

25 Now, the biological opinion, which is being

1 referenced is based on this October 14th version of the
2 translocation plan. So originally we were going to
3 include that as an appendix to the biological opinion, but
4 that is no longer the case. The Fish and Wildlife decided
5 not to include this as an appendix. It's a stand alone
6 document.

7 MR. RITCHIE: And I appreciate that. And I guess
8 to that end, you know, Sierra Club, the ROD is an official
9 federal document. So that's one thing. But to the extent
10 there is this other document, we would object to that
11 going on the record and --

12 MS. FOLEY GANNON: We were only asking that the
13 documents that are actually attached to the ROD -- and
14 again it was my mistake because I was thinking. We got
15 them together. The service had earlier said it was an
16 appendix. So that was my mistake. We're only asking that
17 the official ROD and its attachments be taken judicial
18 notice of.

19 MR. RITCHIE: I appreciate that's clarified now.

20 MS. FOLEY GANNON: But we're happy to provide
21 with you the translocation plan if you'd like to see it.

22 MR. RITCHIE: I think we can track that down.

23 MR. OTAHAL: And I can't say for sure, but I
24 believe that the October 14th version is available if you
25 would like that to be disconnected or whatever. If you

1 would like that, that would be great.

2 HEARING OFFICER KRAMER: The Committee would like
3 that. And send it around to everyone. No reason why Mr.
4 Ritchie needs to go fishing.

5 Let me point out then that what was said a few
6 minutes ago is the appendices to the ROD. But the ROD was
7 forwarded to us --

8 MS. FOLEY GANNON: Yesterday.

9 HEARING OFFICER KRAMER: Okay. So the ROD came
10 out yesterday. So you really need four separate PDFs to
11 have the complete package, including the missing -- what
12 is 5 and 7 attachments? Or not including those?

13 MR. BASOFIN: And what is it, Mr. Otahal you're
14 sending to us?

15 MR. OTAHAL: Actually Felicia adjust suggested
16 she has a copy of the October 14th version of the
17 translocation plan.

18 MR. BASOFIN: So that's still the draft?

19 MR. OTAHAL: Well, it's the most current version
20 of the translocation plan, because again, it's a misnomer
21 to have a final plan because for example, we are looking
22 at this being the final plan for the fall implementation
23 part of the project. But we all understand that there are
24 going to be revisions as the guidelines change as we learn
25 information --

1 MR. BASOFIN: Are you saying there hasn't been
2 revisions since October 14th?

3 MR. OTAHAL: Not in the last week, no.

4 MR. BASOFIN: Okay.

5 MS. FOLEY GANNON: And this is a plan that was
6 relied on in issuing biological on October 15th.

7 MR. OTAHAL: This was the version that was
8 utilized from the biological opinion and also on which the
9 ROD was based. So all the decision documents are based on
10 this version.

11 MS. FOLEY GANNON: So in terms of final as in
12 something that would be implemented and it's not
13 anticipated to change before there's some implementation
14 and it's final in that extent. It's not final in that it
15 will never be changed.

16 MR. HUNTLEY: It's not final as far as the CBM is
17 concerned.

18 MR. OTAHAL: Yeah. And I also believe that Fish
19 and Wildlife is on record saying this has not been signed
20 off officially as well. There's still some discussion
21 that is going to happen next week. Again, some of these
22 final refinements that are part of the process.

23 MR. RITCHIE: I think it's fair to say that the
24 nature of this document is still somewhat ambiguous.

25 MS. FOLEY GANNON: This was the -- again, this

1 was the plan that was relied upon by the BLM to issue its
2 Record of Decision. This was the plan that was relied on
3 by the U.S. Fish and Wildlife Service to issue its
4 biological opinion. It's not that ambiguous.

5 MR. OTAHAL: And if any of these changes that do
6 continue as this is a living document, if there is
7 anything that is substantial that would change take, for
8 example, change relocation areas, whatever, that would be
9 something that would be re-negotiation of the consultation
10 and we would have to redo the analysis based on any of
11 these substantial revisions. Because again, this is a
12 living document. It's not something that's static,
13 especially given that the guidance from the coming out of
14 the Fish and Wildlife is full of it because there isn't a
15 lot of -- as all this is being implemented, we're learning
16 and trying to figure out exactly how to do this. And
17 that's part of that adaptive management process again to
18 continue to define this and make it a better plan all the
19 time.

20 HEARING OFFICER KRAMER: Okay.

21 MR. BASOFIN: Mr. Kramer.

22 HEARING OFFICER KRAMER: Go ahead, Mr. Basofin.

23 MR. BASOFIN: I'd just like to make a statement
24 for the record. And I alluded to this earlier, but just
25 for the record, based on what Mr. Otahal has referred to

1 as the fluidity and non-final nature of the translocation
2 plan, this is a document that relates to both the
3 federally and State listed species.

4 And you know, if we were in a situation outside
5 of the Energy Commission Fish and Game would need to make
6 a consistency determination on the translocation plan and
7 I think it's inappropriate. And I've said this before,
8 but I just want to state it for the record. I think it's
9 inappropriate for this to be taken official notice of by
10 the Energy Commission and be part of the record when it
11 hasn't been vetted by the Energy Commission and it's still
12 a fluid document. And it will essentially be part of the
13 record that will determine whether site certification is
14 issued for that project. And based on certainly a lack of
15 analysis by the Committee and by the staff, a plan that's
16 going to deal with mitigation for take of the state listed
17 species, I just think it's entirely inadequate and I just
18 want to state that.

19 MR. OTAHAL: But again, this is consistent with
20 the mitigation measures that are in this staff assessment.
21 The staff assessment didn't rely on a special plan they
22 were analyzing. But as was pointed out earlier, that
23 given this changing nature that the mitigation mentioned
24 basically says has to pass muster with it for agencies,
25 including CEC, there wasn't a specific plan that was

1 analyzed in the mitigation measures.

2 MR. BASOFIN: But my point is I have a problem
3 with that entire concept. My issue is that the concept
4 that the plan need only pass muster with the federal
5 agencies in conjunction with the State agencies and it
6 then becomes the plan that's used to implement the
7 translocation program, I have a problem with that, because
8 under normal circumstances, if you have a federal action
9 that deals with take and mitigation of take for a species
10 at the federal level, if that species is also listed at
11 the state level, then you have to have a consistency
12 determination of that action. And since the Energy
13 Commission is essentially stepping into the shoes of the
14 Department of Fish and Game, you know, I think it's
15 necessary and frankly obligatory of the Commission to do
16 something in the vain of a consistency determination. And
17 to do a consistency determination, you have to have a
18 final plan.

19 MR. OTAHAL: And Fish and Game the CEC is
20 involved in the process of approving the plan.

21 MR. BASOFIN: But again, we're in the process of
22 approving a plan. And so you can't do a consistency
23 determination by definition unless you have the final plan
24 to determine consistency by. I guess that's my point.

25 HEARING OFFICER KRAMER: Let me just call this

1 one agree to disagree again.

2 MR. LAMB: Hearing Officer Kramer, just for the
3 record, we do not object to the consideration under
4 judicial notice of the ROD in terms of the fact that it
5 was issued. I think that's appropriate. But what I'm
6 hearing is the applicant wants to submit it as a piece of
7 evidence and the Commission -- the Commission wants to
8 consider it. I mean, I heard you, Mr. Kramer, say that
9 you want to review it to make sure it's compliant with
10 certain things and that it's consistent with what the
11 Committee intends to do. That would be like another staff
12 report. We don't have an opportunity to comment on it.
13 We don't think that's appropriate. So as far as the mere
14 fact it's issued, I think that's appropriate that the
15 Committee and the Commission take judicial notice of that
16 fact. But to the extent it's being disconnected for
17 purposes of being reviewed and considered by the Committee
18 and the Commission, we object to that.

19 HEARING OFFICER KRAMER: Okay. Well, we'll
20 overrule your objection. I'll note to the extent the
21 Committee does make changes that show up either in an
22 errata or in a revised PMPD, either way you have an
23 opportunity to comment on that again. So your ability to
24 comment is preserved.

25 Furthermore, in discussing our role as a

1 substitute for Department of Fish and Game, I would offer
2 that while the intervenors are not getting the opportunity
3 to perhaps have as many hearings over longer time period
4 on the adequacy and the appropriateness of the measures in
5 the translocation plan, if the Energy Commission were not
6 involved, you probably would have no hearings at all.
7 Because I don't believe that the Department of Fish and
8 Game normally has hearings. They will probably post
9 things, maybe mail you something and they'll take your
10 comments. But you, because of our process, have had not
11 as much as you'd like to have by way of interaction, but I
12 think it's pretty safe to say you've had a lot more
13 interaction than you would have if the Department of Fish
14 and Game were doing this either with the -- well, say some
15 other State agencies that doesn't hold the kind of
16 hearings we have or even some local agencies.

17 So you know, I don't think we expect you to -- or
18 anybody for that matter to be ever fully satisfied by our
19 process. But I think it is offering a little bit more
20 participation than it might otherwise.

21 So we will take official notice of the ROD and
22 the attachments that have been circulated, which again
23 just to emphasize does not include the tortoise
24 translocation plan. However, we encourage the applicant
25 or anybody else who wants to get a copy of the latest

1 version of that plan out to all the parties for the
2 benefit of those who are interested in reviewing it and
3 making whatever efforts they desire to influence the
4 agency decision makers that will be giving that its final
5 review for this go-round and recognizing that at some
6 point in the future the plan may be modified, which I
7 think in many ways is a good thing, because the
8 modifications would be driven by the results of the
9 studies that are required as this work to try to find the
10 best way to protect the tortoise continues.

11 MS. FOLEY GANNON: And it is being docketed right
12 now. It takes some time because there is some large
13 graphics. So it's several different e-mails. But the
14 first ones are just going in right now.

15 MR. LAMB: Can you provide us with the exhibit
16 number of that that you've admitted that?

17 HEARING OFFICER KRAMER: Quite often we don't
18 give those things exhibit numbers. But it sounds like it
19 would be convenient for you.

20 MR. LAMB: Well, that's the reason why I'm
21 asking. I want to know if it's evidence, it's being
22 considered or if it's just the fact. And I'm not sure I'm
23 clear from what Ms. Gannon was proposing. I believe there
24 is a difference, sir.

25 MS. FOLEY GANNON: I believe you just accepted

1 the ROD, right?

2 HEARING OFFICER KRAMER: Right.

3 MS. FOLEY GANNON: Not the desert tortoise
4 translocation plan.

5 HEARING OFFICER KRAMER: Not the translocation
6 plan.

7 MS. FOLEY GANNON: So you've taken judicial
8 notice of the --

9 HEARING OFFICER KRAMER: We call it official
10 notice.

11 MS. FOLEY GANNON: Official notice, right. Of
12 the ROD. And that we just provided -- we're just
13 docketing the translocation plan so people can look at
14 this if we'd like to.

15 HEARING OFFICER KRAMER: Right. And Mr. Lamb,
16 the docket it's just our name for the formal, the larger
17 file of everything that is -- it's like the master file of
18 documents in the case. And not everything that is in the
19 document is evidence. However, by taking official notice
20 of it, we first realize our rules of evidence are more
21 liberal than those you used to in the courts. We have
22 that standard that information that people would commonly
23 rely upon in the conduct of their appears I think that's a
24 rough paraphrase of the language in our regulations. It's
25 something that the Commission can rely upon in making its

1 decision. And the ROD in this case would be of that
2 nature in the Committee's opinion and judgment. But --

3 MR. LAMB: Are you saying that the Committee
4 considers the entire disconnect in its ruling?

5 HEARING OFFICER KRAMER: No, not the entire
6 docket.

7 MR. LAMB: Only those matters admitted into
8 evidence.

9 HEARING OFFICER KRAMER: Right.

10 MR. LAMB: On the record. That's what I am
11 trying to find out from you, sir --

12 HEARING OFFICER KRAMER: Or that we officially
13 notice.

14 MR. LAMB: I am not going to quibble. I disagree
15 with you. I think the statute is very clear that it has
16 to be something that's admitted into the administrative
17 record. I'm trying to find out if it's admitted in the
18 administrative record as a piece of evidence that the
19 Committee is considering as an evidentiary matter.

20 HEARING OFFICER KRAMER: It is being officially
21 noticed and will as appropriate. And perhaps not all
22 parts of it are appropriate for us to rely upon under that
23 standard I just mentioned. But those portions that are
24 appropriate will perhaps be relied upon in our making of
25 the decision.

1 MR. LAMB: I just want to restate my objection.
2 I don't think that's an appropriate thing to do without
3 you telling us what you're relying on. Thank you.

4 HEARING OFFICER KRAMER: Well, you'll see it in
5 the revisions to the proposed decision. And at the
6 moment, the one hearing I had mentioned before is the
7 donated and acquired lands issue. And that's more just to
8 get some facts straight. A memo that we took in
9 apparently is the better discussion of the rationale for
10 finding that the policy has been satisfied. But because
11 it fails to mention the details of the acquired lands, we
12 may need some help from the ROD just to figure out how
13 much is in there. And that's just to tell the story.

14 MR. LAMB: Okay.

15 HEARING OFFICER KRAMER: So are there -- check my
16 list. Are there any other items of business we need to
17 conduct today besides the setting up the meetings for next
18 week?

19 MS. BURCH: I would like to follow up on the
20 question we asked before we break for lunch about the
21 megawatts and how the decisions of the Commission are
22 going to be issued here. We would like to have that
23 guidance as we make our comments on Monday.

24 HEARING OFFICER KRAMER: Correct me if I'm wrong,
25 but I think the decision will approve the maximum amount

1 that can be produced on the site.

2 And I do have a note to make some sort of -- have
3 some sort of discussion about what might happen if some of
4 the ground has to be re purposed for detention basins and
5 that the output is reduced. We will make it clear whether
6 or not we recommend to the full Commission that it
7 adopt -- it approve a project if with the possibility that
8 it might produce fewer megawatts than the maximum.

9 MS. BURCH: Have you considered in a situation
10 putting in conditions that faces are approved until
11 certain conditions are met and then once those are
12 approved -- you cannot move forward with the next phase
13 until conditions are met?

14 HEARING OFFICER KRAMER: Let's see. We had one
15 example today. I'm trying to remember what it was.

16 MS. FOLEY GANNON: We talked about proposed
17 reliability two.

18 HEARING OFFICER KRAMER: Reliability proposal. I
19 think you have to give me -- you need to propose a
20 specific example. That's certainly possible. I mean,
21 it's not illegal or immoral or anything to do it that way.
22 But we would need a good business reason to do it or
23 environmental or if a State policy or rule requires it or
24 something like that.

25 MS. BURCH: Okay.

1 HEARING OFFICER KRAMER: But it's something you
2 can propose.

3 So I think we've covered everything I needed to.
4 So the Committee will authorize the staff to conduct a
5 workshop as early as Monday morning to further discuss any
6 and all conditions of certification and we waive the
7 notice requirement, the ten-day notice requirement.

8 Mr. Meyer, if you can get out something to the
9 e-mail list serve though by -- can you make it tomorrow
10 morning? Just an e-mail --

11 PROJECT MANAGER MEYER: Yeah.

12 MS. BURCH: May I just make a comment? I was
13 furiously trying to reach people in the Midwest to see
14 about availability on Monday. I can't get the people I
15 need until -- it's going to be very difficult for them but
16 3:00 Pacific time.

17 PROJECT MANAGER MEYER: That's telephonically?

18 MS. BURCH: Correct.

19 PROJECT MANAGER MEYER: I'll set this up on Web
20 Ex.

21 HEARING OFFICER KRAMER: So that's the first
22 order. Let me complete the first order.

23 So as we'll leave it to Mr. Meyer's discretion to
24 when it actually happens. But it could be as early as
25 Monday morning, provided that he gives notice by noon

1 tomorrow, that's Saturday, via e-mail to all the parties
2 and lift serve if it's possible. I think it may be too
3 late to get the --

4 PROJECT MANAGER MEYER: It's a furlough Friday.
5 I don't believe they're available.

6 HEARING OFFICER KRAMER: So just -- and then post
7 it on the Commission's website as soon as possible. And
8 the Committee will continue this Committee conference
9 until use the morning -- okay. Is 9:30 too early for
10 people?

11 Okay. Tuesday, October 26th, at 9:30 a.m. in
12 this building. I will have to -- I'll send an e-mail
13 around about the location. I don't want to make you sit
14 and watch me try to find a conference room right now. But
15 we will also have Web Ex and --

16 MS. FOLEY GANNON: Ms. Bellows said she had to
17 fly in. And 10:00 would be better.

18 HEARING OFFICER KRAMER: Okay. 10:00 a.m. on the
19 26th.

20 And we will allow the parties to file, because
21 they may not be meeting until late on Monday, to file the
22 proposed revisions to the various conditions that they
23 will be discussing just prior to the meeting -- well, one
24 hour prior to the meeting, 9:00 a.m.

25 COMMISSIONER EGGERT: So I think just a question,

1 clarification here. Are we suggesting that be
2 specifically for the purposes of soil and water
3 suggestions?

4 HEARING OFFICER KRAMER: You never know what's
5 going to come up. So I think we leave it more -- comments
6 will still be due on Monday at 4:00.

7 COMMISSIONER EGGERT: Right. I just want to
8 clarify too, I think the Committee's -- well, I won't
9 speak for my Associate Member. But I think the Committee
10 is even based on the discussion feels that the soil and
11 water conditions as proposed in the PMPD are adequate, but
12 the reason we're providing this opportunity is for the
13 purposes of I think trying to accommodate what we feel is
14 some legitimate concerns and some comments that have been
15 made by particularly BNSF. So just want to make sure that
16 the purpose is clear.

17 MS. BURCH: And may I just add Civil 1 to that.
18 Because the reports in Civil 1 call on -- (inaudible).

19 HEARING OFFICER KRAMER: Okay. So --

20 PROJECT MANAGER MEYER: Before you gavel that one
21 closed, I'll get my plea in here.

22 If we are going to have this at 3:00 and try to
23 actually get something finalized by 9:00 the next morning,
24 unless somebody has a real compelling reason to open it up
25 to everything, if we can just keep it on the soil and

1 water and Civil 1, I think that would make it possible for
2 staff. If it's opened up to everything, we end up meeting
3 at 9:00 at night on everything else, I don't think I'll be
4 able to make 9:00 the next morning.

5 HEARING OFFICER KRAMER: That's a good point.

6 COMMISSIONER EGGERT: And I also want to
7 recognize what I think I understand and appreciate
8 Christopher's concern for his staff and even today, you
9 know, helping us manage this meeting to allow for their
10 opportunity to leave and either do or work or actually
11 have part of their furlough Friday to enjoy for their own
12 purposes.

13 HEARING OFFICER KRAMER: Okay. That takes care
14 of the continuance. I'll put out a formal notice.

15 MR. RITCHIE: Mr. Kramer, to the extent that
16 leads to a revised PMPD or any further comment period,
17 will you -- is that subject to future determination?

18 HEARING OFFICER KRAMER: Suggest to what?

19 MR. RITCHIE: To -- my understanding of the
20 procedures that is a revised PMPD may trigger public
21 comment and review. I realize at this point there isn't a
22 revised PMPD.

23 But if there is one, do we know when we do hear
24 about that and whether or not it triggers an additional
25 public comment period?

1 HEARING OFFICER KRAMER: Probably on Tuesday
2 after we go back to our conference room and decide what we
3 need to do.

4 MR. RITCHIE: So that's something that would be
5 noticed and distributed to the service list if there is
6 revised --

7 HEARING OFFICER KRAMER: Right. Otherwise, if
8 there is no need to re-circulate, then the notice of the
9 changes will take the format of an errata that will be
10 distributed and considered along with the PMPD at the
11 already noticed business meetings on Thursday, the 28th at
12 10:00 a.m. in this room. And because just as a heads up,
13 because we'll have five Commissioners, probably everybody
14 but the Commissioners and their advisors will be sitting
15 in just rows of chairs. We won't have tables probably, if
16 that effects what you bring with you. And we have to get
17 by the fire marshal. So just as a practical matter, the
18 seating chart is going to be different.

19 So what else was there?

20 COMMISSIONER EGGERT: Maybe just to expand.

21 I think to Mr. Ritchie's question, I think we
22 have -- you know, we have the errata to develop and the
23 consider rags of the comments that we receive through
24 Monday. So I mean, to the extent that we're making
25 changes, I think we'll have to make that determination

1 about re-circulation once we've concluded that process.

2 HEARING OFFICER KRAMER: Right. We're hoping to
3 get out the errata by Tuesday evening. But we'll see. So
4 you have a little bit of time to look at it.

5 MR. RITCHIE: My point being I'm just curious at
6 what point we will know if there is a revised PMPD or an
7 errata to the PMPD and it sounds like that will happen on
8 Tuesday.

9 HEARING OFFICER KRAMER: Correct. And after
10 going through the exercise of responding to the comments
11 and seeing what comes in on Monday, we may even be able to
12 tell you at the Tuesday Committee conference what we think
13 we're going to be doing.

14 MR. RITCHIE: To the extent possible, we would
15 appreciate if that got on the service list. I don't know
16 the Sierra Club, given it seems to be soil and water
17 issues that are at issue on the Tuesday meeting, I don't
18 know that Sierra Club will be able to attend due to other
19 conflict. So just to the extent there is a public comment
20 meeting, we'd appreciate knowing as soon as possible when
21 that opens, when that closes.

22 HEARING OFFICER KRAMER: Well, if it's necessary,
23 it would be at least 15 days and it would start when the
24 revised document came out, I can tell you at least that
25 much.

1 MR. RITCHIE: Thank you.

2 HEARING OFFICER KRAMER: So any other business to
3 conduct? All right. Enjoy your evening.

4 Do you want to make some closing comments?

5 COMMISSIONER EGGERT: Again, I think we have the
6 opportunity to see each other again. But I just want to
7 thank all of the parties for their participation and
8 significant input.

9 Again, as I stated at the beginning of this,
10 we've had -- I'm interested in adding up the numbers of
11 hours in evidentiary hearings. Certainly, I feel like I
12 know this case extremely well and particularly a lot of
13 the various species that we've been discussing. I've
14 learned an incredible amount about the biology of the
15 desert and again I think that has sort of contributed to
16 certainly the Committee's understanding of the impacts of
17 this project and certainly contributed to our decisions
18 that have been on the record.

19 So I guess with that, I'd encourage everybody to
20 get a nice dinner and enjoy the weekend. And we'll see
21 some of you again on Tuesday.

22 (Thereupon the hearing adjourned at 5:40 p.m.)

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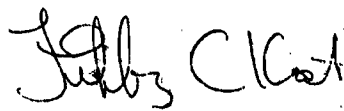
1 CERTIFICATE OF REPORTER

2 I, TIFFANY C. KRAFT, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing hearing was reported in shorthand by me,
7 Tiffany C. Kraft, a Certified Shorthand Reporter of the
8 State of California, and thereafter transcribed into
9 typewriting.

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

13 IN WITNESS WHEREOF, I have hereunto set my hand
14 this 26th day of October, 2010.

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